

**Communications Services Tax Working Group**

**October 16, 2012, Meeting Materials**

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**Agenda Item #1**

**No Materials**

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**Agenda Item #2**  
**Draft Meeting Minutes**

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# COMMUNICATIONS SERVICES TAX WORKING GROUP

July 25, 2012

ROOM 1220, BUILDING ONE, 2450 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA

## DRAFT MINUTES

**MEMBERS PRESENT:** Marshall Stranburg, Chair  
Charles Dudley  
Sharon R. Fox  
Kathleen Kittrick  
Gary S. Lindsey  
The Honorable Gary Resnick  
Alan S. Rosenzweig  
Brian D. Smith  
Davin J. Suggs

### **Agenda Items:**

#### 1. *Call to Order*

The meeting was called to order. Chair Stranburg, Interim Executive Director of the Department of Revenue, introduced himself and announced that he would now serve as chair of the Working Group's meetings.

Roll call was taken and all Working Group members were present.

#### 2. *Meeting Minutes*

Mr. Dudley asked that the June 11, 2012, minutes be corrected to reflect that he was present at the meeting. In addition, Mayor Resnick asked that the minutes reflect the discussion that the state survey data presented at the June 11, 2012, meeting may not have included all relevant information in which to make a true comparison with other states.

#### 3. *Opening Remarks and Administrative Items*

The Chair discussed the following:

- This is a non-rule public meeting held under Section 120.525, Florida Statutes.
- A court reporter is present who is creating a transcript.
- Speaker cards were available for anyone who would like to speak.

- The Department of Revenue has created a web page for the Working Group where agendas, meeting materials, transcripts and other information relative to the Working Group will be posted. Hard copies of the materials were available at the meeting for the public.
- It was announced that if anyone would like to receive updates about the Working Group by email, they could provide their email address with the understanding that their email address will be considered a public record and subject to disclosure if requested.
- The procedures for persons participating in the meeting via WebEx were explained.

#### *4. Follow-up from previous meeting*

Chair Stranburg discussed that information and materials requested by members at the previous meeting were provided in the back-up materials provided under Item 3. There were no questions from the members on the new information and materials.

#### *5. Process for Formulating Recommendations*

Chair Stranburg discussed draft principles for guiding the proceedings of the Working Group, which were requested at the last meeting. The draft principles were developed from several sources. Working Group member Gary Lindsey also provided similar information from the American Institute of Certified Public Accountants.

The Working Group also engaged in a discussion about the process to be used to formulate the Working Group's report, including whether to adopt a procedure by which a certain number of votes would be required to include an option in the final report. No conclusion was reached on this issue.

#### *6. Bonding of Communications Services Tax by Local Governments*

Amber Hughes of the Florida League of Cities provided an overview of the types of bonds issued by local governments and local revenue sources. Ms. Hughes discussed the results of research that she had conducted that identified local governments that had pledged the Communications Services Tax to secure local government debt. The research reflected data that was collected from a number of sources.

#### *7. Residential Exemption from the State Portion of the Communications Services Tax*

Bob McKee, Chief Economist in the Department of Revenue's Office of Tax Research, presented information on an estimate of the potential impact of the repeal of the residential exemption.

## 8. *Prepaid Communication Services*

French Brown, Deputy Director of the Department of Revenue's Office of Technical Assistance and Dispute Resolution, made a presentation regarding Florida's law and the "Tax Information Publication" issued by the Department. Mr. Brown also provided information regarding the 25 jurisdictions that imposed a tax on communications services that answered the initial survey that was conducted for the Working Group. Information was also provided regarding the definition of "prepaid wireless calling service" under the Streamlined Sales and Use Tax Agreement.

Mr. McKee, Chief Economist in the Department of Revenue's Office of Tax Research, provided the Working Group with information regarding an estimate of the tax base for prepaid wireless service. Estimates were provided regarding potential revenue impacts in Florida under different scenarios.

John Barnes, Senior Manager – Transaction Tax for Metro PCS, and Working Group member Kathleen Kittrick of Verizon, jointly presented information from the industry. Information was provided regarding the history and different types of prepaid wireless communications and the various methods of distribution to customers. Data was provided regarding the growth of the prepaid wireless communications for the past several years as well as projections for the future.

At the end of the presentation, Mr. Dudley requested that the Working Group hear from retailers at the next meeting on this issue.

## 9. *Other business*

The Working Group decided to change the date of its next meeting from August 14 to August 21.

## 10. *Adjournment*

With the agenda complete the meeting was adjourned.

# COMMUNICATIONS SERVICES TAX WORKING GROUP

August 21, 2012

ROOM 1820, BUILDING ONE, 2450 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA

## DRAFT MINUTES

**MEMBERS PRESENT:** Marshall Stranburg, Chair  
Charles Dudley  
Sharon R. Fox  
Kathleen Kittrick  
Gary S. Lindsey  
The Honorable Gary Resnick  
Alan S. Rosenzweig  
Brian D. Smith  
Davin J. Suggs

### **Agenda Items:**

#### 1. *Call to Order*

Chair Stranburg called the meeting to order.

Roll call was taken and all Working Group members were present.

Chair Stranburg discussed the following:

- This is a non-rule public meeting held under Section 120.525, Florida Statutes.
- A court reporter is present who is creating a transcript.
- Speaker cards were available for anyone who would like to speak.
- The Department of Revenue has created a web page for the Working Group where agendas, meeting materials, transcripts and other information relative to the Working Group will be posted. Hard copies of the materials were available at the meeting for the public.
- It was announced that if anyone would like to receive updates about the working group by email, they could provide their email address with the understanding that their email address will be considered a public record and subject to disclosure if requested.
- The procedures for persons participating in the meeting via WebEx were explained.

## 2. *Meeting Minutes*

The amended minutes for the June 11, 2012, meeting were approved.

## 3. *Follow-up from previous meeting*

Chair Stranburg discussed that information and materials requested by members from the previous meetings were provided in the back-up materials under Item 3. There were no questions from the members on the new information and materials.

## 4. *Prepaid Communications Services*

The discussion concerning prepaid communications services was continued from the July 25 meeting.

Warren Townsend, Senior Director of Specialty Tax, Walmart, appeared by telephone to provide information and respond to questions from the perspective of retailers on this issue. Mr. Townsend discussed capabilities of his company and the difficulty others may have in complying with various scenarios.

Randy Miller, Executive Director, Florida Retail Federation, provided additional insight regarding the perspective of the members from his organization.

## 5. *Unbundling of Communication Services*

French Brown, Deputy Director of the Department of Revenue's Office of Technical Assistance and Dispute Resolution, made a presentation on Florida's law concerning the definition of "sales price" and the unbundling of goods or services, including 2012 legislative changes. Information was also provided regarding how the 25 states that had responded to the earlier survey treat the unbundling of goods and services for tax purposes.

## 6. *Developments in Technology*

Joy Spahr, Director, AT&T Experience Marketing-AT&T Innovation Center, provided information on "The Changing Face of Communications." Ms. Spahr's presentation focused on three main areas: the changing face of the Internet; the Internet as a value added platform; and the power of convergence.

## 7. *Communications Services Tax Audits*

Peter Steffens, General Tax Administration Program, Florida Department of Revenue, presented information regarding the Department's experience in auditing the Communications Services Tax. Mr. Steffens presented historical information regarding the number of audits, hours spent by auditors and the

collections derived from those audits. The major auditing issues that were identified related to: situsing; surcharges and fees; improperly exempted sales; unsupported bad debts and credits; difference in filing and accounting periods; and other records issues.

#### 8. *Other business*

Chair Stranburg outlined a potential schedule for members to provide proposed options that may be included in the Working Group's report for consideration and discussion in an upcoming meeting. The Working Group agreed to September 14 for members to provide proposed options to staff for compiling and returning to all Working Group members and posting on the Working Group's web page. Mr. Dudley offered to propose any options that the public may wish to send to him for submission and the Chairman said that the Department would do so as well.

Mr. Rosenzweig asked about the process for voting on issues for inclusion in the report. Mr. Dudley indicated that he had reviewed the legislative tapes and that there was no discussion of "intent" that would provide more direction than what is in the law. Additional discussion took place during the meeting regarding the procedures to be used for upcoming meetings. Mr. Suggs asked Chair Stranburg to reach out to legislative leadership for guidance on this issue and the Chair agreed to do so.

Mayor Resnick requested information concerning competitive advantages between the satellite and cable industries.

Ms. Fox asked Mr. Dudley if the cable television association would have data on franchise fees in other states. Mr. Dudley indicated that he would see if there was any national data available. He also suggested that the National Association of Telecommunications Officers and Advisors (NATOA) might have this information. Mayor Resnick indicated that he had checked with NATOA and the National League of Cities. NATOA did not have this information, but suggested checking with the National Cable Television Association. The National League of Cities did not have specific data, but indicated that 5 percent was a reasonable estimate. Mr. Dudley agreed to look into this issue.

Mayor Resnick requested an estimate of the potential revenues that would result from a 5% franchise fee imposed on providers of communications services that utilize rights-of-way.

#### 9. *Adjournment*

With the agenda complete the meeting was adjourned.

## **Agenda Item #3**

### **Follow-Up from Previous Meetings**

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- 1) Information on Cable Franchise Fees provided by Charles Dudley
- 2) Information on Potential Revenues from Franchise Fees provided by the Office of Tax Research
- 3) Selected Documents Relating to Pending Litigation filed by Satellite Service Providers and Satellite Customers

## **Andrea Moreland - Communications Services Tax Working Group - Information from Charlie Dudley - Follow-up Information on Cable Franchise Fees/Internet Access**

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**From:** Andrea Moreland  
**To:** Moreland, Andrea  
**Date:** 8/27/2012 2:12 PM  
**Subject:** Communications Services Tax Working Group - Information from Charlie Dudley - Follow-up Information on Cable Franchise Fees/Internet Access

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Please see the information provided below by Charlie Dudley.

Andrea

Andrea J. Moreland  
Director, Legislative and Cabinet Services  
Florida Department of Revenue  
Post Office Box 5906  
Tallahassee, Florida 32399-0100  
(850) 617-8324  
[morelanA@dor.state.fl.us](mailto:morelanA@dor.state.fl.us)

>>> Andrea Moreland 8/24/2012 1:33 PM >>>

Thank you Charlie. I will share this information with the working group members.

Andrea

>>> Charlie Dudley FLP <cdudley@flapartners.com> 8/24/2012 12:11 PM >>>

Andrea – I was asked by the Task force to provide some information regarding Cable Franchise Fees across the country and the applicability of such fees to other services beyond cable/video such as Internet Access and IP phone (or VOiP). Of course, the adoption and implementation of the CST law in Florida (Ch. 202) resulted in the elimination of “franchise fees” in Florida – essentially “voiding” any local government franchise agreement or ordinance as it related to the application of any franchise fees.

In 2002, the FCC ruled that federal law authorizing the imposition of “franchise fees” by local and state franchising authorities on cable service providers did NOT authorize the calculation of such fees on revenues derived by the provisioning of “cable modem service” (ie., Internet access) as such services were “information services” and not cable services:

See this press release issued at the time of the FCC’s decision classifying cable modem service as an information service: [http://www.fcc.gov/Bureaus/Cable/News\\_Releases/2002/nrcb0201.html](http://www.fcc.gov/Bureaus/Cable/News_Releases/2002/nrcb0201.html)

The relevant sentence: "Regarding franchise fees, the FCC notes that the law limits franchise fees to 5 percent of the gross revenues the cable operator receives from cable service. The FCC said that revenues from cable modem service should not be used in computing this franchise fee ceiling."

The Cable industry has taken a similar position regarding the revenues derived from the provision of IP telephony services and other non-cable services – ie., franchise fees do not apply. I am not aware of any judicial nor FCC rulings regarding this position.

Across the country, those states who have adopted similar CST-like laws, franchise fees have either been included in the new tax scheme or there is a credit against the tax for franchise fees (Kentucky). Of course, the vast majority of states still have cable franchise fees. These fees and their base of assessment are governed by the Federal Cable Act (no more than 5% of revenues derived from the provision of "cable services") and state laws and local franchise agreements/ordinances.

Generally, cable franchise fees range from 3-5%, with many at the maximum rate. Some states have state level cable regulation, so the fees are shared between the state entity and applicable local government. The definition of what revenues are subject to franchise fee assessment vary from jurisdiction dependent on the state law and the particular local franchise agreement or ordinance.

charlie

Charles F. Dudley

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## Potential Revenues from Franchise Fees

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**Request of Working Group:** To estimate the potential revenues from a 5% franchise fee if it were imposed upon providers of communication services that utilize rights of way.

**Methodology:** The Office of Tax Research, Florida Department of Revenue, analyzed return information along with available public information to identify certain providers within Florida who appear to be primarily engaged in providing communications services through the use of facilities in the rights of way. The services assumed to have a presence in the rights of way are land line telephone service and cable service. As such, the majority of the providers represented in this data are engaged in the provision of cable or telephone services.

**Cautions when using this estimate:**

1. Information provided on the return does not provide remittances by type of communication service.
2. Where providers are engaged in multiple areas of communications services, some of which would not utilize the rights of way, the amounts provided below overstate the potential revenues.
3. The tax base numbers do not represent the revenue to the provider.
  - a. These numbers are limited solely to the dollar values associated communications services taxes; where the franchise fee may not limit itself to those values the potential base would be higher.
  - b. In the past franchise fees have been assessed on total revenue (ad sales, total receipts)
4. The amount for 2001-02 consists of 9 months of data and the amount for 2011-12 consists of 11 months of data.
5. The data is provided by state fiscal year. The base for each identified group was added together for the overall total and the proposed rate of 5% was applied to that value.

State Fiscal Year	Tax Base for selected providers (\$M)	5% Franchise Fee Applied to base
2001-02 (partial)	\$ 7,458.0	\$ 372.90
2002-03	\$ 9,510.1	\$ 475.51
2003-04	\$ 8,908.6	\$ 445.43
2004-05	\$ 8,836.9	\$ 441.84
2005-06	\$ 9,054.7	\$ 452.74
2006-07	\$ 8,975.4	\$ 448.77
2007-08	\$ 8,861.4	\$ 443.07
2008-09	\$ 8,425.7	\$ 421.28
2009-10	\$ 8,056.2	\$ 402.81
2010-11	\$ 7,338.3	\$ 366.92
2011-12 (partial)	\$ 6,641.2	\$ 332.06

# Satellite Service and Cable Service

# Selected Documents Relating to Pending Litigation

## Litigation

THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA

DIRECTV, INC., n/k/a DIRECTV, LLC and  
ECHOSTAR SATELLITE CORPORATION,  
n/k/a DISH NETWORK, LLC,

Plaintiffs

CASE NO. 05-CA-1037  
GENERAL CIVIL DIVISION

(Consolidated)

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Defendant

-----/

CASE NO. 05-CA-1354  
GENERAL CIVIL DIVISION

MARCUS and PATRICIA OGBORN,  
on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

JIM ZINGALE , acting in his official capacity as the  
Director of the FLORIDA DEPARTMENT of REVENUE

Defendant

-----/

## Index to Attachment

- Department of Revenue's Motion for Summary Final Judgment (9-4-12)
- Department of Revenue's Amended Answer, Defense, and Affirmative Defenses to Amended Complaint of DIRECTV, Inc., n/k/a DIRECTV, LLC, and ECHOSTAR SATELLITE CORPORATION, n/k/a DISH NETWORK, LLC (8-23-12)
- Department of Revenue's Amended Answer, Defenses, and Affirmative Defense to Second Amended Class Action Complaint of Marcus and Patricia Ogborn (8-23-12)
- Second Amended Class Action Complaint of Marcus and Patricia Ogborn (3-27-09)
- Amended Complaint of DirecTV, Inc., n/k/a DirecTV, LLC and Echostar Satellite Corporation, n/k/a Dish Network, LLC (10-31-08)

**THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA**

**DIRECTV, INC., and ECHOSTAR  
SATELLITE CORPORATION, n/k/a  
DISH NETWORK, LLC,**

CASE NO. 05-CA-1037  
GENERAL CIVIL DIVISION

Plaintiffs,

vs.

(Consolidated)

**STATE OF FLORIDA, DEPARTMENT  
OF REVENUE,**

Defendant.

\_\_\_\_\_/ **MARCUS and PATRICIA OGBORN,  
on behalf of themselves and  
others similarly situated,**

CASE NO. 05-CA-1354  
GENERAL CIVIL DIVISION

Plaintiffs,

vs.

**JIM ZINGALE, acting in his  
official capacity as the  
Director of the FLORIDA  
DEPARTMENT OF REVENUE,**

Defendant.  
\_\_\_\_\_ /

**DEPARTMENT OF REVENUE'S  
MOTION FOR SUMMARY FINAL JUDGMENT**

Defendant, Florida Department of Revenue<sup>1</sup> ("Department"), through its undersigned counsel, files this Motion for Summary Final Judgment pursuant to Rule 1.510, Fla. R. Civ. P., because the pleadings, depositions, affidavits, stipulations, and

<sup>1</sup> The individual Plaintiffs, Marcus and Patricia Ogborn ("Satellite Customers") sued the Department's former executive director, Jim Zingale, in his official capacity. The Department is the real party in interest; Zingale has no personal interest in this case.

answers to interrogatories show there is no genuine issue of material fact and that the Department is entitled to final judgment as a matter of law.

### Introduction

At issue in this case are Communication Services Taxes which Florida imposes on both Satellite Service and Cable Service. In asserting facial constitutional challenges to these carefully crafted tax provisions, Plaintiffs seek a judicial determination that will create an entirely new tax classification for Satellite Service. Such classification does not exist in the current tax laws and would have all of the benefits, and few of the burdens, which the Legislature imposed upon Cable Service.

The Legislature had a rational basis for classifying and taxing Satellite Service and Cable Service differently in the Communications Services Tax laws in Chapters 202 and 203, Fla. Stat. The undisputed facts show that the services are technologically distinct. Furthermore, Cable Service is subject to additional taxes and regulations from which Satellite Service is exempt. The Florida Supreme Court has held that the Legislature possesses great freedom in tax classification, and the burden is on the challenger to negate every conceivable basis which might support a classification for tax purposes. *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311, (Fla. 1984), *appeal dismissed*, 474 U.S. 892 (1985) ("*Eastern Air Lines*") (Appendix 1 Consolidated). Plaintiffs cannot meet this burden.

On its face, the Communications Services Tax does not discriminate against interstate commerce. The taxes at issue here depend upon the location where the customer receives services, not the location of the services provider. Moreover, contrary to Plaintiffs' contention, the Supreme Court recognizes that transmission of

television services by wire is inherently an interstate business, even if the programs originate in the state where the customer received the service. *See United States v. S.W. Cable*, 392 U.S. 157, 168-69 (1968) ("S.W. Cable") (Appendix 2):

Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same state in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that is not only appropriate but essential to the efficient use of radio facilities.

Other jurisdictions which have considered nearly identical claims by satellite television service providers have soundly rejected Plaintiffs' legal arguments. Finally, the effective tax rate imposed upon Cable Service, has, in fact, been higher than that imposed on Satellite Service for each year that is in issue. Accordingly, Plaintiffs' claims must fail and the Department is entitled to summary judgment as a matter of law.

#### **Defined Terms**

In order to facilitate ease of reading this motion, the following terms are utilized throughout.

##### ***A. Terms Related to Satellite Companies***

"Satellite Providers" refers collectively to DirecTV, Inc., n/k/a DirecTV, LLC ("DirecTV") and Echostar Satellite, L.L.C., n/k/a Dish Network LLC ("Dish").

"Satellite System" refers to the technology Satellite Providers use to provide service to their customers, including but not limited to Marcus and Patricia Ogborn

(collectively "Satellite Customers").

"Satellite Service" refers to all services Satellite Providers offer to Satellite Customers.

**B. *Terms Related to Cable Companies***

"Cable Providers" refers to all Cable Service providers, including but not limited to members of the intervenor, Florida Cable Telecommunications Association.

"Cable System" refers to the technology Cable Providers use to provide service to their subscribers (collectively "Cable Customers").

"Cable Service" refers to all services Cable Providers offer to Cable Customers.

**C. *Terms Related to the Tax in Issue***

"CST" refers to the Communications Services Tax Simplification Law enacted as Chapter 202, Fla. Stat.

"Gross Receipts Tax" is the additional tax on utility and communications services enacted as Chapter 203, Fla. Stat.

"Communications Services Taxes" refers to all taxes on communications services imposed in Chapters 202 and 203, Fla. Stat. (*See* section 202.11(2), Fla. Stat.).

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#### **I. Procedural Background and Statement of the Case**

The Satellite Providers filed their initial complaint in Case Number 05 CA 1037 on or about May 4, 2005. They seek a declaration that section 202.12(1)(b), Fla. Stat., unconstitutionally violates the Commerce and Equal Protection Clauses by imposing tax upon Satellite Service at a rate of 10.8% and upon Cable Service at a rate of 6.8%. Although they assert that the Constitution requires a 4% reduction of the tax rate on Satellite Service (from 10.8% to 6.8%), they do not contend that Satellite Service should be taxed the same as Cable Service—because Cable Service bears an additional local component of the CST (which averages more than 4%) from which Satellite Service is exempt. Satellite Providers also seek refunds equal to 4% of the gross revenues used to calculate such taxes. Satellite Providers' Amended

Complaint, ¶ 2 and Prayer for Relief, ¶ 2.<sup>2</sup>

Marcus and Patricia Ogborn, on behalf of themselves and a putative class of Satellite Customers in Florida, filed a similar Commerce Clause and Equal Protection challenge in the Second Judicial Circuit on or about June 9, 2005, under Case Number 05-CA-1354, seeking refunds of "over \$150 million." Ogborns' Second Amended Class Action Complaint, ¶ 59, at 25. The Department moved to dismiss the Satellite Customers' complaint as untimely pursuant to section 202.23(2), because the complaint had been filed more than 180 days after the Department denied the Satellite Customers' refund application. The Circuit Court recognized that sections 202.23 and 215.26, Fla. Stat., are statutes of nonclaim, which prohibit judicial consideration of any action for tax refund if the taxpayer fails to satisfy administrative remedies, unless the sole basis for the claim is a facial Constitutional challenge.<sup>3</sup> *Sarnoff v. Fla. Dept. of Highway Safety and Motor Vehicles*, 825 So. 2d 351, 357 (Fla. 2002) ("*Sarnoff*") (Appendix 3). The court dismissed the Satellite Customers' complaint, with prejudice, because it concluded the claims were as-applied instead of facial challenges.

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<sup>2</sup> The Satellite Providers, however, collected the tax from their customers and remitted the tax to the Department. Because they, themselves, did not pay the tax, they have no standing to seek a refund from the Department until after they refund the tax to their customers. §§ 202.23, 215.26, Fla. Stat. *State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson*, 286 So.2d 529, 532 (Fla. 1974); *see also, Dep't of Rev. v. Daystar Farms, Inc.*, 803 So. 2d 892, 896 (Fla. 5<sup>th</sup> DCA 2002).

<sup>3</sup> Section 215.26, furthermore, is an absolute bar to any refund of tax paid more than three years before a taxpayer files a refund claim or a lawsuit seeking a refund. *Dep't of Revenue v. Leon*, 824 So. 2d 197, 201 (Fla. 3d DCA 2002). Plaintiffs' present refund claims, therefore, are strictly limited to taxes they paid during the three year period before they filed the original complaint or any amended complaint. Plaintiffs' continuing failure to file refund claims or subsequent amended complaints bars any refund of taxes paid after the Satellite Providers filed their Amended Complaint or the Satellite Customers filed their Second Amended Class Action Complaint.

On appeal, the First District recognized that dismissal would have been appropriate "if their [Satellite Customers'] constitutional challenge were treated as an as-applied challenge because they filed their case more than 180 days after they received notice of the denial of their refund request." *Ogborn v. Zingale*, 988 So. 2d 56, 57-58 (Fla. 1st DCA 2008) ("*Ogborn*") (Appendix 4). The First District reversed, however, because "Appellants' challenge is facial in nature." *Id.*, at 59.

Thus, the Ogborns filed a refund application and waited until the refund was denied before filing suit—but they waited too long to be able to assert any as-applied challenge. The Affidavit of Andrea Hunter included as Appendix 5 shows that the Satellite Providers never filed refund claims for the monetary relief they seek in this case. The Ogborns' lawsuit for any grounds other than a facial challenge was late and therefore barred; the Satellite Providers did not even attempt to exhaust administrative remedies. Thus, their refund claims also are barred if they assert any theory other than a facial challenge. The First District Court of Appeal has directed this Court to apply the test for a facial challenge:

A facial challenge considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards.

*Ogborn*, at 59 (emphasis added). The court continued:

A facial challenge to a statute is more difficult than an "as applied" challenge because the challenger must establish that no set of circumstances exists under which the statute would be valid. . . . [S]uch a challenge must fail unless no set of circumstances exists in which the statute can be constitutionally applied. . . . [T]he challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards. *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

*Id.*, at 57-58 (Emphasis added). This is the law of the case, and the standard that the present Court must apply to the pending action.

Following remand, this Court consolidated the actions by the Satellite Providers and Satellite Customers, and permitted the Florida Cable Telecommunications Association ("FCTA"), the association that represents Cable Providers, to intervene as a party for all purposes. Intervention was appropriate because Plaintiffs seek relief that would directly and adversely affect Cable Providers by giving Satellite Providers a significant competitive advantage through reducing the tax rates on Satellite Service, but not on Cable Service.

Both sets of Plaintiffs base their claims on the theory that section 202.12(1)(b), Fla. Stat. (which imposes CST on Satellite Service at the rate of 10.8%) is facially unconstitutional because it is always 4% greater than the 6.8% tax rate which section 202.12(1)(a), Fla. Stat., imposed upon Cable Service. Satellite Providers' Am. Comp., ¶s 1, 52, 61, 67; Satellite Customers' Second Am. Class Action Comp., ¶s 6, 14, 43, 68, 74, 75.<sup>4</sup> Plaintiffs overlook the component of the CST which sections 202.19 and 202.20 impose on Cable Service, from which Satellite Service is specifically exempted. § 202.19(6), Fla. Stat. Plaintiffs also overlook material differences between Satellite Service and Cable Service, which provide a rational basis for classifying them differently. *See Eastern Air Lines*

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<sup>4</sup> The gross receipts tax (Chapter 203, Fla. Stat.) provides funding for public schools through the Public Education Capital Outlay and Debt Service Trust Fund ("PECO Fund"). In 2010, the Legislature reduced the rate section 202.12(1)(a) imposes on Cable Services by 0.15%, from 6.8% to 6.65%, and simultaneously increased the rate section 203.01(1)(b) imposes upon Cable Services by 0.15%, from 2.37% to 2.52%, to provide additional funding for the PECO Fund. §§ 3 and 5, chap. 2010-149, Laws of Florida. Thus, the total tax rate on Cable Services remained unchanged.

(Appendix 1), rejecting an equal protection challenge to different tax treatment of motor fuel and jet fuel because there was a rational basis for classifying the different modes of transportation differently.

