

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

CIVIL DIVISION

CASE NO. 05-CA-1037

DirectTV, Inc. and  
EchoStar Satellite L.L.C.,

Plaintiffs,

vs.

State of Florida Department  
of Revenue,

Defendant.

SUMMONS  
(Civil Action)

THE STATE OF FLORIDA  
TO EACH SHERIFF OF SAID STATE:

YOU ARE HEREBY COMMANDED to serve this summons and a copy  
of the complaint or petition in this action on defendant:


James A. Zingale  
Executive Director  
Florida Department of Revenue  
The Carlton Building  
501 S. Calhoun Street, Room 104  
Tallahassee, Florida 32399

Each defendant is required to serve written defense to the  
complaint or petition on Plaintiff's Attorney, whose name and  
address are as follows:

Peter O. Larsen  
Akerman Senterfitt  
50 North Laura Street  
Suite 2500  
Jacksonville, Florida 32202

Rev'd 514105 at 11:30A m and  
Srv'd 514105 at 11:42A m by

{TL070939;1}

 Chris J. Colson #142  
Certified Process Server, 2nd Judicial Crct of Florida

within 20 days after service of this summons on that defendant, exclusive of the day of service, and to file the original of the defenses with the Clerk of this Court either before service on Plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

DATED on 5/4/05

Bob Izner  
Clerk of the Court



Andhe Moore  
Deputy Clerk

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

DIRECTV, Inc. and EchoStar Satellite  
L.L.C.,

Plaintiffs,

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State of Florida Department of Revenue,

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COMPLAINT

PRELIMINARY STATEMENT

Plaintiffs DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite L.L.C. ("EchoStar"), by and through their undersigned attorneys, sue defendant, State of Florida Department of Revenue (the "Department"), and allege:

1. This is an action under Fla. Stat. §§ 26.012, 86.011, and 86.021 to obtain (a) a declaratory judgment holding that a provision in the Simplified Communications Services Tax Act of 2001, Fla. Stat. § 202.12(1)(c), is facially unconstitutional, (b) a permanent injunction against enforcement of that provision, and (c) a refund of taxes paid pursuant to that provision. Plaintiffs bring this facial challenge to the constitutionality of Fla. Stat. § 202.12(1)(c) on the grounds that it discriminates against interstate commerce, is in violation of the Commerce Clause

of Article I of the United States Constitution, and denies plaintiffs equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and of Article I, Section 2 of the Florida Constitution.

2. Plaintiffs are providers of multi-channel video programming via direct-to-home (“DTH”) satellite television service, also known as “Direct Broadcast Satellite” (“DBS”) service, to subscribers in Florida as well as throughout the nation. As such providers, plaintiffs compete against local cable system operators throughout the country, including Florida. Prior to October 1, 2001, satellite television companies and local cable operators were subject to Florida’s general sales tax at the same rate of six (6) percent. However, the Simplified Communications Services Tax Act of 2001 (the “Communications Services Tax Act”) replaced the general sales tax with a specific tax on communications services that subjects satellite television services to a substantially higher tax rate—10.8 percent of sales—than is imposed on cable television services—6.8 percent.

3. Imposing a tax on satellite television services at a rate substantially higher than the rate imposed on competing cable television services unconstitutionally discriminates against interstate commerce. On its face, the discriminatory tax is protectionist. It confers an unfair competitive advantage on locally-franchised cable operators that provide service using local cable networks and disadvantages DBS providers, who do not have local franchises and who provide service using satellites located out-of-state.

4. The discriminatory tax also facially violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 2 of the Florida Constitution, because it serves no legitimate public purpose. Discriminating between competing

providers of television programming services based on the in-state or out-of-state location of their distribution facilities serves no legitimate state interest.

### THE PARTIES

5. DIRECTV is a corporation organized in the State of California and is headquartered in El Segundo, California. DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, LLC, which is a wholly-owned subsidiary of DIRECTV Holdings, LLC, which is wholly-owned by The DIRECTV Group, Inc., which in turn is 34 percent owned by Fox Entertainment Group, which is approximately 82 percent owned by News Corporation. DIRECTV is one of the two main providers of DBS satellite television services in Florida and nationally.

6. EchoStar is a limited liability company organized under the laws of the State of Colorado and is headquartered in Littleton, Colorado. EchoStar is a wholly-owned indirect subsidiary of EchoStar Communications Corporation. EchoStar is one of the two main providers of DBS satellite television services in Florida and nationally.

7. Taken together, plaintiffs currently provide service to over 1.5 million subscribers in Florida.

8. Defendant the State of Florida Department of Revenue is an agency established under the laws of the State of Florida and collects, administers, and enforces the taxes that are the subject of this action.

