Review

Multistate Tax Commission

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Robert Cline, National Director of State and Local Tax Policy Economics at Ernst & Young's Quantitative Economics and Statistics (QUEST) practice in Washington, DC; Andrew Phillips, senior manager in the EY/QUEST practice and leads the Regional Economic Contribution practice, in Washington, DC; Joo Mi Kim, former QUEST senior consultant, currently an associate at Foros; and, Tom Neubig, National Director of the EY QUEST practice in Washington, DC.

The ultimate burden – the economic incidence --of taxes initially imposed on businesses must be borne by households in their capacity as consumers, workers, or owners of capital; that is, a business may write the check to the tax authority, but the business has no capacity, per se, to bear the burden of the taxes. This paper presents estimates of the ultimate burden of an ***increase*** in each state's business taxes, assuming no other state changes its business taxes. *(Editor's note: If all state and local governments were to simultaneously change their business taxes by the same proportion, the outcome would most likely be significantly different from those contained in this paper.)*

The authors find that:

- On average, 28% of a state business tax increase is "exported" to non-residents, assuming no other state increases its business taxes.
- Resident consumers' and workers' share of a state's business tax increase ranges from 30% in Wyoming to 88% in Hawaii.
- Capital owners' share of state business tax increases ranges from 2/3rds in states with substantial reliance mineral extraction to a low of 12% in Hawaii.

The views expressed in this paper are those of the authors, and do not necessarily reflect the views of their employers; nor do they necessarily represent the views of the editors of this journal nor those of the Multistate Tax Commission.

DirecTV Inc. and Echostar Satellite, LLC v. Richard Levin, Tax Commissioner of Ohio. Brief of Amicus Curiae Multistate Tax Commission in Support of Defendant - Appellee **15**

Shirley Sicilian, General Counsel, Multistate Tax Commission, Sheldon Laskin, Counsel, Multistate Tax Commission

The Multistate Tax Commission's amicus curiae brief in this case is reproduced in its entirety here. The plaintiffs are asserting that Ohio's system of taxing satellite television services is discriminatory because no similar state tax is imposed on cable television service. The amicus brief supports Ohio by showing that the "dormant" Commerce Clause of the U.S. Constitution is not operable in this case.

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Working Together Since 1967 to Preserve Federalism and Tax Fairness

Multitate Tax Commission Review

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Contributions: Submissions of articles, article ideas, suggestions, and comments are welcome. Please send them to the managing editor at the address listed on the back. We also welcome information concerning changes in employment status of persons active in state taxation in both the public and private sectors.

The opinions expressed in the Review are those of the authors and do not necessarily represent the official position of the Multistate Tax Commission or any of its Member States.

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FROM THE EXECUTIVE DIRECTOR

This issue of the ***Review*** is being prepared right after The Executive Committee met by telephone on April 7th. The Executive Committee voted to send two Uniformity Committee Recommendations for public hearings: (1) Repeal of Guideline Regarding Applicability of Sales and/or Use Tax to Sales of Computer Software; and (2) Model Mobile Workforce Withholding Statute. Please check the MTC website – www.mtc.gov – for the details regarding these public hearings. The Executive Committee also voted, upon the recommendations of the Hearing Officers, to direct the MTC staff to survey the affected states regarding: (1) the Repeal of Uniform Principles Governing State Transactional Taxation of Telecommunications – Vendor and Vendee Versions; and, (2) Model Uniform Regulation IV.18.(A) Amendments.

This issue contains two articles that are somewhat unique to the ***MTC Review.*** The first of the two articles is "**Who Really Bears the Burden of a State Level Business Tax Increase?"** by Robert Cline, Andrew Phillips, Joo Mi Kim, and, Tom Neubig. All authors are current or former directors or senior managers of Ernst & Young's Quantitative Economics and Statistics (QUEST) practice in Washington, DC. The authors provide their insights on who (workers, consumers, or owners of capital) ultimately bears the burden of an increase in a state's business taxes, assuming no other state increase their respective business taxes. We appreciate the authors choosing this ***Review*** as a vehicle for disseminating their views on possible effects of increasing taxes imposed on businesses, which, a number of states have already done, or are currently considering. The authors assure us that the views expressed here are theirs, and not necessarily those of Ernst & Young. Nor are they necessarily the views of MTC staff or members states.

The second article is the MTC amicus curiae brief filed in support of the Ohio Department of Revenue in its role of defendant in a suit brought by two providers of satellite television services – DirecTV, Inc, and Echostar Satellite, LLC. Shirley Sicilian, MTC General Counsel and Sheldon Laskin, MTC Counsel wrote the amicus brief.

We welcome your comments on these articles, suggestions for topics, and submissions for future issues of the ***Review.***

Joe Huddleston
Executive Director
Multistate Tax Commission

Who Really Bears the Burden of a State Level Business Tax Increase?[1]

Robert Cline, National Director of State and Local Tax Policy Economics at Ernst & Young's Quantitative Economics and Statistics (QUEST) practice in Washington, DC; Andrew Phillips, senior manager in the EY/QUEST practice and leads the Regional Economic Contribution practice, in Washington, DC; Joo Mi Kim, former QUEST senior consultant, currently an associate at Foros; and, Tom Neubig, National Director of the EY QUEST practice in Washington, DC.

[1]Forthcoming in National Tax Association 2009 Conference Proceedings Volume (Session: Improving our understanding of business taxation).

The views expressed in this article are those of the authors, and do not reflect the views of their employers.