The CST makes no distinctions based upon a service provider's place of business or the quantity of business in the State. Instead, the CST classifies businesses based upon their modes of operation; all Satellite Services are taxed the same, and all Cable Services are taxed the same. The CST bases the amount of tax upon the location where the customer receives the service in Florida and upon what that customer pays for communications services. §§ 202.11(13) and 202.11(14)(b), Fla. Stat. Plaintiffs argue that the court must consider clause 202.12(1)(b) in isolation, and must ignore the total burdens which the Communications Services Tax imposes upon Cable Service. Plaintiffs ask the court to create a new class only available to Satellite Service, with all of the benefits but few of the burdens of Cable Service. This is a political argument, not a legal one.<sup>5</sup>

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<sup>5</sup> Plaintiffs have made similar arguments to their present theories—and lost—in Ohio (*DirectTV, Inc. v. Levin*, 907 N.E.2d 1242 (Ohio App. 2009) (Appendix 6); *DirectTV, Inc. v. Levin*, 941 N.E.2d 1187 (Ohio 2010) (Appendix 7); North Carolina state courts (*DirectTV, Inc. v. State*, 632 S.E.2d 543 (N.C. App. 2006) (Appendix 8); North Carolina federal courts (*DirectTV, Inc. v. Tolson*, 498 F. Supp.2d 784 (E.D.N.C. 2007), *affirmed* 513 F.3d 119 (4<sup>th</sup> Cir. 2008) (Appendix 9); Kentucky federal court (*DirectTV, Inc. v. Treesh*, 469 F.Supp. 2d 425 (E.D. Ky. 2006) (Appendix 10); and the Sixth Circuit Court of Appeals (*DirectTV, Inc. v. Treesh*, 487 F.3d 471 (6<sup>th</sup> Cir. 2007), *cert. denied*, 128 S.Ct. 1876 (2008) (Appendix 11). Notwithstanding the Satellite Providers' well-rehearsed and often repeated arguments, every federal court and every state appellate court that has considered those arguments found they are wrong. Satellite Providers and Cable Providers engage in different businesses so there is no constitutional impediment to the legislature's classifying and taxing them differently.

## II. Undisputed Facts

This case is not, and never has been, a dispute about two forms of television service; the statute defining "communications services" does not mention "television." *See* § 202.11(2), Fla. Stat. Instead, Plaintiffs have asserted facial challenges to the Legislature's classifications of two entirely different modes of electronic communications.

### A. **Plaintiffs' Corporate Representatives Admit They Are Different.**

#### 1. ***Dish's Corporate Representative: "They're just different."***

Dish's corporate representative, Jeffrey McSchooler, testified (Appendix 12), that:

- Dish's Satellite System has always had a one-way architecture. *Id.*, at 61, line 24 through 62, line 13.
- Dish's Satellite System does not have the capability of providing telephone service to its customers. *Id.*, at 62, lines 14-18.
- Dish's Satellite System has never had the capability of providing Internet service to its customers. *Id.*, at 62, lines 19-24.
- Dish's Satellite System has never allowed a subscriber to watch a particular movie that would only be transmitted to that one subscriber at the time. *Id.*, at 72, lines 12-18.
- All Dish's set top boxes in a viewing area receive the same television transmissions simultaneously, but the set top boxes can store programs for future viewing. *Id.*, at 73, lines 8-25.
- Dish's Satellites, therefore, cannot transmit Video-On-Demand in response to a customer's request. *Id.*, at 73, line 16 through 74, line 11.

Mr. McSchooler also acknowledged that satellite technology would not permit a customer to request a particular transmission:

Question (by Mr. Cox): But it would not be sent to a unique subscriber who desires to watch that movie?

Answer: No.

Question: And the technology would not let that be possible?

Answer: It's not possible over satellite. Wish it was.

Question: Why do you wish it was?

Answer: That's just one of those advantages/disadvantages technically you were talking about.

Question: An advantage of cable?

Answer: Correct.

Question: *So is it fair to say that satellite has some advantages and cable has other advantages?*

Answer: *Yes, in my personal opinion. Yes, they're just different.*

*Id.*, at 74, lines 9-24. Emphasis added. Mr. McSchooler explained various reasons that Cable Services and Satellite Services are inherently different:

A disadvantage [of Satellite Systems] is that cable has all of their stuff running in the ground, and so if they want to change something, it's pretty darn easy. I wouldn't say it's, you know, easy for them to have to go do it but they can get it done. If I want to change something that requires making more bandwidth, if I can't figure out how to do it on gear, I can't go into the spacecraft and fix it. There's nothing I can do right at that point.

So those kinds of things-*that's what allows them [Cable Providers] to offer other things like telephone and, you know, some of the wild stuff that they can do that we can't do, right, in the world.* So if I had to look at advantages and disadvantages technologically, that's one that makes our business difficult.

*Id.*, at 70, lines 2-17. Emphasis added.

## **2. DirecTV's Corporate Representative:**

DirecTV's corporate representative, James R. Butterworth, testified by deposition (Appendix 13), that:

- DirecTV's Satellite System provides customers only a passive receipt of Satellite television transmissions. *Id.*, at 20, lines 23-25.
- DirecTV's Satellite System provides only one-way communication from the satellites to the customers. *Id.*, at 21, lines 6-9.
- It has never been possible for a DirecTV subscriber to select movies to be transmitted uniquely to that customer over the Satellite System. *Id.*, at 37, lines 1-6; 38, lines 15-18.
- It has never been possible for the Satellite Systems to provide telephone service. *Id.*, at 38, line 19- 39, line 1.
- Likewise, the Satellite Systems' one-way architecture makes it impossible to provide Internet service. *Id.*, at 44, lines 7-17.

Mr. Butterworth then acknowledged other inherent differences between Satellite Systems and Cable Systems:

- Unlike Satellite Systems' one-way architecture, cable companies have a two-way architecture that permits cable subscribers to send and receive information, to access the Internet, to receive telephone service, and to order a unique transmission of a movie that was not being simultaneously transmitted to other subscribers. *Id.*, at 45, line 1, through 46, line 2.
- Thus, DirecTV does not compete with cable companies for Internet or telephone customers, or for any kind of two-way communications service. *Id.*, at 49, line 25 through 50, line 24.

## **B. Cable Providers Agree They Are Different.**

### ***1. Bright House Networks' Corporate Representative***

Bright House Networks' corporate representative, Robert Grann, testified by deposition (Appendix 14), that:

- Video which Bright House Internet subscribers upload to YouTube over the cable network uses a different frequency from that of television programs that Bright House transmits to those customers. Such uploaded video is known as high speed data. *Id.*, at 101, lines 3-14.
- The final transmission of signals from the node into the various devices in the customer's home is over the same coaxial cable, whether the transmission is of Internet, video on demand, television, or high speed data link. *Id.*, at 105, lines

15-20.

- Bright House also provides telephone service over the same fiberoptic and coaxial cable network. *Id.*, at 109, lines 18-25, and 111, line 19, through 112, line 1.

## 2. *Cox Communications' Corporate Representative*

Cox Communications' corporate representative, Keith Gregory, testified by deposition (Appendix 15), that

- Cox Communications is a two-way architecture. *Id.*, at 12, lines 5-8.
- Cox Communications began delivering Internet service in Florida beginning in 1999 over the same cable network through which Cox Communications transmitted television signals. *Id.*, at 18, line 21 through 19, line 9.
- Even in 1999, a customer who had purchased Internet service from Cox Communications could send e-mails over the Cox Communications cable system. *Id.*, at 19, lines 6-9.
- Cox Communications' digital telephone service does not use the public Internet. Instead, it uses Cox Communications' own networks and interconnects with other telephone companies to effectuate calls. *Id.*, at 28, lines 3-9.
- Cox Communications offers "converged functionality" by which a customer can change his or her telephone service and check voicemail by accessing the Cox Communications website from anywhere in the world with an Internet connection. *Id.*, at 26, line 14, through 26, line 2.
- All the services Cox Communications provides are delivered over the same network. *Id.*, at 29, lines 19-22.

## 3. *Comcast Corporation's Affidavit*

Comcast Corporation's Regional Director of Engineering Operations, Stephen Hill, executed an affidavit (Appendix 16), which acknowledged, *inter alia*, that:

- "Depending on the level of cable television service to which a subscriber subscribes, signals can be sent upstream from a subscriber's remote to a headend or other key location via the subscriber's set-top box."
- "Xfinity is the brand name under which Comcast markets its enhanced Triple

Play services, comprised of Xfinity TV (formerly Comcast Digital Cable), Xfinity Voice (formerly Comcast Digital Voice), and Xfinity Internet (formerly Comcast High Speed Internet), in most major markets throughout the United States."

- "On Demand is a feature of Xfinity TV that allows digital cable subscribers to select from thousands of movies and other programs using their existing digital set-top box. Subscribers can access the On Demand library by navigating through the On Demand menu on their television. The movies and other programs available through On Demand are stored on servers located at headends or other key locations. Once a selection is made, a signal is transmitted through the subscriber's digital set-top box to a server at the headend. The server handles the subscriber's query and streams a video signal as packets over Comcast's cable television network back to the subscriber's digital set-top box, whereupon the signals are reassembled into a viewable television signal."
- "Xfinity Voice is a Voice over Internet Protocol service that allows subscribers to transmit telephone calls over Comcast's broadband network. . . . Subscribers' calls are not routed over the Internet, but rather remain on Comcast's broadband network until Comcast's switch delivers calls on the public switched telephone network."
- "Xfinity Internet is a service that allows subscribers to access the Internet via Comcast's broadband network."
- "Signals related to Comcast's predominantly one-way cable television service and two-way Internet access and VoIP services are transmitted to subscribers over the same coaxial and/or fiber optic cable, albeit at different frequencies. For example, a subscriber of Comcast's bundled Xfinity TV and Internet services can upload audio and video files to third party websites, such as YouTube, using the same coaxial and/or fiber optic cable over which he or she receives television programming."

### **III. TAXATION OF COMMUNICATIONS SERVICES IN FLORIDA, CHAPTERS 202-203, FLA. STAT.**

The Department administers an integrated tax on communications services, which consists of the CST in Chapter 202 (§§ 202.10-202.41, Fla. Stat. (2002)) and

the Gross Receipts Tax in Chapter 203, Fla. Stat. (2002) (Composite Appendix 17).<sup>6</sup> The State preempted the authority of local governments to impose taxes, fees, charges, or other impositions on dealers in communications services for occupying roads or rights of way. § 202.24(1), Fla. Stat. The Department allocates and distributes certain tax proceeds to the State and to local governments—not to local businesses.<sup>7</sup> § 202.18, Fla. Stat. *See Dept. of Rev. of Ky. v. Davis*, 553 U.S. 328, 348 (2008) (Appendix 18), where the Court approved Kentucky's income tax exemption for interest only on bonds issued by the Commonwealth because "the Commonwealth's direct participation favors, not local private entrepreneurs, but the Commonwealth and local governments."

Florida's CST creates four classifications of communications services: 1) direct-to-home Satellite Services (§ 202.12(1)(b)), 2) private communications services (§§ 202.12(1)(c), 202.19, and 202.20, Fla. Stat.), 3) mobile communications services (§§ 202.12(1)(d), 202.19, and 202.20), and 4) all other communications services, including Cable Services (§§ 202.12(1)(a), 202.19, and 202.20).

The Communications Services Tax requires all communications services dealers to make a single return and payment to the Florida Department of Revenue each reporting period; Cable Providers do not report or remit CST to local

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<sup>6</sup> Although the legislature amended several statutes in Chapters 202 and 203 at material times, none of those amendments is material to this case. *See, e.g.*, §§ 3, 4, Ch. 2007-29, Laws of Fla.

<sup>7</sup> *See* affidavit of David Ansley, which details how the CST revenues are distributed to the State, counties, and municipalities. Mr. Ansley's affidavit also shows that the Department does not retain those tax receipts, and that there is no statutory mechanism for the Department to recover those funds from local governments, or to compel those local governments to refund those tax receipts to the Satellite Providers or to the Satellite Customers.

governments. § 202.27, Fla. Stat. The state preempted the authority of local governments to impose taxes or franchise fees on dealers of communication services. § 202.24(1), Fla. Stat.

The Department administers two components of the CST on Cable Service: the statewide component imposed by section 202.12 at the constant rate of 6.8%,<sup>8</sup> and the local component imposed by sections 202.19 and 202.20, Fla. Stat. This motion refers to the former as "statewide" because the rate is the same throughout the State. This motion refers to the latter as "local" because when the legislature preempted local taxation of Cable Service (*see* section 202.24), it also established the original rates for the additional local component of the CST on communications services other than Satellite Service in each city or county (the "conversion rates" in section 202.20, Fla. Stat.); the legislature thereafter allowed local governments to increase or reduce those rates which the legislature had established by law. § 202.19, Fla. Stat.

All businesses providing Satellite Service to addresses in Florida are taxed the same, and all businesses providing Cable Service to addresses in Florida are taxed the same, whether or not those businesses are based in Florida. Florida's Communications Services Taxes do not distinguish between in-state and out-of-state Satellite Providers or Cable Providers; what matters is the "service address in this state" or the receipt of direct-to-home Satellite Service "in this state." *See* § 202.12(1)(a) and (b), Fla. Stat.

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<sup>8</sup> As indicated at page 7, *supra*, sections 3 and 5, chap. 2010-149, Laws of Fla., reduced the rate section 202.12 imposed on Cable Services by 0.15% and increased the rate section 203.01(1)(b) imposed on Cable Services by an equal 0.15%, so there was no net change in the Communications Services Tax rate on Cable Services.

All components of the CST constitute a State tax administered by the Department. §§ 202.10 - 202.41, Fla. Stat. The express purpose of Chapter 202, Fla. Stat., entitled the "Communications Services Tax Simplification Law," was to simplify the complex structure of taxes on telecommunication, cable, direct-to-home satellite and other communications services that were then in existence or thereafter devised. §§ 202.105 and 202.10, Fla. Stat. Communications services dealers make a single return and payment to the Department, instead of filing returns and paying taxes or franchise fees to various local jurisdictions. § 202.27, Fla. Stat. *See also*, § 202.24(1), preempting all franchise fees to the State. After the collection of the tax imposed pursuant to Chapter 202, Fla. Stat., the Department allocates and distributes the tax proceeds. § 202.18, Fla. Stat.

The Communications Services Tax rate on Satellite Service is 13.17%, including the 10.8% tax imposed by section 202.12 and the 2.37% rate imposed by section 203.01, Fla. Stat. The effective Communications Services Tax rate on Cable Service may range as high as 14.27%, and possibly higher. It includes the 6.8% component of the CST (currently 6.65%) imposed by section 202.12, the 2.37% tax (currently 2.52%) imposed by section 203.01, and the local component of the CST imposed by sections 202.19 and 202.20, at a rate of up to 5.1% (or higher pursuant to sections 202.19 and 202.20). Satellite Service is exempt from the local component of the CST. *See* § 202.19(6), Fla. Stat. ("Notwithstanding any other provision of this section, a tax imposed under this section does not apply to any direct-to-home satellite service."). The "conversion rates" for the local component imposed on Cable Service (but not on Satellite Service) by section 202.20 went into effect without any

action by the local government.

Section 202.105(1) states the legislative findings and intent of the "Communications Services Tax Simplification Law:"

(1) It is declared to be a specific legislative finding that the creation of this chapter fulfills important state interests by reforming the tax laws to provide a fair, efficient, and uniform method for taxing communications services sold in this state. This chapter is essential to the continued economic vitality of this increasingly important industry because it restructures state and local taxes and fees to account for the impact of federal legislation, industry deregulation, and the convergence of service offerings that is now taking place among providers. This chapter promotes the increased competition that accompanies deregulation by embracing a competitively neutral tax policy that will free consumers to choose a provider based on tax-neutral considerations. This chapter further spurs new competition by simplifying an extremely complicated state and local tax and fee system. Simplification will lower the cost of collecting taxes and fees, increase service availability, and place downward pressure on price. Newfoundland administrative efficiency is demonstrated by a reduction in the number of returns that a provider must file each month. By restructuring separate taxes and fees into a revenue-neutral communications services tax centrally administered by the department, this chapter will ensure that the growth of the industry is unimpaired by excessive governmental regulation. The tax imposed pursuant to this chapter is a replacement for taxes and fees previously imposed and is not a new tax. The taxes imposed and administered pursuant to this chapter are of general application and are imposed in a uniform, consistent, and nondiscriminatory manner.

(Emphasis added). This competitively neutral tax policy allows consumers to choose a provider based on tax-neutral reasons.

#### **IV. SUMMARY OF THE ARGUMENT**

The court must apply the standard for a facial challenge. Because Plaintiffs did not avail themselves of statutory pre-deprivation or post-deprivation remedies, any claim other than a facial constitutional challenge would deprive the court of subject matter jurisdiction over refund claims. The court must consider the entire

enactment, not a single sentence in isolation. The CST constitutes an integrated taxing scheme that applies to all forms of communications services.

Plaintiffs cannot state a viable claim under any constitutional theory. The Constitution has never been construed to allow one kind of business to claim the benefits and disavow the burdens of another kind of business. There is nothing wrong with basing a tax classification on the technology used by a business, and the location of the service provider (whether satellite or cable) is irrelevant to Florida's Communications Services Tax. Indeed, there is no constitutional impediment to taxing different kinds of businesses differently. Furthermore, Communications Services Taxes sometimes impose a greater burden upon Cable Service than upon Satellite Service. This indisputable fact precludes any facial challenge, whatsoever.

Every state and federal jurisdiction that has considered Plaintiffs' theories on the merits has determined that those theories misstate the law:

- Congress says Satellite and Cable Services may be taxed differently. *See* Section 602 of the 1996 Telecommunications Act, Pub. L. No. 104-104, Title VI, Section 602(c), 110 Stat. 144(a)(1996) (*reprinted at* 47 U.S.C. Section 152, historical and statutory notes). (Appendix 19)
- The United States Supreme Court says Satellite and Cable Services may be taxed differently. *See Leathers v. Medlock*, 499 U.S. 439 (1991) (“*Leathers*”) (Appendix 20); *See also Medlock v. Leathers*, 842 S.W.2d 428, 431 (Ark. 1992) (“*Medlock*”) (Appendix 21), *cert. denied*, 508 U.S. 960 (1993).
- The Sixth Circuit Court of Appeals says Satellite and Cable Services may be taxed differently. *See DirecTV, Inc. v. Treesh*, 487 F.3d 471 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1876 (2008). (Appendix 11);
- North Carolina says Satellite and Cable Services may be taxed differently. *See DirecTV, Inc. v. State*, 632 S.E.2d 543 (N.C. App. 2006). (Appendix 8); and
- Ohio says Satellite and Cable Services may be taxed differently. *See DirecTV, Inc. v. Levin*, 907 N.E.2d 1242 (Ohio App. 2009) (Appendix 6); *DirecTV, Inc. v. Levin*, 941 N.E.2d 1187 (Ohio 2010), (Appendix 7) *cert. denied*, *DirecTV*,

*Inc. v. Testa*, ---S.Ct. ---, 2012 WL 2368692 (Mem) (U.S. 2012).

## V. ARGUMENT

### A. This Court Must Apply the Test for a Facial Challenge.

#### 1. *The Court must consider the entire enactment, not a clause in isolation.*

The Court should give proper consideration to the entirety of the tax scheme, instead of considering one paragraph of section 202.12(1) in isolation. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) (Appendix 22):

It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole. [Citations omitted.] Where possible, courts must give full effect to *all* statutory provisions in harmony with one another. [Citations omitted.] Accordingly, both [provisions] must be considered in their entirety, in order to effectuate the legislative intent. [Citations omitted.] "Every statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts."

(Emphasis in original.) *See also, Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 722 (Fla. 1994) ("*Kuhnlein*") (Appendix 23) (agreeing with the State that the "taxing system itself, not any single part, must be examined by this Court" in order to determine whether a vehicle impact fee was facially unconstitutional); *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-915 (Fla. 2001) (recognizing that statutory phrases are not to be read in isolation).

This principle is eminently reasonable. If a claimant could limit the court's consideration to a single clause, the claimant could challenge any statute as unconstitutionally vague by omitting the clauses or sections which define prohibited activities. If that were permissible, it is doubtful whether any statute could withstand a challenge to isolated provisions. When Florida's taxing scheme in Chapter 202, Fla.

Stat., is considered as a whole, it is abundantly clear that the Communications Services Tax does not unconstitutionally discriminate against Satellite Services in favor of Cable Services. In adopting Chapter 202, Fla. Stat., the Legislature leveled the playing field so that Satellite Service would no longer have a competitive advantage over Cable Service.

**2. *The Court Must Apply the Standard for a Facial Challenge.***

As *Ogborn* explained, the only claims that may be presented in this proceeding are facial constitutional challenges. The presence of any theory other than a facial challenge would deprive the court of jurisdiction because of the Satellite Customers' failure to file the action within 180 days after receiving a refund denial, and the Satellite Providers' failure to exhaust administrative remedies.<sup>9</sup>

A facial challenge to a statute's constitutionality requires some infirmity on the face of the statute. *Ogborn* (Appendix 4), at 59; *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004). Furthermore, a statute challenged facially is void on its face only if the statute cannot be applied constitutionally to any set of facts or factual

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<sup>9</sup> The affidavit of Andrea Hunter (Appendix 5) shows that the Satellite Providers did not file administrative refund claims or receive refund denials related to their present constitutional theories pursuant to section 202.23 before filing suit. The Satellite Providers' refund claims, like those of the Satellite Customers, are barred unless those claims are solely facial challenges. The Florida Supreme Court has explained:

The direct-file exception created by this Court in *Nemeth* and *Kuhnlein* is available only when a taxpayer is seeking a refund pursuant to section 215.26, and the sole basis claimed for the refund is that the statute imposing the tax or fee is facially unconstitutional. This decision upholds the longstanding practice of allowing an individual to bypass the administrative process when the facial constitutionality of a statute is challenged.

*Sarnoff*, at 357 (Emphasis added) (Appendix 3).

situation whatsoever. *Id.* See also, *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Thus, if any set of circumstances exists in which the statute can be constitutionally applied, the statute is facially constitutional.

The *Ogborn* mandate is clear, and it applies equally to the Satellite Providers and to the Satellite Customers. Plaintiffs may not assert any argument that the CST discriminates "in practical effect" or that it has a "discriminatory intent" because such arguments are not "facial" challenges. See, e.g., *DirecTV, Inc., v. State of North Carolina*, (Appendix 8), at 547 ("There are three ways in which a statute can discriminate against out-of-state interests: (1) it may be facially discriminatory; (2) it may have a discriminatory intent; or (3) it may discriminate in its practical effect." (Citing *Amerada Hess Corp. v. Dir. Div. of Taxation, J.J. Dep't of Treasury*, 490 U.S. 66, 75 (1989) ("*Amerada Hess*") (Appendix 24). Plaintiffs' facial challenge must fail because the face of the statute does not create any improper discrimination.

**B. Section 202.12(1)(a) and (b) Does Not Violate Equal Protection.**

In creating the CST, the legislature created two relevant classifications, Satellite Services and Cable Services. These classifications are reasonable and based on the inherent and distinct differences between the two forms of communications services. Accordingly, they do not violate equal protection. Legislatures are accorded broad latitude when establishing tax classifications. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). See also, *Fitzgerald v. Racing Assoc. of Cent. Iowa*, 539

U.S. 103, 109 (2003) (Party challenging a legislative classification scheme can only succeed if it negates "every conceivable basis that might support different treatment."). The legislature only needs a rational basis, and the burden is on the party challenging the classification to negate every conceivable rational basis that might support it. *Eastern Air Lines* (Appendix 1), at 314; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1934). Furthermore, "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993).

Plaintiffs, furthermore, do not really want Satellite Service to be treated the same as Cable Service because the CST imposes additional burdens on Cable Service from which Satellite Service is (and Plaintiffs want to remain) exempt. *See* sections 202.19 and 202.20, which impose the local component of the CST on Cable Service but not on Satellite Service, and section 202.24(2)(c)8., which authorizes local governments to require Cable Providers to provide free wiring and services to local schools and government buildings, to designate channel capacity for public, educational, or governmental use (including capital contributions for studios and the like), and to construct institutional networks for government use.

As a result of that additional local component of the CST, and the additional regulatory burdens that are imposed upon Cable Service but not upon Satellite Service, Satellite Service already bears a lower effective CST burden than Cable Service. In effect, Plaintiffs request that this Court create an entirely new classification for Satellite Service, with all of the benefits and few of the burdens which the Legislature imposed upon Cable Service. Plaintiffs seek a judicial

determination that the Constitution mandates that they receive a competitive advantage which Florida law does not allow.

There is nothing wrong with the statutory definitions of Satellite Service or Cable Service. The Florida Legislature properly based the statutory classifications upon the distinct technology each kind of business uses. Section 202.11(5) adopts the Congressional definition of direct-to-home satellite service ("Direct-to-home satellite service' has the meaning ascribed in the Communications Act of 1934, 47 U.S.C. s. 303(v)."). The Florida legislature defined Cable Service<sup>10</sup> as follows:

"Cable service" means the transmission of video, audio, or other programming service to purchasers, and the purchaser interaction, if any, required for the selection or use of any such programming service, regardless of whether the programming is transmitted over facilities owned or operated by the cable service provider or over facilities owned or operated by one or more other dealers of communications services. The term includes point-to-point and point-to-multipoint distribution services by which programming is transmitted or broadcast by microwave or other equipment directly to the purchaser's premises, but does not include direct-to-home satellite service. The term includes basic, extended, premium, pay-per-view, digital, and music services.

§ 202.11(2), Fla. Stat. These different modes of communications services are "inherently and essentially" different, and the Legislature had a rational basis to support these distinct classifications. *Eastern Air Lines* (Appendix 1), at 314.

The record shows many obvious differences between Satellite and Cable Service upon which their classifications for tax purposes can naturally be based:

- Satellite Systems transmit signals from orbiting satellites; Cable systems use fiberoptic cables. Satellite Providers' Am. Comp. ¶ 3; Satellite Customers' 2d Am. Class Action Comp., ¶ 8.

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<sup>10</sup> § 2, ch. 2012-70, Laws of Fla., deleted the definition of "Cable service" in section 202.11(5), and added a new definition for "Video service" in section 202.11(24), Fla. Stat. The definition of "Video service" is similar to the former definition of "Cable service."

- Satellite Service has a one-way architecture; Cable Service has a two-way architecture. (*See supra*, at 9-14)
- Satellite Service is unable to provide telephone service through Satellite Systems; Cable Service provides telephone service through Cable Systems. (*Id.*)
- Satellite Systems are not taxed or regulated by local governments; Cable Systems are taxed and regulated by local governments. (*Id.*)
- Satellite Service transmits prepackaged television programming to customers through Satellite Systems; Cable Service provides television and other services to customers through Cable Systems. (*Id.*)
- Congress prohibits local taxation of Satellite Service; Congress permits local taxation of Cable Service. (*See infra*, at 30-31).

The Florida Supreme Court's analysis in *Eastern Air Lines* is instructive. In *Eastern Air Lines*, the court rejected an equal protection challenge to fuel tax statutes which taxed interstate air common carriers at a higher rate than other common carriers, such as railroads and vessels. *Eastern Air Lines*, at 313. The court rejected Eastern Air Lines' assertion that all interstate carriers, whether they were airlines, railroad, trucks or vessels, were similarly situated for fuel tax purposes. *Id.*, at 314. The court held that, due to the distinct nature of the differing interstate carriers, the new law's classifications for fuel tax purposes were not arbitrary. The court recognized further that "Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature." *Id.* (Emphasis added). The court explained:

When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. [Citations omitted.] In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on

the one attacking the legislative enactment to negate every conceivable basis which might support it. [Citations omitted.] The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. [Citations omitted.] A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. [Citations omitted.]