### **JURISDICTION AND VENUE**

9. This action arises under the Commerce Clause of Article I and the Fourteenth Amendment of the United States Constitution. The amount in controversy is in excess of \$15,000 exclusive of interest, costs, and attorney's fees. This Court has subject matter jurisdiction under Fla. Stat. §§ 26.012, 86.011, and 86.021.

10. Venue is proper in this Circuit pursuant to Fla. Stat. § 47.011 because the defendant's principal headquarters is located in Leon County.

### **DESCRIPTION OF SATELLITE TELEVISION SERVICE**

11. Plaintiffs provide television programming to subscribers by means of satellites stationed above the Earth's Equator at fixed longitudes (for example, 101° Western Longitude) and a fixed altitude (22,300 miles)—that is, at an extraordinary distance from the State of Florida. EchoStar and DIRECTV, along with a third company, are the only companies that presently own and operate DBS satellites serving the United States.

12. 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 plaintiffs the right to transmit in certain electromagnetic frequencies from these locations. The State of Florida has had no involvement in this process, since no state resources are used in satellite transmission of video programming. Since 1996, the Federal Communications Commission has licensed these orbital slots by auction and has received more than \$700 million from such auctions. In addition, each of the plaintiffs has invested more than \$1 billion in building, insuring, and launching its satellites.

13. DBS subscribers receive the signal directly from these satellites by means of a small, pizza-sized satellite dish mounted on or near their house. The signal is then transmitted to a receiver/decoder system (a "set-top box") connected to the subscriber's television. DBS providers thus employ no infrastructure in the state to transmit their signal directly to the subscriber and do not use public rights-of-way.

14. Satellite operators are not required to obtain franchise rights from municipalities or counties in order to operate in Florida, as cable television companies are required to do. Rather, they obtain their operating authority exclusively from the federal government.

15. Neither DIRECTV nor EchoStar has any offices in Florida. EchoStar employs a single technician in Florida who works out of his home. DIRECTV has only seven employees in Florida: five regional sales people working out of home offices and two call center employees working out of a vendor's office.

#### **DESCRIPTION OF CABLE TELEVISION SERVICES**

16. Cable systems provide television programming to subscribers in Florida using local infrastructure. Specifically, cable systems receive the programming that they retransmit at local cable headends. The cable headends then transmit the programming to consumers' homes by coaxial cable laid in trenches in or along roads or hung on electric utility poles and connected to the subscribers' television sets and set top boxes. Cable television service thus requires the use of significant signal collection, transmission, and distribution facilities within the local service area or elsewhere in the state.

17. In order to provide service within a particular area, cable television companies also must obtain permission from counties or municipalities to use roads and other rights-of-way

in order to lay or string cable connecting their local distribution facilities with the subscribers' homes. Indeed, the use of public rights-of-way is a component of the definition of "cable system" under § 602(7) of the Communications Act, 47 U.S.C. § 522(7). Cable television operators must obtain this permission through franchise agreements entered into with local governments and by permits. *See Fla. Stat. §§ 337.401(3)(a)(1), (2).*

18. Before passage of the Communications Services Tax Act, cable television operators paid a franchise fee to the local government in order to obtain this access to rights-of-way. The franchise fee typically was five (5) percent of gross revenue within the franchise area. *See Fla. Stat. §§ 166.046, 337.4061.* The franchise fee was compensation to the local government for the valuable rights granted by the franchise.

19. Although the Communications Services Tax Act purported to abolish franchise fees, Fla. Stat. §§ 220.24, 337.401(3)(e), local governments are still permitted to award franchises for cable service and such service may not be provided without a franchise. *See Fla. Stat. § 337.401(3)(a)(2).*

20. Cable operators also have a strong local presence in Florida due to the employment of numerous Florida residents and the location of numerous offices and facilities within the state to provide service.

#### **COMPETITION BETWEEN SATELLITE AND CABLE TELEVISION**

21. DIRECTV and EchoStar are competitors of cable television companies nationally and in Florida. The relevant product market in which satellite and cable television companies compete is the market for multi-channel video programming distribution (the "MVPD" market).



MVPD providers sell various packages of television channels, including local television stations and cable programming such as ESPN, CNN, HBO, and MTV.

