



## Multistate Tax Commission Memorandum

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To: MTC Executive Committee  
From: Sheldon H. Laskin  
Date: October 26, 2007  
Subject: Status Report on Public Hearing Regarding a Proposed Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services.

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The purpose of this memo is to summarize the public hearing conducted on October 16, 2007, regarding a proposed model regulation for apportionment of income from the sale of telecommunications and ancillary services.

Five witnesses offered written and/or oral testimony. Kendall Houghton of Sutherland Asbill and Brennan LLP appeared on behalf of AT&T Inc., Comcast Corporation, Sprint Nextel Corporation, Time Warner Cable and Verizon and Verizon Wireless. Ms. Houghton made a joint presentation with Deborah Bierbaum of AT&T. Todd Lard, Tax Counsel of the Council on State Taxation also made a presentation and submitted written testimony. Elliott Dubin, Director of Policy Research for the Multistate Tax Commission submitted written testimony and offered comments during the hearing. Michael Fatale, Tax Counsel, Massachusetts Department of Revenue, also offered comments during the hearing.

The central thrust of Ms. Houghton and Ms. Bierbaum's testimony was that the telecommunications industry should not be singled out for the development of a special apportionment rule at the same time that the National Conference on Uniform State Laws, acting on the request of the MTC, is reviewing UDITPA, with specific focus on Section 17. In support of their position, Ms. Houghton and Ms. Bierbaum assert that any problems with cost of performance sourcing apply across the board to all services and service providers, and are not unique to the telecommunications industry. In addition, they assert that the states have not identified any industry-specific practices that would justify a special rule for telecommunications at this time.

Specifically, Ms. Houghton and Ms. Bierbaum object to the MTC's treatment of wholesale sales of telecommunication services (carrier to carrier sales for resale of telecommunication services). In criticizing the proposed regulation's use of FCC Table 15.6 as a proxy for sourcing wholesale revenues by state, Ms. Houghton and Ms. Bierbaum point out that the data appearing on Table 15.6 represents aggregate industry revenue by state and is not necessarily representative of the revenue of any specific carrier. They maintain that use of this data could raise Commerce Clause issues under both the fair apportionment and fair relationship prongs of the Complete Auto test. Ms.

Houghton and Ms. Beirbaum also object that the data on Table 15.6 is stale (three year lookback).

Finally, Ms. Houghton and Ms. Bierbaum object to the use of throwout for both the property and sales factors, asserting that the use of throwout in this context could raise Commerce Clause issues under both the fair apportionment and fair relationship prongs of the Complete Auto test.

Mr. Lard's testimony essentially tracked Ms. Houghton and Ms. Bierbaum's testimony regarding wholesale sales and throwout.

Mr. Dubin offered a response to industry objections to the use of FCC Table 15.6. In lieu of FCC Table 15.6, Mr. Dubin proposes amending the proposed rule to require telecommunication carriers to report the "total carrier's carrier service revenue" as reported to the FCC on line 315 of FCC Form 499a. Line 315 requires most telecommunication carriers to report total revenues provided for resale, for both interstate and international calls, on an annual basis. Mr. Dubin would then multiply the interstate call revenues by the regional percentages listed by the carrier in Block 5 of FCC Form 499-A to determine a wholesale revenue stream for each region of the country. Mr. Dubin would then apportion the wholesale regional revenues for each state by using the most recent population estimates for each state as reported by the Census Bureau. Mr. Dubin would retain Table 15.6 as a proxy for determining wholesale receipts for those few carriers who are not required to file Form 499-A.

Mr. Fatale testified that there is a present need for a special apportionment rule for telecommunications because that industry is increasingly shifting to non-market based apportionment as the industry evolves. Furthermore, Mr. Fatale offered the view that the proposed wholesale sale rule is fair in light of the fact that industry could not propose an alternative consensus approach, after being given ample opportunity to do so. Mr. Fatale also offered suggestions for improving the bundling and business inputs provisions of the regulation.

In light of Mr. Dubin's testimony and written submission, I am holding the record open in this case until Friday, November 17, 2007 so that interested parties may offer comments in response.