We agree with the circuit court's conclusion that Eastern has not met its burden in attacking the classification made here. They have failed to demonstrate that a hostile and oppressive discrimination has been made. There are many obvious distinctions between public road and highway transportation of persons and property and air transportation upon which the classification at issue could rationally be based. The modes of transportation are inherently and essentially different. The classification drawn does not violate concepts of equal protection.

*Id.* Likewise here, Satellite Service also enjoys certain advantages and must tolerate some disadvantages due to its distinctive nature. Cable Service and Satellite Service, like airlines and other modes of transportation, are inherently and essentially different. The classification drawn does not violate equal protection. *Id.*

Furthermore, the federal government recognizes differences between Satellite and Cable Service, as evidenced by the Congressional directions regarding taxes which may be imposed and the governmental entity that may impose the taxes on Satellite Service and Cable Service. Congress prohibited local taxation of Satellite Service but allowed state taxation of Satellite Service. Section 602 of the 1996 Telecommunications Act provides, in pertinent part; "a provider of direct-to-home Satellite Services shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home Satellite Services." 1996 Telecommunications Act § 602 (Appendix 19). However, Congress also stated:

This section shall not be construed to prevent taxation of a provider of direct-to-home Satellite Services by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

*Id.*<sup>11</sup> Accordingly, Congress expressly approved taxation of Satellite Service by states, and distribution of those tax revenues by states to local governments.

The United States Supreme Court has held that imposition of a sales tax on Cable Service but not on Satellite Service and print media, did not violate the First Amendment. *Leathers v. Medlock* (Appendix 20), at 453. Clearly, if it is fair to distinguish between Cable and Satellite Service and to grant Satellite Service an exemption consistent with the First Amendment, it would be constitutional to base distinctions on the same classification in a tax scheme. On remand, the Arkansas Supreme Court held that the differing transmission methods for Satellite and Cable Systems were a rational basis for differing tax treatment. ("[S]atellite and cable providers transmit their signals to viewers in different ways; therefore, a distinguishable classification at the initial stage of programming exists.") *Medlock v. Leathers* (Appendix 21), at 432. The present Plaintiffs do not dispute the differing transmission methods which the Arkansas Supreme Court found sufficient to withstand an equal protection challenge to tax classification by Cable Providers. *See, e.g.,* Satellite Providers' Amended Complaint, ¶ 3; Satellite Customers' Second Amended Class Action Complaint, ¶ 8.

The First District's decision *People Against Sect. 561.501, Inc. v. Dept. of*

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<sup>11</sup> As noted on page 15, *supra*, the portion of the CST about which Plaintiffs complain is distributed to local governments; there is no statutory provision that would authorize the Department to recover those sums from the local governments, or to compel the local governments to refund them to Plaintiffs.

*Bus. Reg., Div. of Alcoholic Bev. and Tobacco*, 587 So. 2d 644 (Fla. 1<sup>st</sup> DCA 1991) (Appendix 25), also is instructive. Businesses holding "consumption on premises" ("COP") licenses brought an equal protection challenge to a provision imposing a surtax on their sales but not on sales of other businesses selling alcoholic beverages. The equal protection claim was invalid because businesses with "consumption on premises" licenses were regulated differently from businesses without such licenses. (Likewise, Satellite Providers and Cable Providers also are regulated differently.) The First District also recognized that courts allow the legislature deference in enactment of tax legislation, and rejected the taxpayers' efforts to question political motivations of the legislature:

This court is not authorized to pass upon the wisdom of a revenue enactment. Neither is the court in a position to second guess the political motivations of the legislature. The burden upon one mounting a facial invalidity attack upon a taxation measure is substantial.

*Id.*, at 645. For the same reasons, efforts by the present Plaintiffs to question the political motivations of the legislature are inappropriate. The court continued:

We are unable to say that it is not a proper legislative prerogative to impose different burdens upon licensees in recognition of the already well-defined historical classification in Florida. We find it unnecessary to surmise exactly what reasonable grounds the legislature had in mind for determining that a different burden should be placed on a COP licensee. The historically different treatment is so well ensconced in this state, an inquiry at this point would serve no useful purpose. As the Division points out, the state of facts would be presumed if any scenario can reasonably be conceived that will sustain the classification.

*Id.*, at 646. Likewise, it also is a proper legislative prerogative to impose different burdens upon Satellite and Cable Service in recognition of the already well-defined historical classification in Florida and in federal legislation. *See also, Agency for Health Care Admin. v. Hameroff, M.D.*, 816 So. 2d 1145, 1149 (Fla. 1<sup>st</sup> DCA 2002),

approving imposition of a special assessment on certain health care facilities but not on others because leveling the economic playing field and resolving competitive or financial advantages are an appropriate rational basis for legislation.

Because Congress specifically approved different taxing schemes for Satellite and Cable Service, there can be no constitutional impediment to taxing them differently. The statute was intended to embrace "a competitively neutral tax policy that will free consumers to choose a provider based on tax-neutral considerations." § 202.105, Fla. Stat. There is no discriminatory intent on the face of the statute, and the Legislature had a rational basis to treat the different industries differently. In addition, the CST restored revenue to local governments that would otherwise be lost when the State preempted the local governments' authority to require taxes, fees, charges or other impositions from dealers for occupying roads and rights-of-way.

Plaintiffs cannot successfully attack the classification made here. The classification drawn and the different treatment for tax purposes, in this case, do not violate equal protection.

**C. Section 202.12(1)(a) and (b) Does Not Violate the Commerce Clause.**

The Commerce Clause is an express grant of power to Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3, U.S. Const. It also has a negative aspect described as the dormant Commerce Clause, which prohibits certain state taxation that interferes with interstate commerce. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992). The dormant Commerce Clause applies when a state taxes interstate commerce at a higher rate than intrastate commerce, leading to a discriminatory effect on interstate

commerce. *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting, *Ore. Waste Sys., Inc. v. Dep't of Env. Equal. of Ore.*, 511 U.S. 93, 99 (1994) (Appendix 26)). This is the only foundation for Plaintiffs' Commerce Clause challenge in the present case. See Satellite Providers' Am. Compl., ¶ 61; Satellite Customers' Second Am. Class Action Compl., ¶ 68.

The appropriate comparison under the dormant Commerce Clause involves two identical products, one produced in-state with a lower tax burden and one produced out of state with a higher tax burden when it crosses states lines, not a comparison of two interstate products. See *Ore. Waste Systems*, (Appendix 26), at 99 ("[A] law is discriminatory if it tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.") (internal quotations omitted).

Congress specifically pre-empts local taxation of Satellite Services, but preserves a state's authority to tax Satellite Services. Pub. L. No. 104-104, Title VI, Section 602(c) (Appendix 19). In essence, the federal government has renounced any regulatory authority it may have had on State taxation of Satellite Service, allowing individual states to choose the means of taxing Satellite Service. Such a "renunciation of federal interest eliminate[s] any objection to the statutes under the Commerce Clause or dormant Commerce Clause." *Ne. Bancorp Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 166 (1985) (Appendix 28). Indeed, where a state acts as Congress has authorized, "the state actions are invulnerable to constitutional attack under the Commerce Clause." *Ne. Bancorp*, 472 U.S., at 174.

Florida's law cannot violate the Commerce Clause because the location of a communications services provider is irrelevant under Florida law. Tax rates for Satellite or Cable Service would not be any different if the businesses were domiciled within or outside of Florida. All Satellite Services bear the same taxes and all Cable Services bear the same taxes. Neither the definitions of the two classes nor the treatment of the two classes contains any reference to the location of a communications services provider. The tax depends upon the location where the customer receives the communications services, what the customer pays to purchase the communications services, and the classification of the communications services (Cable Service or Satellite Service).

Furthermore, Plaintiffs' allegations that Cable Service is an "intrastate" business is incorrect. The Supreme Court has long determined that the cable industry is itself involved in "interstate" commerce as a matter of law. *United States v. Sw. Cable* (Appendix 2), at 168 (rejecting claim that television transmissions by wire are "intrastate" and finding that such transmissions are "interstate" communications, instead). Therefore, any difference in taxation results from the difference in the nature of the businesses. As a result, the dormant Commerce Clause is not implicated. *See Amerada Hess* (Appendix 24); *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 125-129 (1978) ("*Exxon*") (Appendix 27).

Notably, the Supreme Court has rejected the same arguments Plaintiffs assert here. In *Amerada Hess*, the Court rejected a dormant Commerce Clause challenge to a New Jersey statute which effectively denied out-of-state oil producers a state tax deduction that was available to domestic retailers. 490 U.S. at 70. Producers who

marketed their own oil could never receive the deduction. New Jersey had no oil reserves and no refineries, so oil producers (which were out-of-state) could never benefit from the state tax deduction. The Court found this different treatment did not violate the Commerce Clause because the oil producing taxpayers

operate both in New Jersey and outside New Jersey. Similarly, nonproducing retailers may operate both in New Jersey and outside the State. Whatever different effect the [deduction denial] may have on these two categories of companies results solely from the differences between the nature of their businesses, [and] not from the location of their activities.

*Id.*, at 78. (Emphasis added). The same could be said in the present case, that whatever different effect Florida's Communications Services Tax may have on Satellite or Cable Service results solely from the differences between the nature of the providers' businesses, and not from the location of their activities. The tax rates on Satellite Service would not change even if Satellite Providers moved all of their facilities and operations to Florida.

Similarly, in *Exxon* (Appendix 27), the Court sustained a Maryland statute prohibiting oil producers and refiners from operating retail gas stations in the state. 437 U.S. at 126. Oil producers asserted the statute was inherently discriminatory against interstate business because Maryland had no domestic oil reserves and no domestic oil producers or refiners. The Court held:

[The statute] does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. . . . The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

*Id.* Likewise, Florida's Communications Services Tax does not impose a greater burden upon communications services that cross state lines or distinguish between in-

state or out-of-state companies. The tax rates on Satellite Service would not change even if the Providers' transmission and production facilities were all moved to Florida. The federal and state appellate courts which have considered DirecTV's and Dish's Commerce Clause arguments found that *Amerada Hess* and *Exxon* were dispositive.

**D. Appellate Courts Uniformly Reject Plaintiffs' Theories.**

Satellite Providers have brought unsuccessful Equal Protection or Commerce Clause claims in North Carolina state and federal courts, in Kentucky, in Ohio, in the Fourth and Sixth Circuits, and have unsuccessfully sought certiorari in the United States Supreme Court on two occasions.

**1. North Carolina State Cases**

Satellite Providers asserted the same Commerce Clause and Equal Protection challenges to a North Carolina law as they have asserted in the present case—but in North Carolina they asserted both that the statutes discriminated against interstate commerce on their face and also in practical effect. *DirecTV, Inc. v. State*, (Appendix 8). Satellite Providers paid a 5% state tax; Cable Providers paid no state tax but paid local franchise fees of approximately 5%. The court rejected plaintiffs' argument that the court should consider one clause of the statute in isolation, and disposed of the facial challenge by reviewing the face of the statute. The court held:

[T]he plain language of [the statute] does not make any geographical distinctions, but merely describes one method of providing television programming services to North Carolina subscribers: the satellite companies' method, as opposed to the cable companies' method. The dormant Commerce Clause protects the interstate market for a particular product, but it does not protect "the particular structure or methods [of] operation in a retail market."

*Id.* at 547 (emphasis added.) The court recognized that "the imposition of the sales tax on satellite companies has, in fact, equalized the local franchise taxes already imposed on cable companies." *Id.*, at 550. Likewise, the plain language of the Florida law does not make any geographical distinctions as to the location of the service provider. The North Carolina court found this simple fact dispositive as to the facial challenge.

The court noted the Satellite Provider's argument was the same theory the Supreme Court rejected in *Amerada Hess*. The statute in *Amerada Hess* "could not have been intended to induce the plaintiffs to move their oil-producing activities to New Jersey because there were no oil reserves in New Jersey." *Id.* The North Carolina court concluded:

Likewise, [the North Carolina statute] could not have been implemented to induce Plaintiffs to move their provision of Satellite Services to North Carolina because satellites, by their nature, are inherently out-of-state businesses. Given this fact, "it is difficult to see how [the statute] unconstitutionally discriminates against interstate commerce." *Amerada Hess*, 490 U.S. at 78. ...

632 S.E.2d, at 549-550. Even if the Satellite Providers established a distribution system within the state, their taxes would not change. *Id.*, at 550.<sup>12</sup> Likewise, Florida's CST would not change if Cable or Satellite Providers moved to Florida.

## **2. North Carolina Federal Cases**

The Satellite Providers challenged a subsequent North Carolina statute in federal court, arguing that it subsidized competing cable businesses by satisfying their local franchise fees. *See DirectTV, Inc. v. Tolson* (Appendix 9, composite).

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<sup>12</sup> Furthermore, the Satellite Providers could not complain because their higher sales tax rates equalized the additional burden local franchise taxes imposed on Cable Services. *Id.*

Plaintiffs argued that any such subsidy to benefit the local business of Cable Service would discriminate against the out-of-state business of Satellite Service providers. 498 F. Supp. 2d, at 789. The District Court for the Eastern District of North Carolina granted the State's motion to dismiss based upon principles of comity and the Tax Injunction Act. 28 U.S.C. § 1341. *Id.* The Fourth Circuit affirmed.

### 3. *Kentucky Cases*

The Satellite Providers asserted a Commerce Clause challenge to Kentucky's statute prohibiting imposition of local franchise fees upon Cable Service based upon the theory that the statute had the discriminatory effect of subsidizing Cable Providers' operating costs. *DirectTV, Inc. v. Treesh* (Appendix 10). The court held:

[E]ven if the Satellite Companies could produce evidence that the legislature intended to burden them and to benefit the Cable Companies, this would not establish an intent to discriminate against interstate commerce... [D]iscrimination against satellite-delivered programming in favor of cable-delivered programming does not constitute discrimination against interstate commerce.

469 F. Supp. 2d, at 435. (Emphasis added). The Sixth Circuit affirmed and the Supreme Court denied certiorari. *See DirectTV, Inc. v. Treesh* (Appendix 11), *cert. denied*, 128 S.Ct. 1876 (2008). The Sixth Circuit considered the Satellite Providers' theory on the merits, and held:

In this case, ..., the two "goods" [Cable Services and Satellite Services] are distinct, consisting of two very different means of delivering broadcasts. . . .

We must be cautious about applying the dormant Commerce Clause in cases that do not present the equivalent of a protective tariff. States must be allowed, and even encouraged, to work "to attract business by creating an environment conducive to economic activity." Applying the dormant Commerce Clause to invalidate Kentucky's revenue statute in this case would dramatically increase the clause's scope and limit states' right to experiment with different incentives to business, [citation

omitted], or to implement "effective and creative programs for solving local problems." [Citation omitted.]

*Id.*, at 480-481.

#### 4. *Ohio Cases*

The Satellite Providers brought their next Commerce Clause challenge in Ohio. See *DirectTV, Inc. v. Levin* (Appendix 6). Ohio imposed a sales tax on Satellite Service but not on Cable Service. The Ohio Court of Appeals agreed with North Carolina's and the Sixth Circuit's analyses:

[W]e find that Ohio's sales tax, as applied to the Satellite Services providers and not applied to Cable Services providers, does not run afoul of the dormant Commerce Clause because both of these providers are engaged in interstate commerce...

*Id.*, at 1252 (emphasis added). On appeal, the Ohio Supreme Court held:

As other jurisdictions that have considered this issue have done, we conclude that the Commerce Clause protects the interstate market, not particular interstate firms or particular structures or methods of operation in a retail market. The imposition of a sales tax by the Ohio General Assembly on satellite broadcasting services but not on cable broadcasting services does not violate the Commerce Clause of the United States Constitution, because the tax is based on differences between the nature of those businesses, not the location of their activities, and it does not favor in-state interests at the expense of out-of-state interests. Accordingly, the judgment of the court of appeals is affirmed.

*DirectTV, Inc. v. Levin*, Appendix 7, at 1190. (Emphasis added). DirecTV and Dish again petitioned for certiorari review in the Supreme Court.

The United States Solicitor General submitted a Brief for the United States as Amicus Curiae, advising the Supreme Court that the Satellite Providers' petition should be denied because the Ohio Supreme Court's decision "is consistent with this

Court's dormant Commerce Clause precedents," because "the decision below does not conflict with the decisions of other lower courts," and because "further review in this case is not warranted." Amicus Br. of U.S. Solicitor General, *DirectTV, Inc. v. Testa*, United States Supreme Court Case No. 10-1322, at III. (Appendix 29). The Court denied review on June 25, 2012. *DirectTV, Inc. v. Testa*, --- S.Ct. ----, 2012 WL 2368692 (Mem) (U.S. 2012).

**E. Satellite Services Bear a Lower Effective CST Rate than Cable Service.**

Plaintiffs' insistence that section 202.12(1)(b) always imposes the Communications Services Tax upon Satellite Service at a rate 4% higher than the rate imposed upon Cable Service is demonstrably wrong and intentionally ignores the entirety of the CST. In constitutional challenges to allegedly unequal tax burdens, courts properly consider the effective tax rate on each class of taxpayer. See *Westinghouse Elect. Corp. v. Tully*, 466 U.S. 388 (1984) (finding a New York tax scheme in violation of the Commerce Clause because it manipulated the effective tax rate in a discriminatory manner by providing incentives for increased shipping activities in New York and penalizing shipping activities in other states). A review of the tax return data shows the effective CST rate on Cable Service has been higher than the CST rate on Satellite Service each year,<sup>13</sup> thus belying the assertion that the CST discriminates against Satellite Service.

Communications Services Tax returns filed by Satellite and Cable Providers report taxable sales taxes, and Communications Services Taxes paid each reporting

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<sup>13</sup> Because the Satellite Providers, Cable Providers, and Department have agreed to limit their analyses to years before 2010, the following discussion of the actual CST rates specifically addresses only those years.

period.<sup>14</sup> The effective Communications Services Tax rates for Satellite and Cable Service are computed by simple division of numbers appearing on electronic tax return data filed with the Department:

$$\frac{\text{Total Communications Services Taxes Reported and Paid}}{\text{Total Taxable Sales of Communications Services.}}$$

The Department compiled all pertinent raw data from Communications Services Tax return filings between October 1, 2001, and December 31, 2009, for the Satellite Providers and for all identifiable Cable Providers. The tax return data report taxable sales for each provider for each month, and Communications Services Taxes paid by each provider for each month since October 2001 (the effective date of the Communications Services Tax).

Appendix 30 consists of the Affidavit, curriculum vitae, and expert report of Jeffrey Baxter, Ph.D., who applied a statistical regression analysis to compare the effective CST rate on Satellite Service and on Cable Service from October 1, 2001, through December 31, 2009. Each year, Cable Service bore a higher effective CST rate than Satellite Service. Plaintiffs have identified no appellate decision that would accept their unique theory that the Constitution somehow requires creation of a wholly new classification for Satellite Service, consisting of all of the benefits and few of the burdens imposed upon Cable Service.

## **VI. CONCLUSION**

Plaintiffs' never-ending litigation of their theories eventually must come to an end. Florida's Communications Services Tax, like that of North Carolina, Kentucky,

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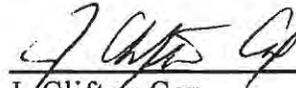
<sup>14</sup> Section 203.01 imposed Gross Receipts Tax on both Satellite and Cable Services at the rate of 2.37% from 2001 through 2009. In 2010, the rate on Cable Services increased to 2.52%. §§ 3, 5, ch. 2010-149, Laws of Fla.

and Ohio, does not base taxation upon the location of the communications service provider, and the Legislature had a rational basis for classifying Satellite Service and Cable Service differently. Likewise, Plaintiffs' facial Commerce Clause challenge fails because Plaintiffs can identify no language on the face of the statutes that would discriminate against interstate commerce. Furthermore, circumstances exist under which Cable Service bears a greater tax burden than Satellite Service.

The Commerce and Equal Protection Clauses mean the same thing in Florida as in every other state or federal court, and Plaintiffs' constitutional theories are mistaken. The *Ogborn* mandate is clear: this court must consider the face of the statute to determine whether "any set of circumstances exists in which the statute can be constitutionally applied." *Ogborn*, at 59. For these reasons, there is no genuine issue of any material fact, and the Department is entitled to final summary judgment.

Respectfully submitted,

PAMELA JO BONDI  
ATTORNEY GENERAL



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Counsel for Defendant,  
Department of Revenue

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy hereof was furnished by e-mail to each of the following on this 4th day of September, 2012:

**A. Counsel for DirecTV, Inc. and Dish Network:**

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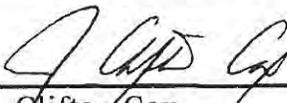
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\_\_\_\_\_  
J. Clifton Cox  
Special Counsel  
Counsel for Department of Revenue

THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA

DIRECTV, INC., n/k/a DIRECTV, LLC and  
ECHOSTAR SATELLITE CORPORATION,  
n/k/a DISH NETWORK, LLC,

CASE NO. 05-CA-1037  
GENERAL CIVIL DIVISION

Plaintiffs,

vs.

(Consolidated)

STATE OF FLORIDA, DEPARTMENT  
OF REVENUE,

Defendant.

\_\_\_\_\_/

MARCUS and PATRICIA OGBORN,  
on behalf of themselves and  
others similarly situated,

CASE NO. 05-CA-1354  
GENERAL CIVIL DIVISION

Plaintiffs,

vs.

JIM ZINGALE, acting in his  
official capacity as the  
Director of the FLORIDA  
DEPARTMENT OF REVENUE,

Defendant.

\_\_\_\_\_/

**DEFENDANT'S AMENDED ANSWER, DEFENSES, AND  
AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT  
OF DIRECTV, INC., n/k/a DIRECTV, LLC, and ECHOSTAR  
SATELLITE CORPORATION, n/k/a DISH NETWORK, LLC**

Defendant in these consolidated cases, State of Florida Department of Revenue  
("Department"), through its undersigned counsel, serves this Amended Answer,

Defenses, and Affirmative Defenses to the Amended Complaint of DirecTV, Inc. (n/k/a DirecTV, LLC), and Echostar Satellite Corporation (n/k/a Dish Network, LLC). Because Plaintiffs have not served a Reply to the Department's Answer and Affirmative Defenses served on June 22, 2012, the Department serves this Amended Answer as a matter of right pursuant to Rule 1.190(a), Fla. R. Civ. P. This Amended Answer adds an additional defense and clarifies which defenses constitute "Affirmative Defenses." See Rules 1.110(d) and 1.140, Fla. R. Civ. P.

**Amended Answer**

1. The Department is without knowledge sufficient to admit or deny whether six million Florida residents subscribe to pay television or whether they receive similar programming and watch many of the same shows, movies and sporting events. The Department denies the remaining allegations of this paragraph and therefore demands strict proof thereof.

2. The Department denies that there is a 4% difference in rates between taxes imposed upon satellite television and cable television. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

3. The referenced statutes speak for themselves, and the Department denies that Plaintiff has accurately described the relevant statutes. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

4. Denied.

5. The Department is without knowledge sufficient to admit or deny the

allegations of this paragraph and therefore demands strict proof thereof.

6. Denied.

7. Denied.

8. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

9. Denied.

10. Denied.

11. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

12. Admitted.

13. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

14. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

15. Admitted.

16. The Department denies that the Commerce Clause or the Equal Protection Clause supports Plaintiffs' theories. The Department admits that this Court has subject matter jurisdiction over this action.

17. Admitted.

18. Denied.

19. The Department denies that cable companies constituted a "monopoly." The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

20. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof. The Department further notes that an allegation in a complaint does not constitute a determination of fact which would be *res judicata* in these proceedings.

21. The Department denies that cable companies constituted a "monopoly." The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

22. The Department denies that cable service providers and satellite service providers provide similar services. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

23. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

24. Denied.

25. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

26. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

27. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

28. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

29. The Department is without knowledge sufficient to admit or deny the

allegations of this paragraph and therefore demands strict proof thereof.

30. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

31. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

32. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

33. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

34. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

35. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

36. The Telecommunications Act of 1996 speaks for itself. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof. The Department further notes that a statement by one United States senator does not constitute a legislative determination or a finding of fact in Florida, and is not *res judicata*.

37. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

38. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

39. The Department denies the existence of a "monopoly" or of a "*de facto*"

partnership. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

40. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

41. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

42. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

43. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

44. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof. In addition, the alleged statement by an unnamed person is legally irrelevant.

45. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof. In addition, the alleged statement by Charles Dudley is legally irrelevant.

46. The Laws of Florida speak for themselves. All other allegations in this paragraph are denied.

47. The Department denies the existence of any protectionism in Florida, and further denies that any statements or actions in other states would be relevant to Florida law. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

48. The Department denies that any statements or actions in other states

would be relevant to Florida law. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

49. Denied.

50. Denied.

51. The referenced statutes speak for themselves.

52. The referenced statutes speak for themselves. The Department denies that Plaintiffs have accurately described the relevant statutes.

53. The referenced statutes speak for themselves.

54. The Department denies that Florida's tax regime gives a substantial price advantage to cable companies, and is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

55. The Department denies that Florida's tax regime gives a substantial price advantage to cable companies, and is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

56. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

57. The Department denies that Plaintiffs have suffered a competitive injury as a result of Florida law, whether in the alleged amount of "at least \$150 million" or any other amount. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph, and therefore demands strict proof

thereof.

58. The Department hereby incorporates and realleges its responses to paragraphs 1-57, inclusive.

59. Denied.

60. Denied.

61. The Department denies that Florida Statutes chapters 202 or 203 violate the Commerce Clause.

A. Denied.

B. Denied.

C. Denied.

62. Denied.

63. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

64. The referenced statutes speak for themselves. The Department denies that Florida imposes a higher tax on sales of satellite services than on sales of cable services. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

65. The referenced statute speaks for itself. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

66. The referenced statute speaks for itself. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

67. The referenced statutes speak for themselves. The Department denies that Plaintiff has accurately described the relevant statutes. The Department denies all remaining allegations of this paragraph.

68. The Department hereby incorporates and realleges its responses to paragraphs 1-66, inclusive.

69. The Department denies that satellite customers pay a higher tax than cable customers. All other allegations of this paragraph are denied.

70. The Department admits that the rational basis test governs this case but the Department denies that the referenced statement has any other applicability to the present case. The Department specifically denies that satellite services and cable services are similarly situated. All other allegations in this paragraph are denied.

71. Denied.

72. Any allegations that have not been fully addressed above are hereby denied.

### **Defenses and Affirmative Defenses**

#### **First Defense**

#### *(Failure To State a Cause of Action)*

73. Plaintiffs have failed to state a cause of action for the following reasons:

A. Plaintiffs' Commerce Clause and Equal Protection claims both fail because satellite television and cable television are inherently different business models which may be assigned to different classes and taxed differently without any constitutional impediment. See, e.g., *Leathers v. Medlock*, 499 U.S. 439 (1991) ("*Leathers*"); *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla.

1984), *appeal dismissed*, 474 U.S. 892 (1985). ("*Eastern*").

B. Plaintiffs' Commerce Clause challenge fails because satellite television providers in Florida, including Plaintiffs, possess substantial infrastructure in Florida and employ a substantial number of independent contractors in Florida. Plaintiffs' claim that cable television providers are *de facto* partners of the Department and local governments is misleading; satellite television providers, including Plaintiffs, are no less "business partners" than cable television providers.