### STATE SALES AND COMMUNICATIONS SERVICES TAXES

22. Prior to October 1, 2001, both satellite and cable television services were subject to Florida's state sales tax. *See Fla. Stat. § 212.05 (1999)* (imposing a tax of six percent on "[a]ny TV system program service"). This provision subjecting satellite and cable to equal sales taxes was repealed by the 2001 legislation. *See Communications Services Tax Act, ch. 2001-140, § 3.*

23. In lieu of the sales tax, the Communications Services Tax Act imposed a specific tax on sales of communications services. However, the 2001 legislation subjected satellite television services to a substantially higher tax rate than cable television services. The special rate applicable to DTH satellite services is 10.8 percent. *See Fla. Stat. § 202.12(1)(c).* The rate applicable to cable services is only 6.8 percent. *See Fla. Stat. § 202.12(1)(a).*

### INJURY

24. Because satellite and cable compete by providing similar programming packages, there is substantial cross-elasticity of demand between cable and satellite. That is, in deciding whether to purchase cable television or satellite television services, consumers consider price a significant factor. Because cable television operators collect a substantially lower tax from their subscribers, the Florida law gives cable a significant price advantage over their satellite television competitors. The communications services tax thus increases the cost of use of an interstate service substantially more than the cost of use of a local service.

25. By imposing a significant cost disadvantage on satellite television providers, locally-franchised cable television operators are protected from increased competition from DBS providers using out-of-state facilities. This cost disadvantage did not exist until the enactment of the Communications Services Tax because, prior to its enactment, cable and satellite were subject to the same rate of Florida sales tax.

26. Since October 1, 2001, Plaintiffs have been injured by being required to collect and remit an approximately sixty (60) percent higher rate of tax than their cable television competitors. DIRECTV estimates that it has paid over \$76 million more in tax than would a cable operator with the same statewide revenues. EchoStar estimates that it has paid over \$31 million more in tax than would a cable competitor with the same statewide revenues.

### COUNT I

#### (Discrimination Against Interstate Commerce)

27. Plaintiffs incorporate and re-allege the allegations of paragraphs 1 through 26 as though fully set forth herein.

28. The imposition of a 10.8 percent tax on satellite television services that is substantially higher than the 6.8 percent tax imposed on cable television services discriminates against interstate commerce in violation of the Commerce Clause of Article I of the United States Constitution.

29. The Communications Services Tax facially discriminates against DBS providers in favor of cable system operators. The higher 10.8 percent rate of tax applies only to "any direct-to-home satellite service received in the state." Fla. Stat. § 202.12(1)(c). The Communications Service Tax adopts the federal definition of "direct-to-home satellite service"

in § 303(v) of the Communications Act, which defines the term as “the distribution or broadcasting of programming or services by satellite directly to the subscriber’s premises without the use of ground receiving or distribution equipment, except at the subscriber’s premises or in the uplink process to the satellite.” 48 U.S.C. § 303(v); Fla. Stat. § 202.11(6).

30. By necessity, satellites are located outside of the state. Thus, on its face, the Communications Service Tax imposes the higher rate of tax only on those companies that provide service using out-of-state facilities and that do not use local “ground receiving or distribution equipment” of the type contemplated in the statute.

31. The effect of the 2001 legislation also is to discriminate against interstate commerce. Imposing a significantly higher tax on satellite television services than on cable television services bestows a significant cost advantage on businesses using local facilities, an advantage not available to competing businesses providing service using out-of-state facilities.

32. The discriminatory effect of the Florida tax is further demonstrated by the fact that it constitutes the type of discrimination against satellite television services, and in favor of cable television services, that Congress and the Federal Communications Commission have condemned as a barrier to competition in the MVPD market. The discriminatory Florida sales tax thus frustrates the federal policy of promoting DBS television as the principal source of competition with cable television.

33. Imposing a substantially higher communications services tax on satellite television services than on cable television services discriminates against interstate commerce notwithstanding the local so-called “taxes” that counties and municipalities have been authorized to levy against cable television services. The tax on DBS services is not a compensatory tax

within the meaning of the Commerce Clause, and thus, the local cable "tax" cannot be considered for purposes of assessing the discriminatory impact of the state tax.

34. Under the compensatory tax doctrine of the Commerce Clause, a state may constitutionally impose a tax on interstate activities to compensate for a tax on intrastate activities only if the interstate tax is for the same purpose as the intrastate tax and is levied on substantially equivalent events. The DBS tax does not constitutionally compensate for the local cable "tax" because the latter is not a tax at all, but a fee paid by cable system operators for valuable franchise and access rights. In any event, the local cable "tax" is not imposed for the same purposes as the DBS tax and is not levied on substantially equivalent events.

35. Prior to the Communications Services Tax Act, cable television companies paid franchise fees to local governments. The franchise fee was the price cable television operators paid in order to receive substantial benefits from the franchise authorities, including the use of public rights-of-way.

36. The Communications Services Tax Act purported to abolish franchise fees. *See* Fla. Stat. §§ 202.24, 337.401(3)(e). In fact, however, the 2001 legislation simply relabeled the "franchise fee" the "local communications services tax."