C. Congress specifically pre-empts local taxation of satellite services, yet expressly preserves a state's authority to tax satellite services. Pub. L. No. 104-104, Title VI, Section 602(c), 110 Stat. 144(a)(1996) (reprinted at 47 U.S.C. Section 152, historical and statutory notes). In essence, the Federal government has renounced any regulatory authority it may have had on taxation of satellite services, allowing individual states to regulate state taxation of satellite services.

D. Congress' "renunciation of federal interest eliminate[s] any objection to the statutes under the Commerce Clause or dormant Commerce Clause." *Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 166 (1985) ("*Northeast Bancorp*"). Indeed, where a state acts as Congress has authorized, "the state actions are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp*, 472 U.S., at 174.

**Second Defense**  
(*Failure To State a Cause of Action*)

74. Plaintiffs have failed to assert a viable facial challenge under any possible theory. In *Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008), the First District Court of Appeal restated the long-standing requirements for a valid

facial challenge:

"A facial challenge to a statute is more difficult than an 'as applied' challenge because the challenger must establish that no set of circumstances exists under which the statute would be valid. Except in a First Amendment challenge, the fact that the act might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face; such a challenge must fail unless no set of circumstances exists in which the statute can be constitutionally applied. A facial challenge considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards."  
Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

Plaintiffs cannot meet these requirements for the reasons stated in the Department's First Defense, which is incorporated by reference. In addition, the communications services tax created an essentially level playing field, and Plaintiffs seek a judicially-mandated competitive advantage. Plaintiffs should refer their economic arguments to the legislature, rather than to the court.

**Third Defense**  
*(Lack of Standing)*

75. Plaintiffs lack standing to assert a challenge on any theory because the effective communications services tax rate imposed on Satellite Services is lower than the effective communications services tax rate imposed on Cable Services.

**Fourth Defense**  
*(Lack of Standing)*

76. Plaintiffs lack standing to assert a facial constitutional challenge because the section 202.20, Fla. Stat., communications services tax conversion rates which Florida law imposes on cable customers without any action by local governments show that cable customers in various locations pay a higher communications services tax rate than satellite customers.

**Fifth Defense**  
*(Lack of Standing)*

77. Plaintiffs lack standing because they did not pay the tax that they claim is unconstitutional and which they seek to have refunded to them. Instead, they collected the tax from their customers, and any refund to Plaintiffs of the tax paid by their customers would constitute an unfair windfall.

78. Plaintiffs do not allege any ultimate facts showing that they have refunded any alleged overpayments to their customers who allegedly bore the economic burden.

**Sixth Defense**  
*(Separation of Powers Regarding Requested Refund)*

79. The Separation of Powers Doctrine bars Plaintiffs' refund claims for the following reasons:

A. Plaintiffs seek a refund of the difference between the 10.8% communications services tax imposed on satellite television services by section 202.12(1)(b) and the 6.8% (currently 6.65%) tax imposed on cable services pursuant to section 202.12(1)(a), Fla. Stat.

B. The portion of the communications services tax Plaintiffs seek to have refunded is placed into a flow-through trust fund and distributed each month to the State and local governments pursuant to section 202.18(2), Fla. Stat. The Department does not retain those revenues.

C. The tax amounts Plaintiffs seek to have refunded were placed in flow-through trust funds whose revenues were distributed to approximately 471 different local governments, which, presumably, have already spent such

distributions.

D. Those local governments have relied upon such distributions of revenues for approximately 12 years. If the legislature enacts statutory authorization for a special assessment on those local governments to recover refunds of such distributions, the local governments would be required to raise such funds through local taxes and fees. Homestead protections, reduced property values, and Constitutional or statutory restrictions limit the ability of local governments to raise sufficient money to pay the enormous amounts Plaintiffs allege would be owed.

E. The Department has no statutory authorization to take such money from the State's Budget Stabilization Fund or other trust funds, or to collect from such local governments the amounts that would be necessary for the monetary relief Plaintiffs seek.

F. Local governments may pledge their receipts for bond offerings, and the State Constitution, State statutes, and local ordinances limit the ability of local governments to collect the amounts that would be needed for the refunds sought in the present case.

G. Additional statutory authorization, special appropriations, and additional revenues would be required for the Department to issue refunds in the amounts that would be required if Plaintiffs' legal theories were correct.

#### **Seventh Defense**

*(Portions of Plaintiffs' Refund Claims Are Time-Barred.)*

80. Refunds accruing outside the time permitted by sections 215.26 and 202.23, Fla. Stat., are time-barred.

## **Affirmative Defenses**

### **First Affirmative Defense (Unjust Enrichment)**

81. Plaintiffs would be unjustly enriched by a refund of any portion of the taxes in issue which they collected from their customers and remitted to the Department of Revenue, and a refund would unfairly constitute a windfall for the following reasons:

A. Plaintiffs have never paid the tax; instead, they collected the tax from their customers.

B. Section 202.23, Fla. Stat., requires Plaintiffs to refund the tax to their customers before seeking a refund from the Department. Because Plaintiffs have not refunded the tax to the customers who paid it, any refund to Plaintiffs would constitute an unfair windfall.

C. Plaintiffs do not allege any ultimate facts showing that they have refunded any alleged overpayments to their customers who allegedly bore the economic burden. Thus, Plaintiffs cannot state a cause of action for a tax refund on any theory.

### **Second Affirmative Defense (Estoppel)**

82. Plaintiffs are estopped from seeking a refund of any portion of the taxes in issue that they collected from their customers without refunding the alleged overpayment to those customers for the following reasons:

A. Plaintiffs represented to their customers that the price paid by the customers was the correct price.

B. Plaintiffs have not refunded the tax to the customers from whom Plaintiffs collected the tax.

C. Plaintiffs' customers and the Department relied upon Plaintiffs' representations that the price charged to Plaintiffs' customers was correct, and Plaintiffs should not be permitted to receive a windfall: first by collecting the tax from their customers and second by obtaining a refund from the Department.

**Third Affirmative Defense**  
*("Dryden Defense")*

83. Equitable considerations bar the claim for refund. *See Dryden v. Madison County*, 727 So.2d 245 (Fla. 1999).

A. Plaintiffs seek a refund of the difference between the 10.8% communications services tax imposed on satellite television services by section 202.12(1)(b) and the 6.8% (currently 6.65%) tax imposed on cable services pursuant to section 202.12(1)(a), Fla. Stat.

B. The portion of the communications services tax Plaintiffs seek to have refunded is placed into a flow-through trust fund and distributed each year to local governments pursuant to section 202.18(2), Fla. Stat. The Department does not retain those revenues.

C. The tax amounts Plaintiffs seek to have refunded were placed in flow-through trust funds whose revenues were distributed to approximately 471 different local governments, which, presumably, have already spent such distributions.

D. Those local governments have relied upon such distributions of revenues for approximately 12 years. If the legislature enacts statutory authorization

for a special assessment on those local governments to recover refunds of such distributions, the local governments would be required to raise such funds through local taxes and fees. Homestead protections, reduced property values, and Constitutional or statutory restrictions limit the ability of local governments to raise sufficient money to pay the enormous amounts Plaintiffs allege would be owed.

E. The Department has no statutory authorization to take such money from the State's Budget Stabilization Fund or other trust funds, or to assess against such local governments the amounts that would be necessary for the refunds Plaintiffs seek in this case.

F. Local governments may pledge their receipts for bond offerings, and the State Constitution, State statutes, and local ordinances limit the ability of local governments to collect the amounts that would be needed for the refunds sought in the present case.

G. Additional statutory authorization, special appropriations, and additional revenues would be required for the Department to issue refunds in the amounts that would be required if Plaintiffs' legal theories were correct.

H. The Department acted in good faith in collecting the taxes Plaintiffs now demand to be refunded.

I. The taxes were nondiscriminatory because they were computed and collected in the same way from all businesses that sold satellite television service to customers in Florida.

J. The taxes in issue conferred a commensurate benefit upon the taxpayers.

WHEREFORE, the Department requests that the Court dismiss the Amended Complaint, with prejudice, and award the Department its costs and all other relief the Court finds appropriate.

Respectfully submitted,

PAMELA JO BONDI  
ATTORNEY GENERAL



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Counsel for Defendant,  
Department of Revenue

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular mail, and by e-mail to the primary and secondary addresses disclosed by counsel, to each of the following on this 23rd day of August, 2012:

**A. Counsel for DirecTV, Inc. and Dish Network:**

**PETER O. LARSEN, Esq.** and **TIMOTHY J. MCDERMOTT, Esq.**,  
Akerman Senterfitt, 50 North Laura Street, Suite 2500, Jacksonville, FL  
32202;

**E. JOSHUA ROSENKRANZ, Esq.**, **JEREMY KUDON, Esq.**, **RICHARD  
MARK, Esq.**, and **KELLY M. DALEY, Esq.**, Orrick, Herrington & Sutcliffe  
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**FRANK D. RORIE, Esq.**, Orrick, Herrington & Sutcliffe LLP, 777 S.  
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**B. Counsel for Marcus Ogborn & Patricia Ogborn:**

**STACY BARNETT, Esq.**, The Barnett Law Firm, P.C., 253 Washington Avenue, NE, Marietta, GA, 30114;

**JOEL L. TERWILLIGER, Esq.**, 2344 Spruce Street, Suite A, Boulder, CO 80202;

**C. Counsel for Florida Cable Telecommunications Ass'n:**

**ERIC S. TRESH, Esq., AMELIA TOY RUDOLPH, Esq., and JOSHUA A. MAYES, Esq.**, Sutherland Asbill & Brennan LLP, 999 Peachtree Street, NE, Atlanta, GA 30309-3996; and

**DAVID KONUCH, Esq.**, Florida Cable Telecommunications Ass'n, 246 E. 6th Ave., Tallahassee, FL 32302.



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J. Clifton Cox  
Special Counsel  
Counsel for Department of Revenue

THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA

DIRECTV, INC., n/k/a DIRECTV, LLC and  
ECHOSTAR SATELLITE CORPORATION,  
n/k/a DISH NETWORK, LLC,

CASE NO. 05-CA-1037  
GENERAL CIVIL DIVISION

Plaintiffs,

vs.

(Consolidated)

STATE OF FLORIDA, DEPARTMENT  
OF REVENUE,

Defendant.

---

MARCUS and PATRICIA OGBORN,  
on behalf of themselves and  
others similarly situated,

CASE NO. 05-CA-1354  
GENERAL CIVIL DIVISION

Plaintiffs,

vs.

JIM ZINGALE, acting in his  
official capacity as the  
Director of the FLORIDA  
DEPARTMENT OF REVENUE,

Defendant.

---

**DEFENDANT'S AMENDED ANSWER, DEFENSES, AND AFFIRMATIVE  
DEFENSE TO SECOND AMENDED CLASS ACTION COMPLAINT  
OF MARCUS AND PATRICIA OGBORN**

Defendant in these consolidated cases, State of Florida Department of Revenue ("Department"), through its undersigned counsel, serves this Amended Answer, Defenses, and Affirmative Defense to the second amended class action complaint of

Marcus and Patricia Ogborn (“Ogborns”). Because Ogborns have not served a Reply to the Department’s Answer and Affirmative Defenses served on June 22, 2012, the Department serves this Amended Answer as a matter of right pursuant to Rule 1.190(a), Fla. R. Civ. P. This Amended Answer clarifies which defense constitutes an “Affirmative Defense.” *See* Rules 1.110(d) and 1.140, Fla. R. Civ. P. The Department, therefore, serves the following Amended Answer, Defenses, and Affirmative Defense and states as follows.

Answer

1. The Department admits that the court has subject matter jurisdiction but denies all remaining allegations.

2. The Department admits that venue is proper in Leon County but denies the remaining allegations in this paragraph. Jim Zingale is no longer an employee of the Department, and the Department of Revenue is the real party in interest.

3. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

4. Admitted. The Department notes, however, that the current director, Lisa Vickers, has resigned effective July 1, 2012. The Department is the real party in interest.

5. The Department admits that sales of satellite and cable service to customers in Florida are subject to the communications services tax. The Department denies that sales of satellite services to the Ogborns are subject to a communications services tax at a rate higher than that imposed on cable services sold in Polk County, Florida, where Ogborns have received satellite service. The Department also denies

that Ogborns are appropriate class representatives, that the communications services tax is unconstitutional, or that it imposes tax on satellite service at a higher effective rate than it imposes on cable service. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph, and therefore demands strict proof thereof.

6. Denied.

7. Denied.

8. The referenced statutes speak for themselves. All other allegations are denied.

9. The Department denies that cable companies pay franchise fees to local governments. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph, and therefore demands strict proof thereof.

10. Denied.

11. The referenced statutes speak for themselves. All other allegations are denied.

12. Denied.

13. The referenced statutes speak for themselves. All other allegations are denied.

14. The referenced statutes speak for themselves. All other allegations are denied.

15. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

16. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

17. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

18. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

19. The referenced statutes speak for themselves. The Department denies all other allegations in this paragraph.

20. The Department admits that DirecTV and Dish use orbiting satellites for transmission of television signals. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph, and therefore demands strict proof thereof.

21. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

22. The Department admits that satellite television companies transmit signals to customers. The Department denies all remaining allegations of this paragraph.

23. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

24. Denied.

25. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

26. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

27. The Department admits that satellite operators are not required to obtain franchise rights from municipalities and counties in order to operate in Florida. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

28. The Telecommunications Act of 1996 speaks for itself. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof. The Department further notes that a statement by one United States senator does not constitute a legislative determination or a finding of fact in Florida, and is not res judicata.

29. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

30. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

31. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

32. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

33. The referenced statutes speak for themselves. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph, and therefore demands strict proof thereof.

34. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

35. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

36. Denied.

37. The referenced statutes and publications speak for themselves. They are irrelevant to Florida law. All other allegations are denied.

38. Denied. The referenced allegations speak for themselves, and are irrelevant to Florida law. Such allegations are not res judicata or precedent.

39. The referenced statutes speak for themselves. All other allegations are denied.

40. The Department denies that Ogborn's characterization of the sales tax, communications services tax, or gross receipts tax is complete and accurate, and further denies that the sales tax (under chapter 212, Fla. Stat.) has any applicability to this litigation related to the communications services tax and gross receipts tax.

41. Denied as stated. The Department admits that dealers are obligated to collect tax from their customers and to remit those taxes to the Department; the Department also admits that the funds dealers collect as taxes are State funds from the moment of collection. Dealers, including DirecTV and Dish, are not otherwise "agents" or "trustees" of the State.

42. The referenced statutes speak for themselves.

43. The referenced statutes speak for themselves. The Department denies the remaining allegations of the paragraph.

44. Denied.

45. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph, and therefore demands strict proof thereof.

46. The Department denies the existence of any monopoly. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph, and therefore demands strict proof thereof.

47. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

48. The Department denies that the communications services tax imposes higher taxes on satellite services than on cable services. All other allegations also are denied.

49. Denied.

50. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof. In addition, the alleged statement by an unnamed person is legally irrelevant.

51. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof. In addition, the alleged statement by Charles Dudley is legally irrelevant.

52. The Laws of Florida speak for themselves. All other allegations in this paragraph are denied.

53. Denied.

54. Denied.

55. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

56. The Department denies that this case is appropriate for a class action or that Ogborns are appropriate class representatives. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

57. The Department denies that this case is appropriate for a class action or that Ogborns are appropriate class representatives. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

58. Denied.

59. The Department denies that this case is appropriate for a class action or that Ogborns are appropriate class representatives. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

60. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

61. Paragraph 61 and all subparagraphs thereof are denied.

62. The Department admits that the communications services tax applies to all sales of taxable communications services in Florida. The Department denies that this case is appropriate for a class action or that Ogborns are appropriate class representatives. All other allegations are denied.

63. The Department denies that names and addresses of satellite or cable customers are available in its records. The Department is without knowledge sufficient to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

64. The Department realleges and incorporates its responses to paragraphs 1 through 63.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

A. Denied.

B. Denied.

C. Denied.

69. Denied.

70. Denied.

71. The Department is without knowledge sufficient to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

72. The referenced statutes speak for themselves. All other allegations are denied.

73. The referenced statutes speak for themselves. All other allegations are denied.

74. The referenced statutes speak for themselves. All other allegations are denied.

75. The referenced statutes speak for themselves. All other allegations are denied.

76. The Department realleges and incorporates its responses to paragraphs 1 through 63.

77. Denied.

78. The Department admits that the rational basis test governs this case but the Department denies that the referenced statement has any other applicability to the present case. The Department specifically denies that satellite services and cable services are similarly situated. All other allegations in this paragraph are denied.

79. Denied.

80. Any allegations that have not been fully addressed above are hereby denied.

### **Defenses and Affirmative Defenses**

#### **First Defense**

#### *(Failure To State a Cause of Action)*

81. Plaintiffs have failed to state a cause of action for the following reasons:

A. Plaintiffs' Commerce Clause and Equal Protection claims both fail because satellite television and cable television are inherently different business models which may be assigned to different classes and taxed differently without any constitutional impediment. See, e.g., *Leathers v. Medlock*, 499 U.S. 439 (1991) ("*Leathers*"); *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla. 1984), *appeal dismissed*, 474 U.S. 892 (1985). ("*Eastern*").

B. Plaintiffs' Commerce Clause challenge fails because satellite television providers in Florida, including Plaintiffs, possess substantial infrastructure in Florida and employ a substantial number of independent contractors in Florida.

C. Congress specifically pre-empts local taxation of satellite services, yet expressly preserves a state's authority to tax satellite services. Pub. L. No. 104-104, Title VI, Section 602(c), 110 Stat. 144(a)(1996) (reprinted at 47 U.S.C. Section 152, historical and statutory notes). In essence, the Federal government has renounced any regulatory authority it may have had on taxation of satellite services, allowing individual states to regulate state taxation of satellite services.

D. Congress' "renunciation of federal interest eliminate[s] any objection to the statutes under the Commerce Clause or dormant Commerce Clause." *Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 166 (1985) ("*Northeast Bancorp*"). Indeed, where a state acts as Congress has authorized, "the state actions are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp*, 472 U.S., at 174.

**Second Defense**  
*(Failure To State a Cause of Action)*

82. Plaintiffs have failed to assert a viable facial challenge under any possible theory. In *Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008), the First District Court of Appeal restated the long-standing requirements for a valid facial challenge:

"A facial challenge to a statute is more difficult than an 'as applied' challenge because the challenger must establish that no set of circumstances exists under which the statute would be valid. Except in a First Amendment challenge, the fact that the act might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face; such a

challenge must fail unless no set of circumstances exists in which the statute can be constitutionally applied. A facial challenge considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards." Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

Plaintiffs cannot meet these requirements for the reasons stated in the Department's First Affirmative Defense, which is incorporated by reference.

83. In addition, cable customers located in Ogborns' county pay a higher communications services tax rate than the Ogborns. Thus, the Ogborns cannot have standing, and cannot be appropriate class representatives.

**Third Defense**  
*(Lack of Standing)*

84. Plaintiffs lack standing to assert a challenge on any theory because the effective communications services tax rate imposed on Satellite Services is lower than the effective communications services tax rate imposed on Cable Services. In addition, cable services to customers located in Ogborns' county incur a higher communications services tax rate than the Ogborns' satellite services. Thus, the Ogborns cannot have standing, and cannot be appropriate class representatives. Plaintiffs should refer their economic arguments to the legislature, rather than to the court.

**Fourth Defense**  
*(Lack of Standing)*

85. Plaintiffs lack standing to assert a facial constitutional challenge because the section 202.20, Fla. Stat., communications services tax conversion rates which Florida law imposes on cable services without any action by local governments

show that cable services in various locations, including the county where Plaintiffs reside, incur a higher communications services tax rate than satellite services.

**Fifth Defense**  
*(Separation of Powers Regarding Requested Refund)*

86. The Separation of Powers Doctrine bars Plaintiffs' refund claims for the following reasons:

A. Plaintiffs seek a refund of the difference between the 10.8% communications services tax imposed on satellite television services by section 202.12(1)(b) and the 6.8% (currently 6.65%) tax imposed on cable services pursuant to section 202.12(1)(a), Fla. Stat.

B. The portion of the communications services tax Plaintiffs seek to have refunded is placed into a flow-through trust fund and distributed each month to the State and local governments pursuant to section 202.18(2), Fla. Stat. The Department does not retain those revenues.

C. The tax amounts Plaintiffs seek to have refunded were placed in flow-through trust funds whose revenues were distributed to approximately 471 different local governments, which, presumably, have already spent such distributions.

D. Those local governments have relied upon such distributions of revenues for approximately 12 years. If the legislature enacts statutory authorization for a special assessment on those local governments to recover refunds of such distributions, the local governments would be required to raise such funds through local taxes and fees. Homestead protections, reduced property values, and Constitutional or statutory restrictions limit the ability of local governments to raise

sufficient money to pay the enormous amounts Plaintiffs allege would be owed.

E. The Department has no statutory authorization to take such money from the State's Budget Stabilization Fund or other trust funds, or to collect from such local governments the amounts that would be necessary for the monetary relief Plaintiffs seek.

F. Local governments may pledge their receipts for bond offerings, and the State Constitution, State statutes, and local ordinances limit the ability of local governments to collect the amounts that would be needed for the refunds sought in the present case.

G. Additional statutory authorization, special appropriations, and additional revenues would be required for the Department to issue refunds in the amounts that would be required if Plaintiffs' legal theories were correct.

#### **Sixth Defense**

*(Portions of Plaintiffs' Refund Claims Are Time-Barred.)*

87. Refunds accruing outside the time permitted by sections 215.26 and 202.23, Fla. Stat., are time-barred.

#### **First Affirmative Defense**

*("Dryden Defense")*

88. Equitable considerations bar the claim for refund. *See Dryden v. Madison County*, 727 So.2d 245 (Fla. 1999).

A. Plaintiffs seek a refund of the difference between the 10.8% communications services tax imposed on satellite television services by section 202.12(1)(b) and the 6.8% (currently 6.65%) tax imposed on cable services pursuant to section 202.12(1)(a), Fla. Stat.

B. The portion of the communications services tax Plaintiffs seek to have refunded is placed into a flow-through trust fund and distributed each year to local governments pursuant to section 202.18(2), Fla. Stat. The Department does not retain those revenues.

C. The tax amounts Plaintiffs seek to have refunded were placed in flow-through trust funds whose revenues were distributed to approximately 471 different local governments, which, presumably, have already spent such distributions.

D. Those local governments have relied upon such distributions of revenues for approximately 12 years. If the legislature enacts statutory authorization for a special assessment on those local governments to recover refunds of such distributions, the local governments would be required to raise such funds through local taxes and fees. Homestead protections, reduced property values, and Constitutional or statutory restrictions limit the ability of local governments to raise sufficient money to pay the enormous amounts Plaintiffs allege would be owed.

E. The Department has no statutory authorization to take such money from the State's Budget Stabilization Fund or other trust funds, or to assess against such local governments the amounts that would be necessary for the refunds Plaintiffs seek in this case.

F. Local governments may pledge their receipts for bond offerings, and the State Constitution, State statutes, and local ordinances limit the ability of local governments to collect the amounts that would be needed for the refunds sought in the present case.

G. Additional statutory authorization, special appropriations, and additional revenues would be required for the Department to issue refunds in the amounts that would be required if Plaintiffs' legal theories were correct.

H. The Department acted in good faith in collecting the taxes Plaintiffs now demand to be refunded.

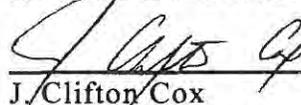
I. The taxes were nondiscriminatory because they were computed and collected in the same way from all businesses that sold satellite television service to customers in Florida.

J. The taxes in issue conferred a commensurate benefit upon the taxpayers.

WHEREFORE, the Department requests that the Court dismiss the Amended Complaint, with prejudice, and award the Department its costs and all other relief the Court finds appropriate.

Respectfully submitted,

PAMELA JO BONDI  
ATTORNEY GENERAL



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Department of Revenue

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular mail, and by e-mail to the primary and secondary addresses disclosed by counsel, to each of the following on this 23rd day of August, 2012:

**A. Counsel for DirecTV, Inc. and Dish Network:**

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**B. Counsel for Marcus Ogborn & Patricia Ogborn:**

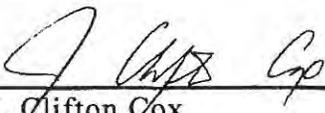
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**C. Counsel for Florida Cable Telecommunications Ass'n:**

**ERIC S. TRESH, Esq., AMELIA TOY RUDOLPH, Esq., and JOSHUA A. MAYES, Esq.**, Sutherland Asbill & Brennan LLP, 999 Peachtree Street, NE, Atlanta, GA 30309-3996; and

**DAVID KONUCH, Esq.**, Florida Cable Telecommunications Ass'n, 246 E. 6th Ave., Tallahassee, FL 32302.

  
\_\_\_\_\_  
J. Clifton Cox  
Special Counsel  
Counsel for Department of Revenue

In

IN THE CIRCUIT COURT, SECOND  
JUDICIAL CIRCUIT IN AND FOR  
LEON COUNTY FLORIDA

-----X  
 :  
 DIRECT TV, INC. AND ECHOSTAR :  
 SATELLITE LLC n/k/a :  
 DISH NETWORK, LLC :  
 :  
 Plaintiffs, :  
 :  
 v. :  
 :  
 JIM ZINGALE, acting in his :  
 official capacity as the :  
 Director, Florida Department of :  
 Revenue, :  
 :  
 Defendant. :  
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RECEIVED  
MAR 30 2009

DEPARTMENT OF REVENUE  
OFFICE OF GENERAL COUNSEL  
  
(CONSOLIDATED)

-----X  
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 MARCUS & PATRICIA OGBORN on :  
 behalf of themselves and others :  
 similarly situated, :  
 :  
 Plaintiffs, :  
 :  
 v. :  
 :  
 JIM ZINGALE, acting in his :  
 official capacity as the :  
 Director, Florida Department of :  
 Revenue, :  
 :  
 Defendant. :  
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CASE NO.: 05-CA-1354  
  
CLASS REPRESENTATION

PLAINTIFFS' SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiffs, MARCUS OGBORN and PATRICIA OGBORN ("Plaintiffs")  
and others similarly situated, sue Defendant JIM ZINGALE, acting  
in his official capacity as the Director, Florida Department of

Revenue, and on information and belief, based upon the investigation of counsel, except as to allegations related to Plaintiffs and their counsel which are alleged upon personal knowledge, allege as follows:

#### JURISDICTION AND VENUE

1. This class action on behalf of Plaintiffs and those similarly situated, arises under (a) the Commerce Clause of Article I of the United States Constitution; and (b) the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The amount in controversy exceeds \$15,000 exclusive of interest, costs, and attorney's fees. This Court has subject matter jurisdiction under Fla. Stat. §§ 26.012, 86.011, 86.021 and 213.015, the Florida Taxpayer's Bill of Rights.

2. Venue is proper in Leon County because defendant Jim Zingale is an employee of the State of Florida and maintains his principal office as the Director of the Florida Department of Revenue in Tallahassee, Leon County, Florida.

#### THE PARTIES

3. Plaintiffs, Marcus Ogborn and Patricia Ogborn, are residents of Polk County, Florida. At all times relevant, they have been subject to and otherwise purchased and paid taxes

pursuant to Fla. Stat. Chapt. 202 to state taxing authorities through their agents since October, 2001.

4. Defendant, Jim Zingale, was, at times relevant, the Director of the Florida Department of Revenue and is named in his official capacity. He is a necessary party as the officer whose duty it is to administer and enforce the collection of the taxes in question.

#### GENERAL ALLEGATIONS

5. The Ogborn Plaintiffs are recipients of multichannel video programming via satellite TV service offered to subscribers in Florida and all other states. Accordingly, Plaintiffs bring this action as a class action on behalf of themselves and over one million other Florida residents similarly situated who, pursuant to Florida Statutes chapters 202 and 203 (collectively, the "Communications Services Tax," or "sales tax"), are subject to a tax on direct-to-home satellite television service which is greater than the tax imposed on cable television service. Plaintiffs allege that Communications Services Tax is facially unconstitutional because it imposes or authorizes a sales tax on the provision of satellite broadcasting service in an amount greater than that imposed on cable television service.

6. Plaintiffs bring this class action to obtain (a) a declaratory judgment holding that Fla. Stat. §202.12(1)(c) is

unconstitutional because it imposes a greater tax rate on direct to home satellite television services than other communication services; (b) a permanent injunction against enforcement of that statute; and (c) a refund of taxes paid in accordance with that statute.

7. Plaintiffs challenge the constitutionality and validity of certain provisions of the Communications Services Tax on the grounds, *inter alia*, that it is facially unconstitutional as it discriminates against interstate commerce, in violation of the Commerce Clause of Article I of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it imposes or authorizes a sales tax on the provision of satellite broadcasting services in an amount greater than that imposed on cable television service.

8. The Communications Services Tax statute discriminates based solely on the fact that satellite TV providers--also known as "direct broadcast satellite" or "DBS" providers--transmit their programming signals "without the use of ground receiving or distribution equipment" in the State of Florida, whereas cable companies cannot provide such services without the use of such physical equipment located in the State. Fla. Stat. § 202.11(6) (incorporating definition of "direct-to-home satellite service" from 47 U.S.C. § 303(v)). The statute thus effectively nullifies

a significant technological advantage that satellite TV holds over cable. Satellite TV providers transmit their programming directly to Florida's consumers' homes in Florida from satellites located in space without the use of local rights-of-way or other intrusive means. Cable companies, by contrast, serve their subscribers through an indispensable web of cables that lie above or are buried below Florida's city streets and rights of way.

9. The cable companies have invested many millions of dollars to install these massive networks. In exchange for access to the public streets and rights of way cable companies pay substantial periodic sums--in the form of rent or "franchise fees"--to local governments.

10. The Communications Services Tax imposes, on its face, a sales tax on satellite TV subscribers that is four percentage points higher than the tax imposed on cable subscribers and thus discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution. The purpose and effect of the discriminatory sales tax is protectionist. It confers an unfair competitive advantage on cable companies that provide their programming through "the use of ground... distribution equipment" in Florida, and a competitive disadvantage on satellite TV providers who by virtue of their use of other non-intrusive technology transmit their programming

directly to subscribers' homes from satellites located in outer space.

11. Defendant, via the Communications Services Tax, violates the Commerce Clause by imposing a tax on Plaintiffs that depends upon whether Plaintiffs receive television programming services from a business that performs a specified function within the state--whether that function is building a manufacturing plant, building a distribution facility, or building a network of cables. In other words, if satellite TV providers used cables to distribute its programming to the Ogborns and the class, they would not be subject to the greater tax rate.

12. Consumers, such as the plaintiffs, suffer adverse effects from such discriminatory practices at the hands of their state tax authorities, the Department of Revenue, and their agents as these protectionist policies conferred by the state on cable TV are directly passed on to the end customer.

13. The sales tax rate set forth in the text of the Communications Services Tax, which became effective October 1, 2001, is discriminatory and violates the Commerce Clause because the burden imposed on interstate commerce is excessive in relation to the putative local benefits. The lower sales tax enjoyed by cable subscribers (6.8% vs. 10.8% for the Ogborns and

the Class) serves only the parochial economic interests of those businesses.

14. In addition, the Communications Services Tax is discriminatory and violates the Equal Protection Clause of the United States Constitution because it does not serve a legitimate public purpose. There is no rational basis for the discriminatory tax rate assessed against satellite subscribers like the Ogborns--at a rate of 10.8%--but not charging them 10.8%, but rather 6.8%, if they were cable subscribers. Receiving television services via cable imposes far greater demands on the State for services than receiving such services from a satellite over the air.

#### DESCRIPTION OF SATELLITE TV SERVICE IN FLORIDA

15. The Ogborns and the Class are recipients of multichannel video programming via over the air direct-to-home ("DTH") satellite television service, also known as "Direct Broadcast Satellite" ("DBS") service. DBS services are offered to subscribers in Florida as well as throughout the nation. As such, they compete with other Multichannel Video Programming Distributors ("MVPDs"), including local cable operators in each and every state.

16. The only providers of satellite TV services to residents in Florida are DIRECTV, Inc. ("DIRECTV") and DISH Network, LLC. ("DISH").

17. DIRECTV, Inc. is headquartered in El Segundo, California and currently provides service to approximately 1.1 million residential subscribers in Florida.

18. DISH Network, LLC, is a limited liability company headquartered in Englewood, Colorado and currently provides service to approximately 560,000 residential subscribers in Florida.

19. DIRECTV and DISH, as the agent for the State of Florida, collects Communication Services Taxes from Plaintiffs and the Class pursuant to Chapt. 202, Fla. Stat. and remits, less the collection allowance provided in Fla. Stat. §202.28, such taxes to the Defendant.

20. DIRECTV and DISH provide television programming to subscribers in Florida by means of satellites stationed above the Earth's Equator at fixed longitudes (for example, 101° Western Longitude) and at a fixed altitude (22,300 miles) - that is, at an extraordinary distance from the State of Florida.

21. The orbital positions used by these satellites are allotted to the United States by the International Telecommunication Union. In turn, the federal government has

granted DBS providers the right to transmit in certain electromagnetic frequencies from these locations.

22. Satellite television companies, including DIRECTV and DISH, do not use public rights-of-way or other public infrastructure to provide service; signals are transmitted over the air from out-of-state facilities directly to the subscribers' premises, including the plaintiffs.

23. DIRECTV and DISH thus transmit the programming signal, and the Ogborns and the class receive that signal, directly from these orbital satellites by means of small, pizza-sized satellite dishes mounted on or near their homes. The signal is transmitted to a receiver/decoder system ("set-top box") connected to Plaintiffs and the Class's televisions.

24. DBS providers, like DIRECTV and DISH, do not have or maintain cable transmission networks in the State of Florida and unlike cable, do not have ground distribution equipment within Florida. They do not use facilities based in Florida to deliver services to their customers.

25. DBS providers, like DIRECTV and DISH, do not assemble in Florida the programming packages that they transmit to the plaintiffs. Rather, they collect programming feeds from various parts of the country at their "uplink" facilities in other states including California, Wyoming and Colorado. From those

facilities, the programming is "uplinked" to the DIRECTV and DISH Network satellites for the purpose of retransmission to the Plaintiffs' home.

26. Similarly, the vast majority of the programming that is assembled at those uplink facilities--hundreds of channels such as CNN, Discovery, C-SPAN, MTV, HBO, Showtime and the like--does not originate in Florida.

27. Satellite operators are not required to obtain franchise rights from municipalities and counties in order to operate in Florida. Cable television companies are required to obtain franchise rights from municipalities and counties in order to operate in Florida.

28. Congress in the Telecommunications Act of 1996, recognized the lack of local presence within a state utilized by Satellite TV providers, like DIRECTV and DISH, in delivering their programming, prohibited local governments from imposing franchise fees or other obligations on satellite TV providers. Rep. Henry Hyde, as Chair of the House Judiciary Committee, explained that the preemption of local taxes on satellite TV services "reflects a legislative determination that the provision of direct-to-home satellite service is *national, not local in nature.*" 142 Cong. Rec. 2,219 (1996).

## DESCRIPTION OF CABLE TELEVISION SERVICES IN FLORIDA

29. Cable television companies have evolved from the Community Antenna Television (or "CATV") systems of the 1960s and 1970s. Cable systems provide television programming to subscribers in Florida using public infrastructure. Cable systems receive the programming that they retransmit at local cable headends.

30. Within Florida's borders alone, thousands of headends serve more than five millions cable customers in Florida. The cable headends then transmit via "trunk" and "feeder" cable lines the programming to consumers' homes by coaxial cable laid in trenches in or along roads or hung on electric utility poles and connected to Cable TV's subscribers' television sets and set-top boxes in Florida. The signal ultimately reaches the consumers televisions and set top boxes via "drop" lines that are connected to the residence.

31. Cable television service requires the use of significant signal collection, transmission and distribution facilities using public rights-of-way within the local service area or elsewhere in Florida. Specifically, local cable providers have laid more than 76,700 miles of cable in Florida and have invested billions of dollars in ground equipment and related repair and maintenance facilities. They are believed to

employ thousands of employees, mostly Florida residents, who were or are still employed to construct, operate, and maintain those networks, and to connect and disconnect drop lines that reach their subscribers.

32. Cable's extensive physical network of cable, head ends and distribution network installed within Florida generates significant revenues for local governments: The cables that distribute television signals to local neighborhoods typically run through local rights-of-way. Obtaining access rights to these rights-of-way is required for any company that seeks to use such rights-of-way to provide cable television or other services.

33. Until 2007, it was necessary for a cable company to enter into a franchise agreement with the local municipality or county to obtain that access. That agreement allowed the cable operator use of public rights-of-way in order to run trunk and feeder lines and connect to subscribers' premises. The use of public rights-of-way is a component of the definition of "cable system" under Section 602(7) of the federal Communications Act. See 47 U.S.C. § 522(7). In addition to conferring the right to provide service within the given local area, the franchise agreement afforded the cable operator use of public rights-of-way in order to connect with subscribers' premises.

34. The franchise fee due from the Cable TV providers in exchange for the franchise was typically three to five percent of the cable company's gross revenues derived from its activities within the area granted by the franchise. Accordingly, local governments in exchange for providing local cable providers the property rights necessary to install their physical television network, the cable providers paid Local Governments between three to five percent of their gross revenues. The sums paid were material to the Local Governments and represent an important source of revenue relied upon by local governments to pay for essential governmental services including salary and health benefits of government employees, and payment of municipal bond obligations sold by such municipalities.

35. Thus, the amount of revenues received by local governments from cable television providers is directly impacted by the number of cable television subscribers, now about five million. The more Florida residents that subscribe to cable, the more revenue local governments receive. Similarly, competition which results in Florida Residents receiving television programming services from a source other than cable television, i.e. DBS, results in fewer cable subscribers and thus less revenue for the local government.

36. The primary material difference between the two types of providers of television programming (Cable TV on the one hand and Satellite TV on the other) involves how the programming packages are ultimately delivered to subscribers. Cable companies distribute their service from local headends through elaborate local physical and intrusive networks of ground equipment running to the home, whereas satellite TV providers beam signals directly from satellites in outer space to their customers' homes, with no physical impact in Florida.

COMPETITION BETWEEN  
SATELLITE AND CABLE TELEVISION

37. Congress has recognized that satellite television distributors compete with cable operators and, has defined the market in which they compete as the Multi-Channel Video Programming Distributor ("MVPD") market. Congress has required the FCC to report annually on the state of competition in that market. In doing so, the FCC consistently has viewed DBS providers as the main competitors of cable systems. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 02-145, FCC 02-338, at ¶ 58 (Dec. 31, 2002) (Ninth Annual Report) ("DBS has become the largest competitor to cable in the MVPD market."); *Annual Assessment of the Status of Competition in the Market for the*

*Delivery of Video Programming*, 17 FCC Rcd. 1244, 1272 ¶ 57 (2002) (Eighth Annual Report) ("DBS is the principal subscription competitor to cable television service. . . ."); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd. 24,284 at 24,323 ¶ 62 (1998) (Fifth Annual Report)

"DBS continues to represent the single largest competitor to cable operators and DBS subscribership continues to show strong growth."

38. According to the United States Department of Justice,

"[c]able and DBS are both MVPD products. While the programming services are delivered via different technologies, consumers view the services as similar and to a large degree substitutable."

*Complaint, United States v. Primestar, Inc.*, Civil No. 1:98CV01193 (JLG) (D.D.C.) (May 12, 1998), at ¶ 63. Indeed, in a report issued in March 2007, the National Cable & Telecommunications Association ("NCTA") admits that

"DBS is an effective substitute for cable's video services" and "is a proven competitor in the multichannel video market."

NCTA, Newsletter (March 2007) (emphasis in original).

39. The defining feature of satellite TV service that sets it apart from all other forms of communications services, taxed under the CST, including cable TV, is that, to provide its

service, satellite TV does not employ as expressly set forth in the statute, "the use of ground . . . distribution equipment" in the State of Florida. See, Fla. Stat. § 202.11(6) (incorporating 47 U.S.C. § 303(v)). In other words, it does not have a physical distribution network within Florida.

**APPLICATION OF FLORIDA'S STATE  
AND LOCAL SALES TAX STATUTES**

40. Florida imposes a broad-based excise tax on every retail sale. The vendor is required to add to the sales price the amount of the tax due. The tax is to be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee and agent for the state of Florida, the full and exact amount of the tax payable on each taxable sale. In addition, the vendor is permitted to retain a percentage of the taxes collected in certain circumstances where the remittance to the state follows specified procedures.

41. DIRECTV and DISH, in collecting the CST is a trustee and agent of the State of Florida.

42. Prior to October 1, 2001, consumers of DBS services were subject to the uniform state sales tax of six percent. See Fla. Stat. § 212.05 (1999) (imposing a tax of six percent on [a]ny TV system program service.") That tax was repealed by the

Communications Services Tax Simplification Law ("CST") and Fla. Stat. §202.12.

43. Florida's Legislature during the 2000 General Session amended the sales tax statute to impose a greater tax on retail sales of "satellite broadcasting service" to Florida subscribers, including the plaintiffs than it imposes on retail sales of other communications services. Specifically, Fla. Stat. §202.12 reads, in part:

§ 202.12. Sales of communication services<sup>1</sup>

The Legislature finds that every person who engages in the business of selling communications services at retail in this state is exercising a taxable privilege. It is the intent of the Legislature that the tax imposed by chapter 203 be administered as provided in this chapter.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction, and the tax is due and payable as follows:

(a) Except as otherwise provided in this subsection, at a rate of 6.8 percent<sup>2</sup> applied

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<sup>1</sup> "Communications services" are defined as: "the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points, by or through any electronic radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance." Fla. Stat. § 202.11 (2005).

<sup>2</sup> This 6.8% tax rate is applied to all communications services with the only exception being direct-to-home satellite service.

to the sales price of the communications service which:

1. Originates and terminates in this state, or

2. Originates or terminates in this state and is charged to a service address in this state,

when sold at retail, computed on each taxable sale for the purpose of remitting the tax due.

\* \* \*

(c) At the rate of 10.8 percent on the retail sales price of any direct-to-home satellite service received in this state. The proceeds of the tax imposed by chapter 203 shall be accounted for and distributed in accordance with s. 202.18(2).

Fla. Stat. §202.12 (2005). Persons engaged in the business of providing DBS services are considered vendors, must obtain a license from the defendant, and must collect and remit sales tax on their retail sales.

44. Under the 2000 amendments, local authorities may also levy additional sales taxes on the same transactions taxed by the State, including on satellite television providers.

**FLORIDA'S COMMUNICATION SERVICES TAX  
IS ENACTED TO PROTECT CABLE TELEVISION  
AND IMPOSES A DISCRIMINATORY PURPOSE AND EFFECT**

45. Satellite TV technology was made available for the first time to Florida consumers in early 1994. By October 2001,

the number of satellite TV subscribers in the United States grew from less than 1 million subscribers at the end of 1994 to more than 16 million subscribers at the end of 2001.

46. Thus, Satellite TV technology represented the first material threat to the nearly 20-year monopoly the cable industry enjoyed. This exponential growth in satellite TV subscribership impacted the State and local governments in at least two ways. First, the reduction in cable subscribers reduced the need and incentive of Cable television operators to lay new television cable in the State. This in turn, would result in a smaller investment within the State and the hiring of fewer employees within in the state to develop and maintain the infrastructure or service a shrinking or stagnant customer base. Second, franchise fee revenue received by local governments and relied upon by them for years would contract.

47. In 1999, an independent work group comprised of representatives from, among other groups, the intervenor defendant Florida Cable Telecommunications Association ("FCTA"), the Florida League of Counties, the Florida Association of Cities, and both houses of the Florida Legislature convened to develop a tax reform proposal for the telecommunications industry (the "Work Group"). Notably, the only telecommunications provider not represented at the work group was Satellite TV.

After several meetings, the Work Group agreed upon a proposal that would, among other things, establish two taxing rates. The rate imposed on consumers who purchased their television programming services from a satellite TV provider would be substantially higher than if they purchased those services from a cable TV provider. This proposal was subsequently introduced--with no substantive changes--in the Florida Legislature as the Communications Services Tax Simplification Law.

48. The 2000 amendments (i.e. the Communications Services tax at issue here and as ultimately enacted effective October 1, 2001) to the sales tax law discriminates on its face against satellite television consumers, including the plaintiffs, by imposing on the consumer a higher tax for services obtained via direct-to-home satellite services than on other communication services, such as cable television.

49. The purpose of the 2000 amendments and the statute as enacted is protectionist. On its face, the sales tax law imposes higher taxes on consumers of the services provided by DBS providers, all of whom provide their service to Florida consumers from out-of-state facilities. DBS consumers should not be forced to pay a higher tax than cable TV consumers.

50. The protectionist purpose of the 2000 amendments is revealed, in part, from a review of the April 9, 2001 hearing of

the Senate Finance and Taxation Committee. During that hearing, a representative from the Work Group defended the discriminatory tax as "competitively neutral." But as indicated from his statements to the Committee below, the actual aim of the proposed legislation was to neutralize the competitive advantage that satellite TV enjoyed over cable due to its advanced technology—technology that enabled satellite TV to avoid paying a "franchise fee" for the access rights to the local roads and sidewalks—a cost unique to cable method of signal delivery:

[S]ome of the [communications] services are competitive, even though they are provided by different technologies and existing tax treat different competing technologies differently. What this bill does is treat them all the same so they're all competitively neutral. *This competitive neutrality also helps what we call tax erosion. For example, 3 out of every 5 new television customers are going to satellite. But local governments do not get the local taxes from satellite that they do from cable. So you'll see a lot of local tax erosion if this bill were not to pass.*

51. This protectionist rationale (i.e. avoid the loss of local revenue generated from local cable television subscribers if they obtain services from DBS) was echoed by Charles Dudley, Esq., general counsel to the FCTA and cable's lead lobbyist, during the same hearing:

"We think overall everyone's going to be better off. [W]e think what happens is... that many new customers are getting their services from satellite, so local

governments get no revenue from the satellite customer [under the existing tax statutes]. So we think that overall it's a good plan."

Mr. Dudley, talking as the agent of the FCTA and the Work Group, made clear that unless the State enacted the discriminatory tax scheme proposed by the Work Group, local businesses like cable would lose subscribers and revenue to DBS providers, like DIRECTV. This loss of customers would directly and negatively bear on the amount of "franchise fees" or "rent" that Florida's cable providers would pay to the local governments in the future in exchange for their continued access to the local rights-of-way that were indispensable to the distribution of their product (i.e., television programming) to their subscribers.

52. Following the hearing, the Committee unanimously voted to report the bill back to the Senate for a vote. Less than one month later, the Senate passed an amended version of the Communications Services Tax Simplification Law that contained the same discriminatory tax scheme proposed by the self proclaimed "independent" Work Group and advocated by the FCTA's general counsel, Mr. Dudley, Esq.

INJURY TO PLAINTIFF AND THE CLASS

53. Beginning on or about December 1, 2001 Plaintiffs and the class by statute were required to and did pay (4%) four percentage points more in sales taxes on DBS services than any other communications services purchased in Florida including cable television services.

CLASS REPRESENTATION ALLEGATIONS

54. Plaintiffs bring this action as a class action pursuant to Florida Rules of Civil Procedure 1.220(b)(1) and (b)(2), on behalf of a class (the "Class") of all persons or entities, who during the Class Period are subject to or otherwise paid taxes to the State of Florida or its agents pursuant to Florida's Communications Services Tax for DBS services. Defendant collected the tax from Plaintiffs during the period from October 1, 2001 through present, inclusive (the "Class Period"). Defendant and its agents, DIRECTV and DISH, have collected an illegal and facially unconstitutional tax.

55. Excluded from the class is the Defendant herein, DIRECTV, DISH, any person, firm, trust, corporation, officer, director or other individual or entity in which DIRECTV, DISH, or any Defendant has a controlling interest or which is related to or affiliated with DIRECTV, DISH, or any Defendant, and the

legal representatives, heirs, successors-in-interest or assigns of any such excluded party.

56. The members of the Class are so numerous that joinder of all members is impracticable. During the Class Period, more than 1.5 million class members paid Communications Services Taxes imposed on them by the state of Florida. The precise number of class members is unknown to Plaintiffs at this time but the two sole providers of DTH /DBS services in Florida have over 1.5 million subscribers. In addition, the names and addresses of the Class members can be readily ascertained from the books and records of Defendant or, DIRECTV and DISH.

57. Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class. Plaintiffs have retained competent counsel experienced in class action litigation and the issues presented in this case to further ensure such protection and intend to prosecute this action vigorously.

58. Plaintiffs' claims are typical of the claims of the other members of the Class because Plaintiffs' and all the Class members' damages arise from and were caused by the same violations of Florida and Federal law and are chargeable to Defendant. Plaintiffs do not have interests antagonistic to, or in conflict with, the Class.

59. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Since the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the Class members to seek redress for the wrongful conduct alleged. Plaintiffs know of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a class action. In total it is estimated that over \$150 million has been paid in taxes by the class which would not have been collected if class members had instead of purchasing their television programming from DBS had purchased it from cable tv providers.

60. The interests of DIRECTV and DISH are adverse to the interest of the class as DIRECTV and DISH receive a portion of and profit from the CST.

61. Common questions of law and fact exist as to all members of the Class and such issues predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) Whether the portion of the Communications Services Tax which imposes a four percentage point higher tax on DBS services than other communications services, including MVPD

services, is facially unconstitutional in violation of the Commerce Clause;

(b) Whether the portion of the Communications Services Tax which imposes a a four percentage point higher tax on DBS services than other communications services, including MVPD services, is unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and

(c) The amount of damages sustained by the members of the Class and the appropriate measure of damages.

62. Defendant has acted and continues to act on grounds generally applicable to the Class, thereby making it appropriate to render final injunctive relief or corresponding declaratory relief with respect to the Class.

63. The names and addresses of members of the Class are available from, the Defendant, the DBS providers, including DIRECTV and DISH, and third parties. Notice can be provided to such Plaintiffs by a combination of notice included in DIRECTV and DISH customer billing statements, and published notice using techniques and a form of notice similar to those customarily used in class actions involving numerous and geographically disbursed class members.

COUNT I

(VIOLATION OF THE FEDERAL COMMERCE CLAUSE)

64. Plaintiffs incorporate and re-allege the allegations of paragraphs 1 through 63 as if fully set forth herein.

65. Florida's CST discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution.

66. The State of Florida is imposes a discriminatory tax based on whether Plaintiffs or the Class use a particular provider of multi-channel video programming services. The discrimination is based upon whether the consumer purchases services from a given provider that has invested in utilizing a costly physical infrastructure of "local ground receiving or distribution equipment" in Florida or not. 47 U.S.C. § 303(v) (incorporated by Fla. Stat. § 202.11(6)).

67. The State has made favorable tax treatment received by a consumer dependent on whether one element of distributing multi-channel television services--specifically, the ultimate transmission of programming signals to subscribers--is conducted in such a way as to provide a significant economic benefit to the State. Customers of satellite companies, like the Ogborns and the Class, are punished because they received their satellite television service, by virtue of a superior technology which does

not require the utilization of a costly in-place physical infrastructure of ground equipment in Florida. Customers of cable companies are rewarded by virtue of cable television's older technology and dependence on the utilization of extensive physical ground equipment in Florida.

68. Florida's CST is discriminatory and violates the Commerce Clause in three independent ways:

(a) The CST has a discriminatory purpose. The CST was drafted by the Work Group—a biased committee of people whose goal and incentive was to draft legislation that would protect the cable TV industry by discriminating against satellite TV. When the Work Group presented the draft legislation to the Florida Legislature, they repeatedly acknowledged the discriminatory nature of the statute. Despite this, the Florida Legislature adopted, and enacted the proposed bill, without making any material changes to the draft. In doing so, the Florida Legislature adopted, as its own, the discriminatory purpose of the statute.

(b) The discrimination is *facial*, because it is discernible from the face of the relevant Florida statutes. Section 202.11(6) explicitly requires different tax treatment of consumers of television programming based on whether or not they obtain that programming from companies that distribute their

programming via "ground receiving or distribution equipment" in the State of Florida. 47 U.S.C. § 303(v) (incorporated by Fla. Stat. § 202.11(6)).

(c) The CST is unlawful because it has the *practical effect* of discriminating against interstate commerce. The effects of Florida's tax regime are apparent: it artificially increases the net price paid by consumers for satellite TV services. Satellite TV customers pay more in taxes for identical television services, making such services a financially less attractive option for consumers. Conversely, it also makes cable TV a more financially attractive option.

69. The discriminatory sales tax also violates the Commerce Clause because the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. The lower sales tax imposed on cable subscribers serves only the parochial economic interests of the businesses that serve those customers and deprives the public of sales tax revenues. Why do cable customers pay a lower tax rate than the Ogborns or the Class?

70. The pernicious effects of the CST are further demonstrated by reviewing Congress's efforts to remove barriers to competition in the market for multi-channel video programming. The CST thus frustrates the federal policy of promoting satellite

TV as a real source of competition with entrenched cable monopolies.

71. Florida's discriminatory tax on the Ogborns and the Class as consumers of satellite TV services cannot be justified as a "compensatory" tax. Under the compensatory tax doctrine, a state may impose a tax on *interstate* activities to compensate for a corresponding tax on *intrastate* activities. This defense is limited, however, to the narrow context of a use tax that compensates for an in-state sales tax (a situation that has no relation to this lawsuit).

72. Florida's higher sales taxes paid by the Ogborns and the Class for their satellite TV services is not a compensatory tax. While the State allows localities to impose an additional tax on cable TV services, see Fla. Stat. § 202.19, that tax is for an entirely different purpose than the statewide tax imposed under Fla. Stat. § 202.12. The statewide tax is imposed for the "privilege" of "engag[ing] in the business of selling communications services at retail in this state." Fla. Stat. § 202.12 (emphasis added). By contrast, the local tax is imposed

"in lieu of any fee or other consideration . . . to which the municipality is otherwise entitled for granting permission to dealers of communications services . . . to use or occupy its roads or rights of way for the placement, construction, and maintenance of

poles, wires, and other fixtures used in the provision of communications services."

Fla. Stat. § 202.19(3)(a) (emphasis added). Thus, the statewide tax is based on the conducting of business in *Florida*, while the local tax accounts for the "use or occup[ation]" of a given municipality's "roads or rights of way"--in other words, they are the express replacement of cable's franchise fees.