37. The local communications services "tax" is charged for the same purpose as the franchise fee. Like the franchise fee, the local communications "tax" includes "any fee or other consideration to which the municipality or county is otherwise entitled for granting permission to dealers of communication services, including, but not limited to, providers of cable television 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 communication

services." Fla. Stat. § 202.19(3)(a). The statutory language thus explicitly permits local governments to charge a local communications services "tax" for the very same purposes for which franchise fees formerly were charged, namely, the valuable rights that cable companies receive by entering into franchise agreements.

38. Moreover, the amount of the local communications services "tax" is essentially the same as the franchise fee. Prior to 2001, franchise fees typically were 5 percent of gross revenues within the franchised service area. Under the 2001 legislation, charter counties and municipalities are authorized to impose a local "tax" rate of between 4.98 percent and 5.1 percent.

39. The DBS tax thus does not constitutionally compensate for the local communications services "tax" because the latter are not true taxes on gross revenues for general revenue-raising purposes. Rather, they are the price charged for rights granted by local governments to cable operators, who value these rights nationally in the billions of dollars.

40. In any event, Florida has no legitimate basis for obtaining compensation from interstate DBS providers. Unlike cable system operators, DBS providers do not use public rights-of-way and are not required to obtain the local franchise rights for which local governments are entitled to obtain compensation.

41. The state tax on DBS services is not imposed on events that are substantially equivalent to the events subject to the local communications services "tax." The local communications "tax" is imposed only on those cable operators that have a franchise agreement with the local government imposing the "tax." The local "tax" is thus effectively imposed on

revenues earned under the franchise agreement. In contrast, the state tax on DBS services is imposed without regard to the existence of a franchise agreement.

## COUNT II

### (Equal Protection—United States Constitution)

42. Plaintiffs incorporate and re-allege the allegations of paragraphs 1 through 26 as though fully set forth herein.

43. The Communications Services Tax Act unconstitutionally discriminates against satellite television companies in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

44. Section 202.12(1)(c) of the 2001 Communications Services Tax Act advances no legitimate public purpose. The state has no legitimate interest in discriminating between competing providers of multi-channel television programming services based on the in-state or out-of-state location of distribution facilities. Such discrimination serves only the parochial economic self-interest of cable television companies that desire protection against competition from satellite television companies.

## COUNT III

### (Equal Protection—Florida Constitution)

45. Plaintiffs incorporate and re-allege the allegations of paragraphs 1 through 26 as though fully set forth herein.

46. The Communications Services Tax Act unconstitutionally discriminates against satellite television companies in violation of Article I, Section 2 of the Florida Constitution.

47. Section 202.12(1)(c) of the 2001 Communications Services Tax Act advances no legitimate public purpose. The state has no legitimate interest in discriminating between competing providers of multi-channel television programming services based on the in-state or out-of-state location of distribution facilities. Such discrimination serves only the parochial economic self-interest of cable television companies that desire protection against competition from satellite television companies.

WHEREFORE, Plaintiffs pray for relief as follows:

1. The Court declare that Fla. Stat. § 202.12(1)(c) violates the Commerce Clause and the Equal Protection Clause of the United States Constitution, and Article I, Section 2 of the Florida Constitution, to the extent it imposes a higher communications services tax on satellite television services than on cable television services.
2. The Court award plaintiffs refunds of communications services taxes paid since October 1, 2002, equal to four (4) percent of the gross revenues used to calculate such taxes.
3. The Court permanently enjoin defendant from collecting a state communications services tax from plaintiffs at a rate higher than imposed on cable television services and from imposing any sanction for failure to pay the discriminatory portion of such taxes plus interest, costs, and fees.
4. For such other and further relief as the Court may deem just and proper.

Dated: May 4, 2005

Respectfully submitted,

**AKERMAN SENTERFITT**

BY:  on behalf of.

Peter O. Larsen  
Florida Bar No. 0849146  
David E. Otero  
Florida Bar No. 0651370  
Cynthia DeBula Baines  
Florida Bar No. 0108774  
50 North Laura Street  
Suite 2500  
Jacksonville, Florida 32202  
Telephone: (904) 798-3700  
Facsimile: (904) 798-3730

-and-

**STEPTOE & JOHNSON LLP**

Betty Jo Christian (Pro Hac Vice)  
District of Columbia Bar No. 304865  
Mark F. Horning (Pro Hac Vice)  
District of Columbia Bar No. 203323  
Lincoln L. Davies (Pro Hac Vice)  
District of Columbia Bar No. 479511  
1330 Connecticut Avenue, N.W.  
Washington, DC 20036  
Telephone: (202) 429-3000  
Facsimile: (202) 429-3902

*Attorneys for Plaintiffs DIRECTV, Inc.  
and EchoStar Satellite L.L.C.*