73. The CST and the tax authorized under §201.19, Fla. Stat. do not impose a tax on equivalent, or even remotely similar, events. Any MVPD that conducts business in Florida faces the statewide tax imposed under Fla. Stat. § 202.12. In contrast, a provider is only subject to the local tax authorized under §202.19, Fla. Stat. if it utilizes the localities "roads or rights of way". Likewise, the local tax is explicitly designed to compensate municipalities for the "use of or occup[ation]" of those "roads or rights of way" to install equipment. *Id.* § 202.19(3)(a). As noted, unlike cable companies, satellite companies do not use public roads or rights of way in order to deliver their programming service. Consumers of DBS services are taxed simply because the way in which they receive their programming services is via a technology that does not use public roads or rights of way.

74. Moreover, the imposition of the local tax under 202.19 is discretionary and not required by State law. See Fla. Stat. §202.19 ("The governing authority of each county and municipality may, by ordinance, levy a *discretionary* communications services tax") (emphasis added). The statewide tax imposed by §202.12, and collected by the DBS Providers for the State--namely DIRECTV and DISH--mandates that satellite company customers, such as the Ogborns and the Class pay a 10.8% sales tax (4% points more than if they were paying a cable tv provider) on the television services. The discretion of whether or not to impose taxes on cable companies is vested with the local municipality. By expressly granting local jurisdictions the discretion to not tax customers of cable companies, the State has treated cable companies and their customers and satellite companies and their customers differently. That differential treatment constitutes unlawful discrimination in violation of the Commerce Clause.

75. In sum, the CST by imposing on its face, a 10.8% sales tax on consumers for satellite TV services but only a 6.8% sales tax on competing cable TV services, see Fla. Stat. § 202.12(a)-(b), the State of Florida discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution. U.S. Const., art. I, § 8.

COUNT II

(VIOLATION OF THE FEDERAL EQUAL PROTECTION CLAUSE)

76. Plaintiffs incorporate and re-allege the allegations of paragraphs 1 through 63 as though fully set forth herein.

77. Florida's CST, by expressly and facially taxing the Ogborns and the Class for the satellite TV services it purchases at a higher rate than consumers pay for cable TV services, unconstitutionally discriminates against Plaintiffs and the Class in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. U.S. Const., amend. XIV.

78. The United States Supreme Court has held that the Equal Protection Clause forbids discriminatory state laws unless they "'bear[] a rational relation to a legitimate state purpose.'"

79. Florida's discriminatory CST tax regime does not advance any legitimate state purpose. The State has no legitimate interest in discriminating between competing providers of MVPD and the customers who purchase those services based on whether or not the provider utilizes "local ground receiving or distribution equipment" in transmitting their programming to those subscribers. 47 U.S.C. § 303(v) (incorporated by Fla. Stat. §202.11(5)). Rather, the CST is discriminatory because it serves only the interest of local protectionism. As the Supreme Court has explained, such "parochial discrimination" is exactly what

"the Equal Protection Clause was intended to prevent."

WHEREFORE, plaintiffs pray for relief as follows:

(a) Declaring this action to be a Plaintiff Class Action properly maintained pursuant to Rule 1.220(a), (b)(1), and (b)(2) Florida Rules of Civil Procedure;

(b) The Court declare that the provisions of the Communications Services Tax which imposes a greater tax on DTH service than other communication services is facially unconstitutional, violates the Commerce Clause of the United States Constitution, the Florida Taxpayer's Bill of Rights, F.S.A. § 213.015, and Article I, Sections 2 and 9 of the Constitution of Florida and that Plaintiffs and the Class are entitled to a declaration regarding same and, as incidental and supplemental relief a refund of all taxes paid thereunder;

(c) Awarding Plaintiff and other members of the Class compensatory damages;

(d) Awarding injunctive relief, including permanently enjoining defendant from imposing and collecting state taxes on DTH services in an amount greater than those imposed on other communications services;

(e) The Court permanently enjoin the State of Florida from imposing taxes on DTH services in an amount greater than those imposed on other communications services;

(f) The Court permanently enjoin the State of Florida from

utilizing DIRECTV and DISH from collecting taxes on DTH services in an amount greater than those imposed on other communications services;

(g) Awarding Plaintiff's counsel and other members of the Class their costs and expenses of this litigation, including reasonable attorneys' fees, accountants' fees, consultants and experts' fees and other costs and disbursements; and

(h) Awarding Plaintiffs and other members of the Class such other and further relief as may be just and proper under the circumstances.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following:

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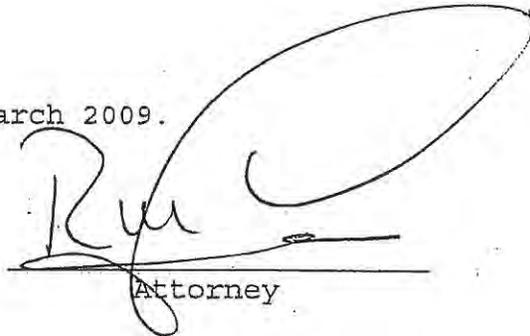
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\_\_\_\_\_  
Attorney

IN THE CIRCUIT COURT OF THE  
SECOND JUDICIAL CIRCUIT IN AND  
FOR LEON COUNTY, FLORIDA

CASE NO.: 05-CA-1037  
DIVISION: General Civil

DIRECTV, INC. and EHOSTAR  
SATELLITE CORPORATION, n/k/a  
DISH NETWORK, LLC

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT  
OF REVENUE,

Defendant.

**RECEIVED**

NOV 05 2008

DEPARTMENT OF REVENUE  
OFFICE OF GENERAL COUNSEL

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**AMENDED COMPLAINT**

Plaintiffs DIRECTV, Inc. ("DIRECTV") and DISH Network, LLC ("DISH") (together "Plaintiffs") allege on information and belief against Defendant State of Florida Department of Revenue ("DOR") as follows:

**INTRODUCTION**

1. Over six million Florida residents subscribe to pay television. They receive similar programming, and watch many of the same shows, movies, and sporting events. Yet the State of Florida imposes a 10.8% sales tax on nearly two million of those individuals, while the other four million are only asked to pay a 6.8% sales tax. The difference: the first group subscribes to satellite TV, while the second group subscribes to cable.

2. If the two million satellite TV subscribers are anything like the typical consumer, this 4% difference would be enough to persuade them to drop their satellite TV subscriptions for cable. Or it could mean that local cable companies in Florida are (and have been) free to raise

their prices by 4%, without much risk of losing any of their four million plus subscribers to satellite TV. The difference in tax treatment also means that the State of Florida, in the midst of an historic budget shortfall, is giving up over \$100 million in tax revenues each year by failing to impose a level sales tax on cable and satellite TV subscribers.

3. According to the relevant Florida Statute, this discrimination is based solely on the fact that satellite TV providers—also known as “direct broadcast satellite” or “DBS” providers—transmit their programming signals “without the use of ground receiving or distribution equipment” in the State of Florida, whereas cable companies depend upon such in-state equipment to deliver programming to their subscribers. § 202.11(6), Fla. Stat. (incorporating definition of “direct-to-home satellite service” from 47 U.S.C. § 303(v)). The Florida Statute, therefore, nullifies an important technological advantage that satellite TV holds over cable, which is a competitive advantage that the legislature should not and cannot reverse. Satellite TV providers transmit their programming directly to consumers’ homes in Florida from satellites located tens of thousands of miles above the Earth’s equator. Cable companies, by contrast, serve their subscribers through a web of cables that lie over, or are buried under, Florida city streets; have invested a fortune to lay these massive networks—often using public streets and other rights-of-way; and pay substantial amounts—in the form of rent or “franchise fees”—to local governments to do so.

4. The story behind this regime is a textbook case of protectionism. For decades, cable companies were entrenched monopolies in the market for subscription television service. Then came satellite TV, with its high-powered satellites transmitting programming directly to the subscriber’s home. Satellite TV threatened cable’s monopoly by giving consumers a real choice for the first time.

5. Florida's local cable industry sprung to action. Under the cover of tax reform, and alleged simplification, the cable industry unleashed its army of lobbyists on the Florida Legislature to push for legislation that would insulate Florida's 289 local cable systems from competition from this "out-of-state" interest. Their message was simple: if the Florida Legislature did not take immediate steps to protect local cable operators from the competition posed by out-of-state satellite TV, their subscriber numbers would continue to fall, and local governments would lose a major source of revenue.

6. The Florida Legislature answered the call of the local cable industry and local governments in 2001 by subjecting satellite TV subscribers to a nearly 60% higher sales tax rate than cable subscribers. Significantly, it distinguished between the two based on "the use of ground . . . distribution equipment" in Florida. § 202.11(6), Fla. Stat. (incorporating 47 U.S.C. § 303(v)). Thus, with the Florida Legislature's help, the cable industry and local governments succeeded in artificially increasing the tax on satellite TV and therefore on its main competitor's ultimate price.

7. The tax has yielded exactly the competitive advantage that cable advocated: satellite TV providers, like plaintiffs, have lost an estimated 300,000 subscribers as a result of the discriminatory tax. Plaintiffs have also collected and remitted to the State at least \$150 million more in states sales taxes than if they distributed their programming to subscribers via ground equipment in Florida.

8. But this is not the only example of a local cable industry using its in-state economic leverage to enact a discriminatory tax against satellite TV subscribers. During the past eight years, cable lobbyists have used similar protectionist arguments to persuade six other state legislatures to enact similar discriminatory tax statutes. Those arguments typically turn on the

same basic theme: Cable is the in-state provider that invests in state and local government, while satellite TV is the "national company" that takes jobs and tax revenues out of the state.

9. Imposing a higher sales tax on satellite TV subscribers than on cable subscribers discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution. The purpose and effect of the discriminatory sales tax is protectionist. It confers an unfair competitive advantage on local cable operators that provide their programming through "the use of ground . . . distribution equipment" in Florida, and a competitive disadvantage on satellite TV providers who transmit their programming directly to subscribers' homes from satellites located in outer space. The Commerce Clause prohibits a state from imposing a tax that depends upon whether a business performs a specified function within the state—whether that function is building a manufacturing plant, building a distribution facility, or building a network of cables.

10. The discriminatory sales tax also violates the Equal Protection Clause of the United States Constitution because it serves no legitimate public purpose and has no rational basis for the discrimination between satellite TV and cable. The lower sales tax imposed on cable subscribers serves only the parochial economic interests of those businesses and local government entities, and deprives the public of sales tax revenues. There is no rational basis for taxing satellite subscribers at a rate of 10.8%, but not cable subscribers, when the latter imposes far greater demands than the former on the State for services, infrastructure, easements, and environmental impact.

11. Accordingly, plaintiffs—the two main providers of satellite TV service in Florida and nationally—have brought this lawsuit under sections 26.012, 86.011, and 86.021, Florida Statutes, to obtain (a) a declaratory judgment holding that section 202.12(1)(c), Florida Statutes,

is unconstitutional; (b) a permanent injunction against enforcement of that statute; and (c) a refund of taxes remitted pursuant to that statute.

#### THE PARTIES

12. Plaintiffs are providers of multi-channel video programming distribution ("MVPD"). They offer their programming through "direct broadcast satellite" service, abbreviated as "DBS."

13. DIRECTV is a corporation organized in the State of California and is headquartered in El Segundo, California. It currently provides service to approximately 1.1 million residential subscribers in Florida, and approximately 16.4 million residential subscribers nationwide.

14. DISH is a limited liability company organized under the laws of the State of Colorado and headquartered in Engelwood, Colorado. It currently provides service to approximately 560,000 residential subscribers in Florida, and 13.6 million residential subscribers nationwide.

15. The Florida Department of Revenue ("DOR") is an agency established under the laws of the State of Florida. DOR collects, administers, and enforces the taxes that are the subject of this action.

#### JURISDICTION AND VENUE

16. This action arises under: (a) the Commerce Clause of Article I of the United States Constitution; and (b) the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The amount in controversy exceeds \$15,000 exclusive of interest, costs, and attorney's fees. This Court has subject matter jurisdiction under sections 26.012, 86.011, and 86.021, Florida Statutes.

17. Venue is proper in this Circuit under section 47.011, Florida Statutes, because DOR's principal headquarters is located in Leon County.

### SUBSTANTIVE ALLEGATIONS

#### A. *The Local Cable Monopoly and the Local Governmental Entities Face a New Threat From Satellite TV*

18. This is a story of local protectionism. For some 20 years, beginning in the late 1970s, any Florida consumer who wanted to subscribe to a broad menu of television programming was stuck with one option: the local cable monopoly.

19. Cable companies exploited their monopoly power, subjecting customers to ever-increasing price hikes that bore no relation to cable's costs. What is more, like any entrenched monopoly, cable had little incentive to provide good service, to respond to customers' needs, or to innovate. Consumers fumed over the notoriously high prices and poor service, but they had no other alternative.

20. Into this competitive vacuum entered satellite TV. Both cable television and satellite TV offer subscribers a variety of programming packages, including basic channels (such as CNN, ESPN, and C-SPAN), premium channels (such as HBO and Showtime), pay-per-view shows, and local broadcast stations. According to the United States Department of Justice, "[c]able and DBS are both MVPD products. While the programming services are delivered via different technologies, consumers view the services as similar and to a large degree substitutable." Complaint, *United States v. Primestar, Inc.*, Civil No. 1:98CV01193 (JLG) (D.D.C.) (May 12, 1998), ¶ 63.

21. The emergence of satellite TV meant that a consumer who was once captive to the cable monopoly now had an alternative. The consumer could choose satellite TV over cable based on what really matters: price, service, and the specific package of programs offered. That,

as it turns out, is precisely what consumers have done: Satellite TV has made significant inroads into cable's monopoly to become "the principal competitor to cable television service." FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd. 6005, 6037 ¶ 61 (2001). Indeed, in a report issued in March 2007, the National Cable & Telecommunications Association ("NCTA") admitted that "DBS is an effective substitute for cable's video services" and "is a proven competitor in the multichannel video market."

**B. *Cable Versus Satellite Technologies and the Use of Ground Receiving Equipment***

22. Since cable and satellite TV providers offer similar services, it should be no surprise that they have the same basic business model. Their programming content comes mainly from negotiations with cable networks like CNN and ESPN, movie studios, and local broadcasters.

23. Both send this content to assembly points. For satellite TV providers, these assembly points are satellite "uplink" facilities located outside of Florida. For cable systems, these assembly points are local "headends"—one for each city or county, or, in a few instances, a small number of cities or counties. At these assembly points—uplink facilities and headends respectively—the raw material (i.e., programming content) is assembled and processed into programming packages.

24. The only material difference between the two types of providers involves how those programming packages are delivered to subscribers. Cable companies distribute their service from local headends through elaborate local networks of ground equipment running to the home, whereas satellite TV providers beam signals directly from satellites in outer space to their customers' homes.

C. *Cable is as Big a Part of Florida's Local Economy as Orange Juice and Mickey Mouse*

25. Within Florida's borders alone, thousands of headends serve Florida cable residents. These headends are like local distribution centers, where a manufacturer might put the finishing touches on a product for delivery to the consumer. At each headend, the local cable provider merges the package of programming with content from the local broadcast channels.

26. From the cable headend, the final programming package travels along "trunk" and then "feeder" cable lines that are laid in trenches along streets or hung on electric utility poles. The signal reaches consumers via "drop" lines that are connected to the residence. Thus, cable distributes its product and television programming, through an intricate web of veins and capillaries that run on, or under, the ground *in* Florida, tracing paths from a headend on the ground to each of the five million Florida homes that subscribe to cable.

27. This distribution mechanism translates into an enormous local footprint in the State. Local cable providers have laid approximately 76,717 miles of cable in Florida—enough to wrap around the world more than twice. Those providers have invested billions of dollars in their network of ground equipment, and in related repair and maintenance facilities. They employ thousands of Florida residents, most of them to construct, operate, and maintain those networks, and to connect and disconnect drop lines that reach their subscribers.

28. It should come as no surprise, then, that cable's footprint also extends into the halls of the Florida Legislature. In 2000, the year before the enactment of the discriminatory tax at issue in this lawsuit, the cable industry's trade association, the Florida Cable and Telecommunications Association ("FTCA") had more registered lobbyists than two staples of the Florida economy combined: Disney World and the citrus industry. The FTCA also contributed nearly \$400,000 that year to 154 different members of the Legislature.

29. Cable's vast ground networks also translate into significant revenues for local governments: The cables that distribute television signals to local neighborhoods typically run through local rights-of-way. Thus, obtaining access rights to these rights-of-way is an essential requirement for any company that provides cable television service. Until 2007, it was necessary for a cable company to enter into a franchise agreement with the local municipality or county to obtain that access. That agreement allowed the cable company use of public rights-of-way in order to run trunk and feeder lines and connect to subscribers' premises.

30. A near universal condition of any franchise agreement—at least until October 2001—was that the cable company was required to pay the local government a franchise fee in exchange for its use of these public rights-of-way and to compensate the local government for the costs associated with administering the franchise. This fee was typically three to five percent of the cable company's gross revenues derived from its activities in the franchise area.

31. In this sense, local governments were cable's business partners. They granted the local cable providers valuable (and essential) property rights in return for a cut of the revenues. And, those revenues were not insignificant. To the contrary, they were one of the primary streams of revenue that local governments relied upon to provide essential services to residents, pay the salary and health benefits of government employees, and pay down municipal bonds sold to investors.

32. Local governments, therefore, had a vested interest in cable's success. The calculus was simple: The more people subscribe to cable, the more revenue would pour into the local franchise area, and the more franchise fees that went to the local government; conversely, fewer cable subscribers meant less revenue for the local franchise area, and less franchise fee revenue for the local government.

**D. *Satellite TV Does Not Need to Lay Down Roots in Florida to Deliver its Services***

33. Satellite TV providers do not use locally based facilities to deliver service to their customers. Instead, they deliver their service directly to subscribers by means of satellites stationed high above the Earth's equator at fixed longitudes and at a fixed altitude (22,300 miles). Customers receive the signal directly from the satellite using a small satellite dish mounted on or near their house or apartment. The signal is then transmitted to a receiver/decoder system, or "set-top box," connected to the subscriber's television set.

34. Because satellite TV providers transmit the programming signal directly from the satellite to the customer's home, they, unlike cable, do not have ground distribution equipment within Florida. This distinction is crucial for two reasons.

35. First, it means that satellite TV providers do not need to hire armies of workers to lay and maintain cable. Neither plaintiff has an office in Florida, and the companies employ only a fraction of Florida residents as compared to the thousands employed by the cable industry. Nor does satellite TV have any presence in the Florida Legislature. In comparison to the 24 lobbyists registered in 2008 to represent the interests of the cable industry, satellite TV did not have a single lobbyist on retainer in Florida during the period of January 2000 through October 2008.

36. Second, satellite TV providers do not need access to local rights-of-way in order to deliver their service to subscribers. For that reason, Congress, in the Telecommunications Act of 1996, prohibited local and state governments from regulating satellite TV service through franchise agreements, statutes, or ordinances and granted the Federal Communications Commission exclusive regulatory jurisdiction. For the same reason, in the same act, Congress prohibited local governments from imposing franchise fees or other obligations on satellite TV providers. Rep. Henry Hyde, then Chair of the House Judiciary Committee, explained that the

preemption of local taxes on satellite TV services "reflects a legislative determination that the provision of direct-to-home satellite service is *national, not local in nature*." 142 Cong. Rec. 2,219 (1996).

37. This is not to suggest that satellite TV providers do not have their own costs of doing business. To the contrary, it costs DIRECTV and DISH anywhere from \$285 million to \$350 million per year to purchase, launch, maintain, and insure a *single* one of the satellites in their respective fleets. DIRECTV and DISH, however, do not break this expense out as a separate line item on subscriber's monthly bills as cable does with franchise fees.

**E. *Satellite Emerges as a True Rival to Cable in the Late 1990s***

38. Satellite TV was first available to Florida consumers in 1994. Within seven years, the number of satellite TV subscribers in the United States grew from less than 1 million subscribers in December 1994 to more than 16 million subscribers in December 2001.

39. The meteoric rise in satellite TV subscribership presented the first real threat to the local cable industry's 20-year monopoly over the Florida MVPD market. At the same time, it also raised two potential issues for cable's *de facto* business partners, the State and local governments.

40. First, as more cable subscribers switched their service to satellite TV or new subscribers chose satellite TV instead of cable, local cable providers would be less inclined to lay new cable in the State. This, in turn, would lead to a smaller investment in the State as fewer employees would be needed to develop infrastructure or service customers.

41. Second, local cities and counties in Florida would begin to receive less revenue—by way of franchise fees—from the local cable providers. This meant there would be less

revenue to pay for essential services to residents, hire employees to work in the schools or collect trash, and pay investors who purchased municipal bonds.

***F. Cable and Local Governments Form a Partnership to Enact Protectionist Legislation***

42. In 1999, an independent work group comprised of representatives from the Florida Cable Telecommunications Association ("FCTA"), the Florida Telecommunications Industry Association, the Florida League of Counties, the Florida Association of Cities, and both houses of the Florida Legislature convened to develop a tax reform proposal for the telecommunications industry (the "Work Group"). The only telecommunications provider not invited to the Work group: Satellite TV.

43. This omission was not accidental. After several meetings—none of which were attended by representatives from the satellite TV industry—the Work Group agreed upon a proposal that would, among other things, impose a substantially higher state sales tax on satellite TV than on cable or any other communications service. This proposal was subsequently introduced—with no substantive changes—in the Florida Legislature as the Communications Services Tax Simplification Law.

44. In the months that followed, the members of the Work Group made no bones about the protectionist rationale for the discriminatory tax. For example, during an April 9, 2001 hearing of the Senate Finance and Taxation Committee, a representative from the Work Group defended the discriminatory tax as "competitively neutral." But as indicated from his statements to the Committee below, the actual aim of the proposed legislation was to neutralize the competitive advantage that satellite TV enjoyed over cable as a result of its advanced technology. As discussed above, this technology enabled satellite TV to avoid paying a

"franchise fee" for the access rights to the local roads and sidewalks—a cost unique to cable's method of signal delivery:

[S]ome of the [communications] services are competitive, even though they are provided by different technologies and existing tax treat different competing technologies differently. What this bill does is treat them all the same so they're all competitively neutral. *This competitive neutrality also helps what we call tax erosion. For example, 3 out of every 5 new television customers are going to satellite. But local governments do not get the local taxes from satellite that they do from cable. So you'll see a lot of local tax erosion if this bill were not to pass.*

45. This protectionist rationale was echoed by Charles Dudley, general counsel to the FCTA and cable's lead lobbyist, during the same hearing: "We think overall everyone's going to be better off. [W]e think what happens is . . . that **many new customers are getting their services from satellite, so local governments get no revenue from the satellite customer [under the existing tax regime].** So we think that overall it's a good plan." Mr. Dudley's message to the Committee was clear: Unless the State enacted the discriminatory tax scheme proposed by the Work Group, local businesses (like cable) would lose subscribers and revenue to out-of-state companies (like plaintiffs), and local governments, in turn, would receive less revenue—in the form of "franchise fees" or "rent"—from those local businesses.

46. Following the hearing, the Committee unanimously voted to report the bill back to the Senate for a vote. Less than one month later, on May 2, 2001, the Senate passed an amended version of the Communications Services Tax Simplification Law that included the same discriminatory tax scheme proposed by the so-called "independent" Work Group and voted upon by the Senate Finance and Taxation Committee in April 2001.

47. This protectionist theme has become a mantra for local cable industry trade associations across the country. In 2002, for instance, the Ohio Cable Telecommunications

Association ("OCTA") engaged in a massive lobbying effort to persuade the state legislature to enact a satellite-only sales tax. The OCTA's message: Local cable companies should not be taxed because of the breadth of their economic activity in the State:

Unlike satellite or other wireless providers of [television] services . . . cable operators must construct and maintain an interconnected network of cables and other physical system assets which cross the state . . . [C]able operators and telephone companies must make and maintain a significant investment in [the State] in terms of tangible property, equipment and employees, whereas other service providers such as wireless and satellite companies require virtually no investment in [the State] in order to compete.

48. The OCTA even created a "resource kit" for state legislators" that included a chart entitled: "Cable vs. Satellite: Contributions to Ohio Government and Communities." The chart touted cable's economic connection to the state, all stemming from its ground distribution equipment, and highlighted the fact that cable employed more than 6,000 people across the State, paid more than \$57 million each year in franchise fees to local governments, and over \$31 million in property taxes to the State. Satellite TV, in contrast, was portrayed as an "out-of-state interest that does not care about" the State; "[p]rovides [state residents] with very few job opportunities, [d]oesn't pay an appreciable tax of any kind anywhere in [the State] . . . [and h]as not done much of anything to support local communities."

49. Thus, cable's message in Florida and elsewhere is clear: Because of their ground distribution equipment, cable companies are intensely local businesses who are heavily invested in state and local governments. If state legislatures are interested in protecting these local businesses and the revenue they generate for state and local governments, they must enact a discriminatory tax against satellite TV services to tilt the competitive playing field to cable's advantage.

50. The result is that plaintiffs are specifically penalized for innovation and entrepreneurship is discouraged.

**G. *Florida's Discriminatory Tax Scheme***

51. Before October 1, 2001, satellite TV and cable television services in Florida were subject to a uniform state sales tax of six percent. *See* § 212.05, Fla. Stat. (1999) (imposing a tax of six percent on [a]ny TV system program service.") That tax was repealed by the Communications Services Tax Simplification Law ("CST").

52. In lieu of the sales tax, the CST imposed a specific tax on the retail sales of all communications services, including both cable TV and satellite TV. The Act, however, singled out satellite TV and subjected its services to a substantially higher tax rate than cable TV services—nearly 60% higher. The special rate applicable to satellite TV services is 10.8 percent of the sales price. § 202.12(b), Fla. Stat. The rate applicable to cable services is only 6.8 percent of the sales price. *Id.* § 202.12(a).

53. The statutory defining feature of satellite TV service that sets it apart from all other forms of communications services, including cable TV, is that, to provide its service, satellite TV does not employ "the use of ground . . . distribution equipment" in the State of Florida. § 202.11(6), Fla. Stat. (incorporating 47 U.S.C. § 303(v)).

**H. *The Discriminatory Tax Has Artificially Reduced the Number of DBS Subscribers in the State of Florida***

54. Satellite companies compete with cable companies by providing similar programming packages. In choosing between satellite TV and cable TV, consumers consider price to be a significant factor. Florida's tax regime gives a substantial price advantage to cable companies over satellite companies such as Plaintiffs.

55. This price advantage has translated into a significant loss of customers for plaintiffs. This loss can be estimated from the results of a 2001 study conducted by two University of Chicago Graduate School Business professors, which concluded that every one percent increase in price for satellite TV services would lead to a 4 to 5 percent decrease in demand. This study indicates that Florida's discriminatory tax has cost plaintiffs anywhere from 225,000 to 300,000 subscribers since it was enacted in 2002.

56. These numbers are consistent with research conducted by Dr. Jerry Wind, the Lauder Professor and Professor of Marketing at the Wharton School of the University of Pennsylvania, on the impact of a similar discriminatory tax in Ohio on demand for DBS. Based on a double blind telephone survey of approximately 1,015 consumers, Dr. Wind found that 18% of Ohio TV households said they had been affected by the sales tax on satellite TV. There is no reason to believe that these results would not be the same in Florida.

57. In addition to the competitive injury it has suffered as a result of the enactment of the CST, plaintiffs estimate that since October 1, 2001, they have collected and remitted at least \$150 million more than they would have been required to collect and remit to the State if they earned the same statewide revenues but distributed their programming to subscribers via ground equipment in Florida.

### COUNT I

#### **(Violation of the Federal Commerce Clause)**

58. Plaintiffs incorporate and re-allege the allegations of paragraphs 1 through 56 as though fully set forth herein.

59. Florida's tax regime discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution.

60. The State of Florida is discriminating among providers of multi-channel television services. It is basing that discrimination upon whether a given provider has invested in utilizing a costly infrastructure of "local ground receiving or distribution equipment" in Florida. 47 U.S.C. § 303(v) (incorporated by § 202.11(6), Fla. Stat.). In other words, the State has made favorable tax treatment dependent on whether one element of distributing multi-channel television services—specifically, the ultimate transmission of programming signals to subscribers—is conducted in such a way as to provide a significant economic benefit to the State and its residents. Satellite companies and their customers are punished because satellite television *does not* require the utilization of a costly infrastructure of ground equipment in Florida, while cable companies are rewarded because cable television *does* require the utilization of ground equipment in Florida.

61. Florida's discriminatory tax regime violates the Commerce Clause in three independent ways:

(a) First, the tax regime has a discriminatory *purpose*. The CST was drafted by the Work Group—a committee of local industry and government representatives that had every incentive to draft legislation that would discriminate against satellite TV. When asked to defend its proposal, the Work Group expressly acknowledged the discriminatory nature of the tax against satellite TV and the protectionist rationale behind the tax. Despite this, the Florida Legislature adopted, and enacted the bill, without making any material changes to the draft. In doing so, the Florida Legislature adopted, as its own, the discriminatory purpose of the statute.

(b) Second, the discrimination is *facial*, meaning it is discernible from the face of the relevant Florida Statutes. Section 202.11(6), Florida Statutes, explicitly requires different tax treatment of companies based on whether or not they distribute their programming via

“ground receiving or distribution equipment” in the State of Florida. 47 U.S.C. § 303(v) (incorporated by § 202.11(6), Fla. Stat.).

(c) Third, the Florida regime is unlawful because it has the *practical effect* of discriminating against interstate commerce. The effects of Florida’s tax regime are apparent: it artificially increases the price of satellite TV. That makes satellite TV a less attractive option for consumers. Conversely, it also makes cable TV a more attractive option.

62. The pernicious effects of the Florida regime are further demonstrated by Congress’s efforts to remove barriers to competition in the market for multi-channel video programming. The Florida regime frustrates the federal policy of promoting satellite TV as a real source of competition with entrenched cable monopolies.

63. Florida’s discriminatory tax on satellite TV services cannot be excused as a “compensatory” tax. Under the compensatory tax doctrine, a state may impose a tax on *interstate* activities to compensate for a corresponding tax on *intrastate* activities. This defense is limited, however, to the narrow context of a use tax that compensates for an in-state sales tax (a situation that has no relation to this lawsuit).

64. Florida’s higher sales tax on satellite TV is not a compensatory tax. While the State allows localities to impose an additional tax on cable TV services, *see* § 202.19 Fla. Stat., that tax is for an entirely different purpose than the statewide tax imposed under section 202.12, Florida Statutes. The statewide tax is imposed for the “privilege” of “engag[ing] in the business of selling communications services at retail *in this state*.” *Id.* § 202.12 (emphasis added). By contrast, the local tax is imposed “in lieu of any fee or other consideration . . . to which the *municipality* is otherwise entitled for granting permission to dealers of communications services . . . to use or occupy its roads or rights of way for the placement, construction, and maintenance

of poles, wires, and other fixtures used in the provision of communications services.” § 202.19(3)(a), Fla. Stat. (emphasis added). Thus, the statewide tax is based on the conducting of business in *Florida*, while the local tax accounts for the “use or occup[ation]” of a given *municipality’s* “roads or rights of way”—in other words, they are the express replacement of cable’s franchise fees.

65. Nor are the two taxes imposed on equivalent, or even remotely similar, events. Any video provider that conducts business in Florida faces the statewide tax imposed under section 202.12, Florida Statute. But a provider is subject to the local tax only if it conducts business within a given locality. Likewise, the local tax is explicitly designed to compensate municipalities for the “use of or occup[ation]” of “roads or rights of way” to install equipment. *Id.* § 202.19(3)(a). As noted, unlike cable companies, satellite companies do not use public roads or rights of way in order to deliver their programming service.

66. Moreover, the local tax on cable TV is not even required by the State. Rather, it is “discretionary” at the election of each individual locality. The statewide tax imposed by section 202.12, Florida Statute ensures that satellite companies will face a 10.8% sales tax for all their sales in Florida, but state law creates the possibility that cable companies will face little or no local tax in a given jurisdiction. By bestowing upon cable companies the valuable prospect of lower taxes in certain local jurisdictions, the State has treated cable companies and satellite companies differently. That differential treatment constitutes unlawful discrimination in violation of the Commerce Clause.

67. In sum, by imposing a 10.8% sales tax on satellite TV services but only a 6.8% sales tax on competing cable TV services, *see* § 202.12(a)–(b), Fla. Stat., the State of Florida discriminates against interstate commerce in violation of the Commerce Clause of the United

States Constitution. Florida's discriminatory tax regime has unlawfully raised the cost of Plaintiffs' services, thereby putting Plaintiffs at a competitive disadvantage relative to the cable companies with whom they compete for subscribers.

## COUNT II

### (Violation of the Federal Equal Protection Clause)

68. Plaintiffs incorporate and re-allege the allegations of paragraphs 1 through 66 as though fully set forth herein.

69. By taxing satellite TV services at a higher rate than cable TV services, Florida's tax regime unconstitutionally discriminates against Plaintiffs in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

70. The United States Supreme Court has held that the Equal Protection Clause forbids discriminatory state laws unless they "bear[] a rational relation to a legitimate state purpose."

71. Florida's discriminatory tax regime does not advance any legitimate state purpose. The State has no legitimate interest in discriminating between competing providers of multi-channel video programming based on whether they utilize "local ground receiving or distribution equipment" in transmitting their programming to subscribers. 47 U.S.C. § 303(v) (incorporated by § 202.11(5), Fla. Stat.). Rather, the discriminatory tax regime serves only the interest of local protectionism. As the Supreme Court has explained, such "parochial discrimination" is exactly what "the Equal Protection Clause was intended to prevent."

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for relief as follows:

1. The Court declare that section 202.12(1)(b), Florida Statutes, violates the Commerce Clause and the Equal Protection Clause of the United States Constitution by imposing a higher communications services sales tax on satellite TV services than on cable TV services.

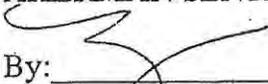
2. The Court award Plaintiffs refunds of the discriminatory portion of the communications services sales tax collected and remitted since October 1, 2002. That portion is equal to 4% of the sales used to calculate such taxes, which is the difference between the 10.8% tax imposed on satellite TV services and the 6.8% tax imposed on cable TV services.

3. The Court permanently enjoin Defendant from imposing a tax on satellite TV services that is higher than the tax imposed on cable TV services, and from imposing any sanction for failure to remit the discriminatory portion of such tax or any interest, costs, or fees.

4. For such other and further relief as the Court may deem just and proper.

Dated: October 31, 2008

AKERMAN SENTERFITT

By: 

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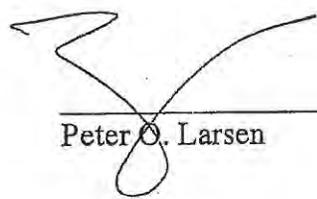
New York, New York 10103

Attorneys for Plaintiffs

DIRECTV, Inc. and DISH Network, LLC

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by U.S. Mail to J. Clifton Cox, Office of the Attorney General, Revenue Litigation Section, PL-01, The Capitol, Tallahassee, Florida 32399-1050, and Richard Lantinberg, 200 W. Forsyth Street, Suite 1200, Jacksonville, Florida 32202, this 31st day of October, 2008.

  
Peter O. Larsen

## **Agenda Item #4 & 5**

### **Discussion of Written Comments and Options**

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# Communications Services Tax Working Group

## Options and Written Comments

Received as of October 1, 2012

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### Submissions by:

- Charles Dudley
- Sharon Fox
- Gary Lindsey
- Mayor Gary Resnick
- Brian Smith
- Marshall Stranburg
- Florida Retail Federation
- AT&T, CenturyLink, Sprint, T-Mobile, and Verizon

# Communications Services Tax Working Group

## Options for Consideration

Submitted by Working Group Member:

Charles Dudley

CST Task Force Options and Background  
Submitted by Task Force Member Charles Dudley  
September 14, 2012

- I. Findings - based on testimony and written materials presented to the Task Force. The following are my interpretation/observations for suggested Findings:
- A. CST state and local revenues have been and are projected to continue to decline. Several reasons for this were presented by DOR staff and others:
1. Substitution of "non-taxable" services, mostly delivered over the Internet (i.e., over the top services), for taxable services - video and voice examples were provided and demonstrated (*August 21, 2012 Agenda, Tabs 5 & 6*)
  2. While there is a "use tax" component of the CST, the same administrative and enforcement problems that DOR faces in regard to the sales and use tax on the on-line sale of goods and services negatively impacts CST receipts (*August 21, 2012 Agenda, Tabs 5 & 7*).
  3. The growth of "pre-paid" wireless, as a substitute for more traditional, post-pay plans, has impacted CST receipts. There is a dispute over the statutory interpretation of the application of the CST to pre-paid wireless, but the DOR has issued a formal opinion saying pre-paid is taxable under CST. Retailers testified that they are NOT dealers of communications services. Providers of pre-paid wireless services and retailers presented legal counter arguments to the DOR interpretation and several administrative issues that make collection/enforcement of the CST on pre-paid very difficult and some would say impossible, especially since 72% of these pre-paid services are sold by non-dealer third parties and 17% via remote sales (*July 25, 2012 Agenda, Tab 7, Slide 4*).
- According to the DOR survey, nearly every other state subjects pre-paid to sales tax only. (*June 11, 2012 Agenda, Tab 4, Slides 33 and 40*) The pre-paid/CST issue is one that may require more time, study and review - similar to the approach taken regarding the application of Florida's 911 fee to pre-paid wireless. Interestingly, the title of one of our pre-paid presentations—"31 Flavors of Pay Go, Pay-as-you-Go, Pay in Advance, Pay & 60, Pre-Pay..."-- illustrates many of the difficulties in defining and implementing changes to the taxation of pre-paid. (*July 25, 2012 Agenda, Tab 7*)
4. While the use of wireless services has clearly increased dramatically, prices have fallen, impacting CST receipts, while the growth of internet access services which are exempt under federal and state law from taxation has

resulted in reduced CST receipts. *(Several DOR presentations to date and EDR)*

- B. DOR audits over the last 12 years have resulted in the additional collection of revenues that represent **less than 1%** of total CST collections, while costing the DOR auditors over 60,000 hours (nearly 50% of total = 121,336). DOR testified and presented data that over 50% of its CST audit staff's time and energy was spent on "situsing" issues, but the resolution of those issues only resulted in "around 20%" of the total additional revenues collected. *(August 21, 2012 Agenda, Tab 7)*
- C. As wireless devices and services have grown exponentially, landline service has correspondingly decreased. *(June 11, 2012 Agenda, Tab 5, Slide 16)* All wireless accounts are determined to be "non-residential" under the CST and so customers who use their wireless phones as their primary phone or as a substitute for their former landline phone, do not receive the benefits of the partial residential exemption to the state sales tax component of the CST *(June 11, 2012 Agenda, Tab 8)*. The residential exemption in 2012-13 has a value of \$124m. If repealed, and the state sales tax component of the state CST was reduced in a revenue neutral manner, the current 6.65% sales tax rate component would become 5.95%, resulting in an overall rate of 8.47% on all communications services subject to the State CST. *(July 25, 2012 Agenda, Tab 6, Slide 11 and phone call with B. McKee)*
- D. Florida has the highest state CST taxes in the country and the second largest variance of local CST tax rates according to the DOR survey. *(June 11, 2012 Agenda, Tab 4, Slides 24 and 25)*
- E. Local governments rely on their CST revenues as a source of general operating revenue as well one of their more reliable sources of revenues to pledge in cases of bond financing. Any changes to the CST law that impact the amount of local CST revenues need to take into account these factors *(July 25, 2012 Agenda, Tab 5)*, and, according to our Mission, our options should not "unduly" reduce local CST revenues *(August 21, 2012 Agenda, Tab 1)*.
- F. The revenues generated by the State gross receipts portion of the CST have similarly decreased over the last several years - and when combined with falling utility gross receipts - has limited the state's ability to issue new bonds for school construction. There was no option or other ideas presented for how to address this issue in terms of changes to the CST, but any changes should take into account their impact on these receipts. *(June 25, 2012 Agenda, Tab 8)*

## II. Options

At the July 25, 2012 Agenda, DOR put forth at Tab 4, Slide 6, Guiding Principles for how a tax structure would ideally function: Reliable, Simple, Neutral, Transparent,

Fair, and Modern. Clearly, Florida's CST needs significant reform in nearly every one of these areas, especially given the pace of technological change over the last 11 years since the CST's effective date.

In reviewing the materials and testimony presented to the Task Force to date, these suggested Guiding Principles, and the statutory "Mission" of the Task Force, I would offer the following options for consideration:

**Option A** - eliminate the partial residential exemption for voice services from the state sales tax component of the CST and suggest a corresponding revenue neutral reduction in that tax rate.

**Option B** - eliminate the situsing requirements for the local CST component and move to a single statewide CST rate as is currently done for DBS service, the rate of which is 13.17%. DOR and interested parties would work to develop a distribution mechanism similar to what is currently done with 4% of the DBS tax to cities/counties. There may need to be a phase-in moving to the 13.17% unified tax rate (or lower upon adoption of Option A and reduction of the state sales tax component of the state CST) in which the impact on each city and county could be minimized by guaranteeing certain revenue amounts; additional state CST revenues could be added to the distribution pool for sharing; or other methods consistent with the Guiding Principles and Mission.

While many details would remain for further review and discussion, I submit that these options would meet the criteria set out in the suggested Guiding Principles and the Mission of the Task Force.

# Communications Services Tax Working Group

## Options for Consideration

Submitted by Working Group Member:

Sharon Fox

**Introduction:**

The development of the CST was a consensus effort of the state, communications service providers, and local governments, intended to simplify the administrative burden of the seven different state and local taxes and fees for both the communications industry and local governments, by employing the Florida Department of Revenue (DOR) to receive, track, and distribute the resulting tax revenues and audit any discrepancies, as they already did for the state's sales and gross receipts taxes.

The CST was initially implemented to cover the broad spectrum of communications services, such that all communications services were taxed, giving no one service provider or communications service delivery method benefit over another, no matter the technology used. Additionally, the taxable base was broadened, such that the seven different state and local taxes and fees, when bundled into a single tax on the larger base, provided revenue neutrality and a stable, bondable revenue source to each of the governmental entities, a single entity for the communications industry to be accountable to for reporting and collection purposes, and a reduced cumulative tax rate on communication services for taxpayers.

Legislative and technological changes which have occurred over the past several years have resulted in a diminution of CST revenues to the state and to local governments, diminishing the reliability of this revenue stream for future bonding needs. These changes have additionally resulted in like services being taxed differently depending on the service provider or method of sale, causing the very discrimination that the Communications Services Tax Simplification Law was intended to prevent and confusing taxpayers in the process.

We have heard industry members' concerns regarding the difficulty in situsing services to the appropriate local jurisdiction, particularly regarding the taxable prepaid market; and the complexity and time-consuming nature of CST audits, given the number of jurisdictions involved, the available records, and the limited resources available to DOR.

In this light, municipal governments propose a number of options which, while individually not sufficient to address all noted concerns, when taken in combination with others may provide assistance in stabilizing the revenue stream for state and local governments, address concerns voiced by DOR regarding the complexity of administration, and provide the communications industry with relief regarding the prepaid service market and removing competitive advantages within the industry.

**Option #1: Further broaden the taxable base, including all like services without exemption, no matter the technology or service provider used.** (a) Eliminate the prepaid calling arrangement tax exemption in its entirety, and establish a methodology to assess a tiered surcharge, based upon the amount of the sale and sitused to the place of purchase. Industry presentations indicated that the bulk of the retail prepaid sales is repeat walk-in business, which leads one to conclude that the location of the sale is in the vicinity of its use. Given the lack of personal data collected, the place of a prepaid cash sale is a reasonable location for situsing for CST purposes. The retail presenters seemed to indicate that taxation in this situation was do-able through a surcharge at the point of sale, while they were averse to a different tax rate for prepaid sales, as vending machines and small retail establishments could accommodate a surcharge better than a varying tax rate. Tiering would prevent a customer from paying

the same amount of surcharge on a \$20 basic prepaid calling plan as would be paid on a \$120 enhanced prepaid calling plan, while further stabilizing the revenues currently being lost for lack of situsing ability.

(b) If prepaid calling plans and arrangements cannot be taxed or surcharged at the point of sale, tax each minute of use using the 9-1-1 location from which the minutes are sent to situs the tax.

(c) Eliminate the state residential tax exemption on communication services, which would make the administration and audit of the CST less burdensome, by further homogenizing the base for both the local and state components of the base.

**Option #2: Unbundle franchise fees from the Communications Services Tax and return franchise fees and the administration of franchise agreements to local government.** Franchise fees have traditionally been seen as license to do business within a specific jurisdiction for the privilege of providing services for profit for the company using the rights-of-way, and rent for the use of the jurisdiction's rights-of-way, in lieu of the need to contract with each parcel owner along the route where facilities have been placed (be they for electric, gas, communications, chilled water, etc.) Local franchise fees on gross revenues generated through the use of local rights-of-way is a nationwide method of providing a stable revenue stream for use for debt service or other local purpose, and most states other than Florida continue to allow franchise fees for use of rights-of-way by communications service providers, in addition to any other state and local taxes and fees. Franchise fees are simply another expense associated with a particular business model, i.e. the cost of renting rights-of-way for the physical placement of facilities. It is not a cost that satellite providers incur, but neither do cable operators have the same cost structure for technology that satellite providers have. Consequently, returning to the local collection of franchise fees is not violative of the goal of tax neutrality within the industry.

**Option #3: Substitute an alternate, stable and revenue-neutral combination of revenue sources to replace the utility tax, franchise fee and permit fee components of the original CST bundle of seven taxes and fees.** The alternate revenue stream should be able to be used for any public purpose, from continuing local government operations to public safety expenditures to debt service payments on infrastructure improvements, etc.

**Option #4: Provide additional resources for DOR to increase audit capacity, given the complex and time-consuming nature of CST audits.** (a) DOR currently has the authority to assess up to 1% of the total revenue generated for all taxing jurisdictions, and the total administrative costs must be prorated among those taxing jurisdictions on the basis of the amount collected for a particular jurisdiction to the total amount collected for all jurisdictions. However, the full assessment is not being spent to support audits for local government CST components. Municipal governments believe that adequate resources should be made available to the Department of Revenue such that they are able to perform the audit functions necessary to maximize revenues and minimize non-compliance. Additionally, if an increase in the 1% allowed by statute is necessary in order to justify additional audit coverage and audit manpower, then we support the 1% be increased.

(b) **Municipal government believes that the definition of "additional resources" should include financial sanctions (such as loss of collection allowance) for communications service dealers who do not comply with due diligence requirements in the assignment and maintenance of customers to local taxing jurisdictions.** Simplification should not mean that communications services providers are allowed to disregard the situsing provisions of Chapter 202, as such tactics merely punish the taxpayers who do not receive the benefit of their taxes, add additional burden to DOR to determine where the

communications service providers customers are located, and relieve service providers of the accountability for the task for which they are paid with collection allowances. Consequently, recent changes made to Chapter 202.22 (5) and (6) should be reversed.

**Option #5: Reverse 2012 statutory changes to Chapter 202.11(13) allowing books and records to be used when determining sales price for other than internet access services when non-taxable property or other services are bundled as part of the sale and for which the charge is not separately itemized on a customer's bill.** This provision is contrary to how Florida Sales and Use Tax is administered in Chapter 212, thereby increasing the complexity and administrative burden on the Department of Revenue, while adding yet another loophole to diminish the stability of the CST. Communications service providers previously had the option of separately stating charges for taxable and non-taxable items, and could revert back to that ability.

**Option #6: Unbundle permit fees from the Communications Services Tax and return permit fees and the administration of permit fees to local government.** If franchise fees are unbundled from the CST for local administration, then rights-of-way construction permit fees might also be considered to be unbundled for local administration. The local governments have the responsibility of making sure that construction in the local rights-of-way is done properly and that the construction site is restored to its original condition, for the safety of the traveling public. Permit fees cover the costs to review plans and inspect the work sites. Providers sometimes forget the purpose of construction permits when there is no direct cost associated with them.

**Option #7: Municipal government recommends that a working group chaired by the Department of Revenue be convened to draft legislation to implement consensus recommendations.** The options above are offered in the spirit of beginning a meaningful dialogue on the difficult issues before the CST Working Group. They are not meant to be exclusive and it is certain that additional new ideas will be identified as the Working Group continues its work. But we believe it is incumbent on all to begin to discuss solutions to the various problems that have been identified to date, and these options are offered to begin the discussion.

# Communications Services Tax Working Group

## Options for Consideration

Submitted by Working Group Member:

Gary Lindsey

**Florida Communications Services Tax Working Group**  
**Submittal of Options for Consideration**  
Gary S. Lindsey

**Introduction**

Florida law Section 12 of Chapter 2012-70 charges the Communications Services Tax (CST) Working Group with the responsibility to review data and information about the current Florida CST obtained from the Working Group meetings and material presented by stakeholders and to then identify options for 1) streamlining the administrative system and 2) to identify options that remove competitive advantages within the industry as it relates to the state's tax structure without unduly reducing revenue to local governments. It was decided in the August 21st Working Group meeting that each member of the Working Group would submit his/her own list of options to the Working Group Chair by September 14, 2012. I am therefore submitting my list of options by way of this document.

**Summary of Options**

I have compiled the following options based on information and ideas from the Working Group meetings, from industry input and from my knowledge and experience in the area of tax policy. These options are listed below and discussed briefly in my analysis that follows.

- Maintain CST "As Is"
- Eliminate CST and Go Back to Traditional State/Local Taxes and Fees
- Eliminate CST and Apply Florida Sales and Use Tax
- Develop a Statewide CST That Applies To All Communications Service
- Address Issue Regarding the Application of CST to Prepaid Communications Services

**Communications Services Tax Background and Current Industry Perspective**

The 2001 adoption of Florida's CST represented forward looking reform that considered the rapid technological changes, growth, and increased competition that was taking place in the communications arena. This reform removed a myriad of taxes and fees that were linked to the rate based monopoly era in which local governments assessed taxes and fees, and regulated providers were able to recover the cost of local fees that were assessed directly on them through the ratemaking process. As unregulated providers entered the marketplace and as the industry shifted to a competitive model, the monopoly era tax and fee structure that still applied to certain communications services and not to others became highly discriminatory and unfair to customers and providers.

The 2001 CST represented a significant step forward; however the new structure effectively spread the old monopoly era taxes and fees over a broader base of communications services including satellite and wireless. The CST provided a much simpler structure than before for most providers, however there are still many complexities including those related to administering the local component of the tax. The CST was designed to encompass a broader base of services, however many traditional revenue streams that were perhaps considered a given in 2001 are diminishing, while new types of services are introduced constantly that may not necessarily fit into the CST taxation model. The rapid technological changes, growth, and increased competition that was evident in 2001 has only accelerated since that time.

As I consider these issues and ongoing changes, I am hopeful that my submission and analysis will contribute to the Working Group effort to collectively generate new ideas that address these ongoing changes and that can lead to options that are administrable, that can generate adequate governmental revenues and that are fair to the Florida taxpayer.

## FLORIDA CST WORKING GROUP

(Gary Lindsey – AT&T – 9/14/2012)

### Methods of Analysis

It is my opinion that as the Working Group proceeds, each of the options submitted must be evaluated through application of certain assumptions and generally accepted benchmark measures which I list below. Many of these are complimentary to or overlap one another; therefore I am not suggesting a strict “checklist” but instead as items to consider holistically when the Working Group reviews each option.

Functionality – This is an understanding of the particular option’s working characteristics including but not limited to implementation, jurisdictional sourcing, ability to apply the tax to the array of communications services sold by CST providers, compliance (i.e., reporting and remittance by providers), and audit considerations.

Viability – This is an overall assessment of whether the option would have a reasonable chance of succeeding if adopted, including an assessment of attributes and potential problems for the particular option.

Tax Policy – the AICPA provides time-tested benchmarks to evaluate each option by reference to the AICPA’s “Ten Principles of Good Tax Policy” and the AICPA’s “Guiding Principles for Tax Equity and Fairness” Both of these references are listed below.

AICPA Ten Principles of Good Tax Policy:

([http://www.aicpa.org/InterestAreas/Tax/Resources/TaxLegislationPolicy/Advocacy/DownloadableDocuments/Tax\\_Policy\\_Concept\\_Statement\\_No.1.doc](http://www.aicpa.org/InterestAreas/Tax/Resources/TaxLegislationPolicy/Advocacy/DownloadableDocuments/Tax_Policy_Concept_Statement_No.1.doc))

1. Equity and Fairness - Similarly situated taxpayers should be taxed similarly.
2. Certainty - The tax rules should clearly specify when the tax is to be paid, how it is to be paid, and how the amount to be paid is to be determined.
3. Convenience of Payment - A tax should be due at a time or in a manner that is most likely to be convenient for the taxpayer.
4. Economy in Collection - The costs to collect a tax should be kept to a minimum for both the government and taxpayers.
5. Simplicity - The tax law should be simple so that taxpayers understand the rules and can comply with them correctly and in a cost-efficient manner.
6. Neutrality - The effect of the tax law on a taxpayer’s decisions as to how to carry out a particular transaction or whether to engage in a transaction should be kept to a minimum.
7. Economic Growth and Efficiency - The tax system should not impede or reduce the productive capacity of the economy.
8. Transparency and Visibility - Taxpayers should know that a tax exists and how and when it is imposed upon them and others.
9. Minimum Tax Gap - A tax should be structured to minimize noncompliance.

## FLORIDA CST WORKING GROUP

(Gary Lindsey – AT&T – 9/14/2012)

10. Appropriate Government Revenues - The tax system should enable the government to determine how much tax revenue will likely be collected and when.

Streamlining of the Administrative System – options for streamlining should be considered in light of the AICPA’s “Guiding Principles for Tax Simplification”.

AICPA Principles:

(<http://www.aicpa.org/InterestAreas/Tax/Resources/TaxLegislationPolicy/Advocacy/DownloadableDocuments/TPCS%20-%20-%20principles%20for%20tax%20simplification.pdf>)

- Make Simplification a Priority
- Seek Simplest Approaches
- Minimize Compliance Burdens
- Reduce Frequency of Tax Law Change
- Use Consistent Concepts and Definitions
- Consider Administrative Burdens
- Avoid Limited Applicability

Competitive Advantage – I consider this to be any aspect of the taxation that would in and of itself influence or compel a consumer to make a particular purchasing decision. This could be related to the applicability of the tax itself or related to the ability of a provider to administer a characteristic of the tax structure.

Revenue Neutrality – The Working Group Study requires options that do not unduly reduce existing tax revenues to local governments. There may be some options that generate sufficient revenue on a stand-alone basis and there may be options that may require some additional means to hold each local government relatively harmless with regard to revenue impact.

### **Other Comments**

There are certain issues that should also be considered and addressed in any of the options listed above. Some of these issues may be touched upon in my discussion of particular options or may reside within the tax policy benchmarks. I will list these issues below, at the risk of some redundancy, to help ensure that these are considered by the Working Group.

Sourcing/Audit issues - one of the primary challenges of the current CST is to correctly and consistently associate a customer’s address to the appropriate jurisdiction. Providers spend millions of dollars and human resources to have systems in place to accomplish this, and are yet still subjected to detailed audits that require further expenditure of dollars, time and effort of providers as well as the Department of Revenue. Providers are motivated by their taxpayer role and also of equal importance by the need to satisfy their customers by taxing them correctly. This task becomes increasingly complex with annexations, new subdivisions and the mobility of customers. A number of states have moved to a statewide tax in recognition of this growing complexity.

Nexus Issues – there are a growing number of entrants to the Florida marketplace that may have no physical presence in the state and are therefore not required to collect and remit the CST.

Internet Tax Freedom Act (“ITFA”) – may cause issues with taxing of package/bundled marketing plans that include internet service and other services. This may also cause limitations in the ability to tax certain new service offerings that are emerging in the marketplace.

## **List of CST Options and Comments**

### Maintain CST “As Is”

This option preserves the status quo. Growth in wireless may offset future landline cord cutting, and local governments may adopt some level of future rate increases to help preserve their tax revenue stream. This option does nothing to eliminate competitive issues or to enhance streamlining of administrative processes. This option also would do nothing with regard to considering the ability to address new and emerging services that may be offered by providers.

### Eliminate CST and Go Back to Legacy Taxes and Fees

A question was raised during one of the recent meetings about the possibility of restoring right of way fees or other usage or licensing fees. I cannot envision the viability or the necessity of adding such fees to the existing CST. Such fees would theoretically be applied to services that have some presence in the right of way and would therefore apply to some providers and not others. Therefore I am assuming that this option would also entail disbanding the CST and reverting back to the old tax regime. This would be an unjustifiable step backward that would exacerbate competitive issues, would reintroduce the same complexities that existed prior to 2001, and would most likely not generate any additional tax or fee revenues but would likely result in declining revenues instead. I do not believe this would be a viable option that warrants much, if any consideration. Also, it is important - when reviewing other states that may have a sales tax and local franchise, right of way or other local fees - to note whether these fees apply in addition to the sales tax or in lieu of the sales tax (e.g., a state may apply sales or other communications tax to wireless, and may apply local franchise taxes to landline and/or video programming in lieu of the sales tax).

### Eliminate CST and Apply Florida Sales and Use Tax

The 2011 CST is a discriminatory tax on communications services customers when compared to the sales tax that applies to the purchase of other goods and services in Florida. Therefore shifting from the higher CST to the sales tax would create a mathematical challenge to the requirement that local government revenues are not to be unduly impaired. Consideration would therefore have to be given to expanding the sales tax base to additional services outside of the communications services arena. Applying the state and local sales tax would still require local sourcing of communications services, and a statewide DBS tax would also still be required. Despite the challenges noted, this option presents a progressive and direct move from the legacy CST structure to one is fair to Florida taxpayers when compared to the tax that they pay on other goods and services, and that would meet the “Good Tax Policy” criteria presented earlier.

### Develop a Statewide CST That Applies To All Communications Service

This option would adopt a statewide CST that would apply to all communications services. The key to this option would be the elimination of any requirement for local sourcing or any local reporting by communications providers when remitting the tax. This would greatly simplify administration and audits and may ultimately allow the Florida address database to be eliminated.

This option would require development of an appropriate state-wide tax that would maintain the existing total tax revenue. It could also include a “hold-harmless” distribution methodology so that local governments would continue to receive their proportionate share of the tax going forward. Consideration could also be given to developing another distribution methodology that would be acceptable to the local governments (e.g., based on population, etc) for further transition and streamlining in the future. This statewide CST platform would result in a uniform communications services tax that would be the same for all Florida communications services consumers. This option would still preserve a higher tax rate on Florida taxpayers than they pay on other goods and service in the state, however one that could be

## **FLORIDA CST WORKING GROUP**

*(Gary Lindsey – AT&T – 9/14/2012)*

reviewed periodically by legislators should they want to consider a path to a more equitable tax rate for consumers of Florida communications services in the future.

### Issue – Application of the CST to Prepaid Communications Services

The prepaid product is a retail product that has historically been subjected to the general sales tax in Florida. Failure to update the definition of prepaid communications service has generated an assertion that there is a perceived CST tax gap and therefore would not technically be defined as a tax increase. Florida taxpayers would however ultimately perceive this as a tax increase. The survey information that the DOR has provided to the Working Group indicated that all other states that tax prepaid communications service use the sales tax or other general tax (e.g., Hawaii, etc) that applies to general goods and services. Options for this area are as follows:

A - The option exists for Florida to be an outlier and to assert the CST and to develop further legislation that would explicitly apply the CST to prepaid communications services. Pursuit of this option would result in a higher tax burden on prepaid communications services customers than they currently pay. This burden would be particularly impactful on those prepaid communications services customers who are in lower income levels. This option would also explicitly require retailers to collect the tax, and the Working Group has already received input from the retail industry regarding the issues that they would have in trying to collect a separate tax at the retail point of sale.

B - Another option was mentioned that would create a single statewide flat tax that would apply to prepaid communications services in lieu of the CST, effectively placing the same level of higher tax on this service through the use of a flat dollar amount instead of a percentage. Comments received by the Working Group from retail representatives indicated that large retailers with robust systems might be able to administer such a fee structure however many other retailers may have difficulty in administering a separate fee of this nature. Consideration would have to be given to deciding on the appropriate amount of the fee to meet the objectives of the various stakeholders (e.g., state, local governments, taxpayers, etc). This option would also position Florida as a tax policy “outlier” throughout the U.S. for taxation of this service, and would also place a regressive burden on low income prepaid communications services consumers.

C - Another viable option is to recommend adoption of an updated definition of prepaid communications services (e.g., the Streamlined Sales Tax definition, etc) so that these services would continue to be subject to (only) the state and local sales tax. Consistent with comments that I made earlier with regard to the sales tax, this option would ensure that Florida communications services consumers are not burdened with a higher tax than they pay on other goods and services in Florida. This option requires no change in methodology for retailers or providers and it maintains the existing actual revenue stream that Florida receives through the state and local sales tax.

### **Conclusion/Summary**

This completes my review and comments regarding options for this phase of the Working Group effort. I am hopeful that the options and guidelines that I have provided will be helpful to the overall effort as the Working Group considers all of the options submitted by Working Group members and other stakeholders.

# Communications Services Tax Working Group

## Options for Consideration

Submitted by Working Group Member:

Mayor Gary Resnick



# City of Wilton Manors

2020 Wilton Drive • Wilton Manors, Florida 33305 • (954) 390-2100 • FAX (954) 390-2199

**Gary Resnick**  
Mayor

**Tom Green**  
Vice Mayor

**Julie A. Carson**  
Commissioner

**Ted Galatis**  
Commissioner

**Scott Newton**  
Commissioner

**Joseph L. Gallegos**  
City Manager

**Kerry Ezrol**  
City Attorney

September 14, 2012

**Via Electronic Mail**

Andrea J. Moreland  
Director, Legislative and Cabinet Services  
Florida Department of Revenue  
Post Office Box 5906  
Tallahassee, Florida 32399-0100  
[morelanA@dor.state.fl.us](mailto:morelanA@dor.state.fl.us)

**Re: Request for Options**

Dear Ms. Moreland:

This is in response to Chair Stranburg's request that members of the Communications Services Tax (CST) Workgroup submit options for the Workgroup to include for Legislative consideration by September 14. The options listed below follow the Workgroup's tasks as set forth in the Statute.

Sections 12(4)(a) and (b) of the Statute provide for the Workgroup to review national and state policies relating to communications taxes and to review the effects of Florida law on the decline in CST revenues, respectively. As information provided to the Workgroup has revealed, every state other than Florida allows local governments to charge users of the rights-of-way reasonable fees to support local governments' costs associated with management of their public rights-of-way. The federal government also charges fees for using its rights-of-way. We have not had information presented to us as to whether the State of Florida charges fees for use of the State's rights-of-way. One of the replaced revenue sources that the local CST was supposed to be sufficient to cover was franchise fees for use of public rights-of-way by communications providers. As we learned, CST revenues to local governments have declined sharply. Accordingly, the Workgroup should include as one of the options for the Legislature to consider, reinstating local governments' ability to charge franchise fees to communications providers that use their public rights-of-way. Even states that have adopted state-wide franchising of cable services, similar to Florida, allow local governments to charge cable franchise fees and to collect such fees directly for use of their rights-of-way. Such fees would be easy to administer by providers as well as governments, easily understood by consumers and would not require any involvement of DOR or create further administrative issues. DOR should be able to estimate based on historic data the amount of revenue this would generate for local governments. Similarly, the Workgroup should also include

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Director, Legislative and Cabinet Services  
Florida Department of Revenue  
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that the Legislature should consider restoring local governments' ability to charge permit fees, without reducing CST rates, to communications providers that apply for permits to perform work in the rights-of-way. Permitting functions often involve complicated and costly reviews by local governments and the local CST structure, as it currently exists, is not sufficient to cover such permitting costs.

Section 12(4)(c) of the Statute provides for the Workgroup to review the extent local governments have bonded CST revenues. As presentations to the Workgroup have revealed, most local governments have bonded their CST revenues. Going forward, significant infrastructure and capital projects that will be vital for Florida's economic recovery require that local governments retain their full bonding capacity with CST revenues, which is one of very few unrestricted sources of revenues for any public purpose. According, the Workgroup should include as an option for the Legislature's consideration that it adopt a policy expressly preserving that local CST revenue may be used by local governments for any public purpose and that any revisions to the CST Statute must ensure that there are no negative financial impacts to local governments.

Section 12(4)(d) of the Statute provides for the Workgroup to review the fairness and administrative burdens of the CST, and the extent the CST is reasonably clear to stakeholders and (e) provides for the workgroup to provide options for streamlining administrative burdens. Based on the presentations to the Workgroup, it does not appear that the CST creates any unfairness or that providers, retailers, consumers, governments and DOR do not have a reasonably clear understanding of the CST. It may be helpful for the Legislature to consider requiring that certain charges by providers on various bills must be clarified as to whether they are a government-imposed fee or tax or not. Further, based on information presented to the Workgroup, the Workgroup should include as one of its options for the Legislature's consideration that the Legislature adopt more strict and definite laws regarding auditing of the CST. DOR presented information that it has the capability of auditing only a small percentage of communications providers, that it does not use contract auditors, and that the vast majority of audits – over 75% -- result in recovery of revenues. Further, DOR did not provide information to the Workgroup as to how it addresses communications providers that should be filing returns and paying CST but do not. Prior to the replaced revenue sources being centrally administered by DOR, local governments were very effective at conducting audits, often utilizing outside auditors with expertise in the industry, with the costs of such audits being borne by the provider if underpayments exceeded a certain percentage. Accordingly, the Workgroup should include that the Legislature should consider mandating

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Director, Legislative and Cabinet Services  
Florida Department of Revenue  
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more audits, requiring DOR to contract for external auditing services, allowing local governments to conduct and to contract for external audits, and requiring that providers pay for the cost of the audit if underpayments exceed a certain percentage. Such policies will not only lead to increased revenues for the State and local governments by ensuring more accurate reporting and collection of CST revenue, they will also reduce the burden and cost of administering the CST.

Section 12(4)(f) of the Statute provides for the Workgroup to identify options that remove competitive advantages within the industry as to the state's tax structure without unduly reducing revenue to local governments. We have had much discussion about the intent of this subsection without reaching any consensus. We discussed to some extent advantages that Internet retailers enjoy over brick and mortar retailers with respect to sales taxes. Consumers alter buying decisions and make purchases over the Internet solely to avoid state sales taxes. Accordingly, to address competitive advantages enjoyed by Internet retailers, the Workgroup should include as an option that the Legislature consider revising the state's tax structure and impose sales taxes on Internet retailers. We have had no presentations that particular segments of the communications industry enjoy a competitive advantage over others by virtue of the state's tax structure. Information provided to the Workgroup indicates that by far, the fastest growing segments of the industry are wireless services generally and in particular prepaid wireless services. The information provided to us indicates that consumers are abandoning landline telephones and utilizing wireless services. Accordingly, options the Workgroup should propose for the Legislature are: 1) eliminate the residential exception from CST and 2) impose a surcharge on prepaid wireless services to add to the state's tax structure. In addition, so as not to reduce unduly CST to local governments from such services, the Workgroup should include that the Legislature should consider requiring consumers of prepaid services, at the time of purchase, to identify the user and address where such services will be used to allow providers to properly and to determine easily the situs of such local CST. Given the importance of knowing who is utilizing communications services and where, there are numerous other public policy benefits of having such information apart from the state's tax policies.

In addition to the options for the Legislature's consideration as outlined above, it is important to note issues with our process for producing a report to the Legislature. It is troubling that after several meetings, the Workgroup has not established a process for producing a report to the Legislature. The Statute clearly provides for the Workgroup to prepare and to submit a report; it does not provide for DOR to do so. Further, the Statute clearly contemplates the Workgroup

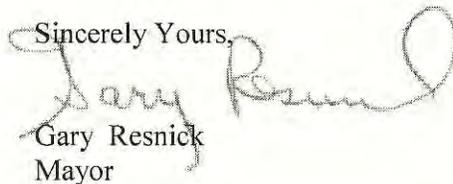
# WILTON MANORS, *Island City*

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voting. Having every Workgroup member's options included in a report prepared by DOR would not be consistent with the Statute and may also be a violation of the Sunshine Law, particularly if members of the Workgroup engage in communications with DOR staff. For example, it would be a violation of the Sunshine Law for the Interim Executive Director of DOR to instruct DOR staff on how to prepare a report or what content to include in any report since, as a member of the Workgroup, such person is bound by the Sunshine Law, unless of course such communications occurred during one of our noticed meetings. The better process would be for the Workgroup to debate information to be included in a report, and ultimately to vote on how to prepare a report and what to include in a report to be issued by the Workgroup. A member of the Workgroup may volunteer to compile such report or alternatively, we could vote on what to instruct DOR to prepare. To do otherwise, would be a disservice to the State's taxpayers.

Thank you for providing this to members of the Workgroup. As always, I appreciate your assistance.

Sincerely Yours,



Gary Resnick  
Mayor

# Communications Services Tax Working Group

## Options for Consideration

Submitted by Working Group Member:

Brian Smith

## DIRECTV's Comments to the Communications Services Tax Force

As you are aware, the task force's mission includes the following:

- a) review of national and state tax policies relating to the communications industry;
- b) review the historical amount of tax revenue that has been generated by the state and local communications services taxes imposed or administered pursuant to Chapter 202, Florida Statutes, for the purposes of determining the effect that laws passed in the past 5 years have had on declining revenues;
- c) review the extent to which this revenue has been relied on to secure bonded indebtedness;
- d) review the fairness of the state's communications tax laws and the administrative burdens it contains, including whether the applicability of the tax laws is reasonably clear to communications services providers, retailers, customers, local government entities and state administrators;
- e) identify options for streamlining the administrative system; and
- f) identify options that remove competitive advantages within the industry as it relates to the state's tax structure without unduly reducing revenue to local governments.

With this in mind, the goals of any reform should be revenue neutrality and creating a favorable business climate.

The current differences in taxation based on method of content delivery has resulted in uncertain revenues for the State. This uncertainty is due, in large part to;

- (1) changing customer patterns with respect to the consumption of media and the use of communications services, and
- (2) the increasing use of business strategies to minimize the tax burden.

Any reform should start with an expansion of the tax base and the creation of a level playing field for all communication providers. This will ensure that the tax burden imposed on the customer will remain the same regardless of the manner in which content is consumed. By way of example, a family in Gainesville should be subject to the same exact tax burden when it watches a TV show or movie on DIRECTV or DISH as a family in Jacksonville who watches the same TV show on Comcast, BrightHouse, or Cox. And both families should be subject to the same tax burden as a family who watches the same show or movie via the Internet, whether it's through Netflix, Amazon, or Apple TV. Similarly, an expansion of the tax base should result in no differentiation between bundled and unbundled services (separately stated movie rentals should be taxed the same as flat-fee rentals).

To the extent the tax base is expanded, there should be an offsetting reduction to the state tax rate in order to achieve revenue neutrality and restore competitive balance between cable and satellite TV providers. As an initial matter, the rates applicable to communications services should be uniform at the state and local level, regardless of technology. We recommend setting the local rate at the highest current local rate to address the needs of the local government for revenue. This would also promote simplicity in compliance since there would only be one local rate for all localities in the state. Furthermore, the Task Force should consider whether the localities should be entitled to payment for the actual and direct use of their right of ways. The uniform rates would provide simplification for retailers (selling prepaid and other taxable items), local governments estimating revenue streams, persons estimating revenue streams for bonding, certainty of collecting and remitting and ease of audit and administration for the Department.

These suggestions will have the additional impact of achieving a favorable business climate. Any uncertainty regarding the taxation of different types of communications services would be removed. Furthermore, a single tax base and single rate would ensure ease of administration and that the tax base was not subject to manipulation (creating competitive advantages amongst industry members).

# Communications Services Tax Working Group

## Options for Consideration

Submitted by Working Group Member:

Marshall Stranburg

## Florida Department of Revenue

### Options Submitted to Communications Services Tax Working Group

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#### A. Options to Streamline the Administrative System

1. Rate Structure Changes
  - a. Create a statewide Local Communications Services Tax rate and distribute the tax to local governments via a formula. In addition, consideration may wish to be given to restructuring the collection allowance since administrative burdens will be reduced.
  - b. Create one Local Communications Services Tax rate per county and distribute the tax to the local governments via a formula. In addition, consideration may wish to be given to restructuring the collection allowance since administrative burdens will be reduced.
2. Records
  - a. Clarify the definition of records and which records must be kept by providers.
  - b. Facilitate the audit process for both providers and the Department by requiring that records be provided in a format that is capable of being exported to the Department as a searchable file.
3. Transparency
  - a. Specify the consequences that will result when customers are not provided with a breakdown of the Florida Communications Services Tax (combined state and gross receipts tax) and Local Communications Services Tax.
  - b. Allow providers to further breakdown the Florida Communications Services Tax into state and gross receipts tax, if desired, on customer bills.
  - c. Allow the Department to release the provider's contact person's name and contact information and/or managerial representative's name and contact information to its customers who have tax questions or complaints, including jurisdictional situsing issues.
  - d. Create a requirement that, when requested by customers or the Department, providers must provide a breakdown of bundled services including a description of the service, amount taxed, tax rate applied, and the period of time the rate applies. Provide a penalty for non-compliance.
  - e. If a breakdown of bundled services is not given to the customer, use tax on the entire amount will be due from the customer as provided by current law. Clarify use tax provision such that customers who request unbundling breakdown in writing from provider, but do not receive it within 30 days may use their own reasonable breakdown in order to calculate use tax.
  - f. Create an incentive for providers to notify customers and the Department of the breakdown of bundled services. For companies that provide advance notice of their unbundling practices to the Department, allow them to use a managed compliance agreement for an agreed upon time period.
4. Refunds
  - a. Amend the refund statute (s. 202.23, F.S.) to allow the local component of the Communications Services Tax that exceeds 90% of the local jurisdiction's average monthly distribution to be refunded to the dealer and recaptured from the local government on a pro-rated basis over a time period that equals the period covered by the refund.

**B. Options to Remove Competitive Advantages within the Industry as it relates to the State's Tax Structure without Unduly Reducing Revenue to Local Governments**

1. Tax Base
  - a. Revise the sales tax base to include a definition for digital goods. These goods and associated services have historically been sold in tangible form, but in recent years are increasingly migrating to electronic delivery. Examples of such products are music, videos, and books.
  - b. Clarify that the definition of video service includes payments for licensure of content.
  - c. Clarify that the residential exemption only applies to landline telephone service.
  
2. Prepaid Wireless Services
  - a. Create a flat Communications Services Tax rate and distribute to local governments via a formula.
  - b. Apply sales and use tax and a fee for gross receipts tax. The gross receipts tax fee could be a flat fee by dollar amount or a percentage, or a tiered amount based on dollars or time.
  - c. Consider a gross receipts tax on the provider of prepaid calling arrangements that can be offset with a dollar-for-dollar credit, if communications services tax is collected from the purchaser of the prepaid calling arrangement.

# Communications Services Tax Working Group

## Written Comments

Submitted by: Florida Retail Federation



September 17, 2012

Marshall Stranburg  
Interim Executive Director  
Florida Department of Revenue  
5050 West Tennessee Street  
Tallahassee, FL 32399-0100

Dear Mr. Stranburg:

On behalf of the 8,000 members of the Florida Retail Federation, we appreciate the opportunity to provide written comments to the Communications Service Tax Work Group regarding the imposition and collection of the Communications Service Tax on certain prepaid calling arrangements that the Department of Revenue has indicated may not be entitled to the exemption from the collection of Communications Service Tax contained in Sec. 202.11(9), FS.

As you are aware, prepaid calling arrangements are very popular with a large segment of the public at large and are sold at thousands of locations throughout Florida. Currently, retailers are collecting the state and local sales taxes on the sale of these products at the point of sale, as required by Chapter 212, FS. Any determination by the Department that certain prepaid calling arrangements are not included in the exemption referenced above will cause extreme confusion among retailers and result in possible disruption in the sales of these products in the future because the Communications Service Tax, with its complicated provisions, cannot be applied at the point of sale by any retailer in this state.

We encourage the work group to continue with its work and would hope that during the deliberations other collection methodologies would be discussed, since the "Point of Sale" methodology will not work with a tax that is as complicated as the Communications Service Tax. The Florida Retail Federation stands ready to assist in vetting any proposals that may evolve from the work of the work group.

Sincerely,

Randy Miller  
Executive Vice President

RM/sw

# Communications Services Tax Working Group

## Written Comments

Submitted by:

AT&T, CenturyLink, Sprint, T-Mobile, and Verizon

# **Telecommunications Industry Proposal to the Florida Communications Services Tax Working Group**

Submitted by: AT&T, CenturyLink, Sprint, T-Mobile, and Verizon

## **Overview**

The average Florida Communications Services Tax (CST) rates on consumers are more than twice as high as the sales tax imposed on other taxable goods and services sold in Florida. At the same time, changes in technology are providing consumers with alternatives to traditional communications services that allow consumers to avoid paying the CST.

This system is not sustainable. Under the status quo, state and local governments will experience revenue declines as discriminatory tax policy, technological change, and consumer preferences continue to undermine the CST base by shifting consumer purchases to services not subject to the CST.

The telecommunications providers listed above recommend that the state repeal the CST and bring all communications services under the state and local sales tax. This proposal would promote competitive neutrality between communications providers, resolve the current dispute over the taxation of prepaid wireless service, and reduce excessive tax burdens on consumers.

## **The Problem**

The Florida CST was enacted to simplify and reduce the number of state and local taxes on communications providers and consumers. However, technological changes and limitations imposed by federal law continue to undermine the CST base. As the presentation by AT&T at the August 21<sup>st</sup> commission meeting explained in great detail, many services are increasingly being provided as applications that “ride” over a high-speed Internet connection. As communications providers upgrade their landline and wireless networks to accommodate higher speeds and higher volumes of data, the capability to provide these enhanced communications services via Internet protocol will grow dramatically.

Instead of purchasing a monthly calling plan, consumers will purchase a fast Internet connection and install applications that provide voice, video, and other services. This will occur in both the wireless and wireline environment. Widespread availability of these “over the top” Internet-enabled services will undermine the CST base in two ways: 1) consumers will continue to drop services subject to CST altogether and install communications applications instead; and 2) competitive pressures from these Internet-based applications will force traditional

communications services providers to lower prices, reducing revenues from percentage-based taxes.

Additionally, federal law prohibits state and local governments from imposing taxes on charges for Internet access service. Therefore, state and local governments will not be able to capture revenues from this shift in technology and consumer preferences. Compounding this problem is the current CST rate structure. All else being equal, a customer switching to an Internet-protocol based communications application will save an average of 14% simply by avoiding services subject to the CST. The existence of the CST will reinforce and exacerbate market forces leading consumers to adopt new technology.

### **The Solution: Repeal the CST and Impose the Sales and Use Tax on Communications**

The industry recommends that the CST be repealed and the sales and use tax base be broadened to include a broad range of communications services that would be subject to the same state and local tax rates as other taxable goods and services. This proposal would solve many of the problems inherent with the current CST structure and position Florida to fairly capture revenue from a broad base of communications services today and in the future.

First of all, this proposal would significantly reduce or eliminate the tax differential between different types of communications services. It would bring taxation of contract wireless plans in line with the current taxation of prepaid calling arrangements under the sales tax at the point-of-sale. Additionally, when Congress passes the Main Street Fairness Act or other similar legislation to permit states to require non-nexus providers to collect sales taxes, Florida would be positioned to collect sales tax equitably. This would place all providers on a level playing field, an important benefit of eliminating the CST in favor of the sales tax. All of the bills currently being considered by Congress to grant state the power to enforce collection on non-nexus sellers would only apply that power to the sales tax, not to other taxes like the Florida CST.

Second, this proposal would dramatically reduce administrative costs for the Florida Department of Revenue and local governments. Instead of an entire structure necessary to administer the CST as a stand-alone tax, our proposal would allow the department to administer the tax under the existing sales and use tax administrative structure.

Finally, the proposal brings fairness and relief to Florida consumers. Federal and state policies have long sought to make sure that all Americans are connected, first through basic telephone service and now through high speed Internet connections (wireline and wireless). Numerous studies show that low- and moderate-income Americans increasingly rely on their

Internet connections to successfully participate in the American economy, whether on the job or even to search for a job. Tax policies that impose excessive tax burdens on communications services work at cross purposes with federal, state, and local economic development goals. Repealing the regressive CST will most benefit low- and moderate-income Floridians.

### **Prepaid Wireless Telecommunications Services**

The industry proposal to eliminate the CST would render moot the current effort by the Department of Revenue to assert that most current prepaid service offerings, including prepaid wireless service offerings, are subject to the CST. Regardless of what the Communications Services Tax Working Group recommends for long term changes to the CST, it is imperative that the current dispute over the status of prepaid wireless service be resolved immediately.

In excluding prepaid calling arrangements from the CST and making such services subject to the sales tax at the point of sale, the Legislature has long recognized that it is simply not feasible to impose the CST on services that are not billed to customers. There is no workable method to situs prepaid transactions to a customer address because address information is not collected in the majority of prepaid transactions. If the State were to require that retailers collect the CST at the point of sale, all Florida retailers that sell prepaid service would be required to collect customer address information and install a parallel CST point-of-sale tax system with hundreds of local CST tax rates alongside their current sales tax systems. This would be a significant expense for retailers and would require additional CST audits on thousands of retail establishments.

Thus, if CST is not eliminated, the industry recommends that the Legislature modernize the definition of "Prepaid Calling Arrangement" to accommodate technological changes that have occurred over the last decade, and encompass current prepaid service offerings. Such a change would conform the Florida Statutes to the original legislative intent of limiting the CST to billed services -- for which it is feasible to collect local CST based on customer addresses.

**Agenda Items #6 and #7**

**No Materials**

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