Abstract

State and local governments are tackling budget deficits of a magnitude that has not been experienced since World War II and tax increases will play an important role in addressing their fiscal challenges. This study extends the authors' January 2010 analysis by examining the effect of a single state increasing its state taxes only, while all other states hold their taxes constant. Key findings from the analysis include:

- *The ultimate burden of state business taxes ("economic incidence") falls on households in their role of consumers, workers, and capital owners.*
- *Capital owners' share of state business tax increases ranges from a high of 2/3rds in states with substantial reliance on oil, gas, coal and mining to a low of 12% in Hawaii.*
- *Resident consumers' and workers' share of a state's business tax increase ranges from 30% in Wyoming to 88% in Hawaii.*
- *On average, 28% of a state business tax increase is "exported" to non-residents.*

I. Introduction

State and local governments are tackling budget deficits of a magnitude that has not been experienced since World War II. Tax increases will play an important role in addressing their fiscal challenges. While the debate will be framed in terms of the increases in legal liabilities imposed on households and on businesses (business taxes), important policy questions are who ultimately bears the burden of business tax increases and what are their economic effects?

Business taxes are ultimately distributed to households after market prices and outputs adjust to the taxes. This study analyzes the economic incidence of state business tax increases after changes in behavior of workers, investors and consumers shift the initial legal liabilities to households that bear the final tax burdens in lower real disposable incomes. The study provides state-by-state estimates of the economic incidence of a ten percent increase in state business taxes in each state, holding taxes in all other states constant. The study estimates the amount and share of a state business tax increase borne by in-state residents through higher prices and lower incomes, along with the amount and share exported to out-of-state residents.

Knowing the economic incidence of business tax changes is important for several reasons. First, the final distribution of business tax increases among in-state consumers, workers, and capital owners will determine the progressivity of business tax increases. This is critical information to know in evaluating the equity or fairness of a state's tax policies. Second, from a longer-run perspective, changes in business taxes affect a state's

competitiveness with other states, which in turn affects the level of capital investment, jobs, productivity and real income in a state. The tax incidence estimates in this study provide state legislators with valuable new information needed to understand and debate the effects of business tax changes on both business competitiveness and the real income or standard of living of their residents.

This study extends the analysis of Cline et alby examining the effect of a single state increasing its state taxes only, while all other states hold their taxes constant.[2] More detail of the methodology, data and an analysis of the economic incidence of existing and incremental state and local taxes can be found in the initial analysis.

II. Background and Unique Features of the Study

Businesses paid[3] almost half a trillion dollars of state and local taxes on their income, capital and intermediate inputs in 2005.[4] Determining the amount of taxes remitted by businesses is a necessary first step in the analysis of the economic effects of taxes on business and on a state's economy. The Ernst & Young 50-State Total State and Local Business Taxes study, done in conjunction with the Council on State Taxation, (EY/COST) was an important first step in analyzing state business taxes. But ultimately consumers, workers, and/or capital owners bear the burden of taxes remitted by business through changes in product and factor prices and levels of outputs and inputs.

This study takes the important next step in analyzing the economic impacts of changes in state and local business taxes by systematically estimating the state-by-state economic incidence of increases in state taxes imposed on business. The study provides a systematic approach to analyze state-by-state business tax changes using a comprehensive tax incidence framework. The study builds on two important prior studies. First, an important advance in analysis of the incidence of state and local taxes is the biennial tax incidence study produced by the Minnesota Department of Revenue.[5] The Minnesota incidence study developed a methodology to distribute state and local business tax liabilities between non-residents and Minnesota resident investors, consumers, workers and land owners. Second, the EY/COST 50-state total state and local business tax study provides the empirical starting point for analyzing all taxes affecting business across all 50 states.

This study adds a number of unique elements to the combination of the Minnesota incidence analysis and the EY/COST 50-state empirical analysis. These unique elements include analysis of the combined impact of all major state and local business taxes; analysis done on an industry-by-industry basis; analysis of the business markets, whether local or national/global; analysis of origin and destination based taxes; and analysis distinguishing between mobile and immobile capital and labor. Additional explanation of why these are important to tax incidence analysis can be found in Cline et al.[6]

The first step in determining tax incidence is to estimate the amount of taxes considered to be the legal liabilities of business by state and by tax type. These taxes include business property taxes, sales and excise taxes paid by businesses on their purchases, gross receipts taxes, corporate income and franchise taxes, business and corporate license taxes, unemployment payroll taxes, the individual income taxes paid by owners of non-corporate (pass-through) businesses, and other state

[2]Robert Cline, Andrew Phillips, Joo Mi Kim, and Tom Neubig, "The Economic Incidence of Additional State Business Taxes," ***State Tax Notes***, January 11, 2010.
[3]Editor's note: this term refers to the legal incidence of the tax; not the ultimate incidence of the tax.
[4]E&Y 50 State Study Cline, Robert, Tom Neubig and Andrew Phillips, "Total State and Local Business Taxes: Nationally 1980-2005, by State 2002-2005, and by Industry 2005," *State Tax Notes*, May 1,2006.

[5]Minnesota Department of Revenue, *1993 Minnesota Tax Incidence Study* (November 1993). This study was the first incidence study to develop detailed, industry-by-industry estimates of the shifting of business taxes based on the economic characteristics of an industry and the relationship between state-local and national business tax rates.
[6]Cline, Phillips, Kim and Neubig, ***State Tax Notes***, *op. cit.*

and local taxes that are the statutory liability of business taxpayers.

Figure 1 illustrates the composition of total state and local business taxes in FY2005. Property taxes on business property were $183 billion in fiscal year 2005; accounting for 37% of total state and local business taxes ($497 billion). Sales tax on business inputs and capital equipment totaled $112 billion, more than 22% of total business taxes. Corporate income taxes, the focus of most of the analysis-to-date of the incidence of business taxes, only accounts for 8% of the total. This study incorporates the entire system of state and local business taxes shown in Figure 1, but analyzes the incremental effect of a change in only state-level business taxes, shown in Figure 2.

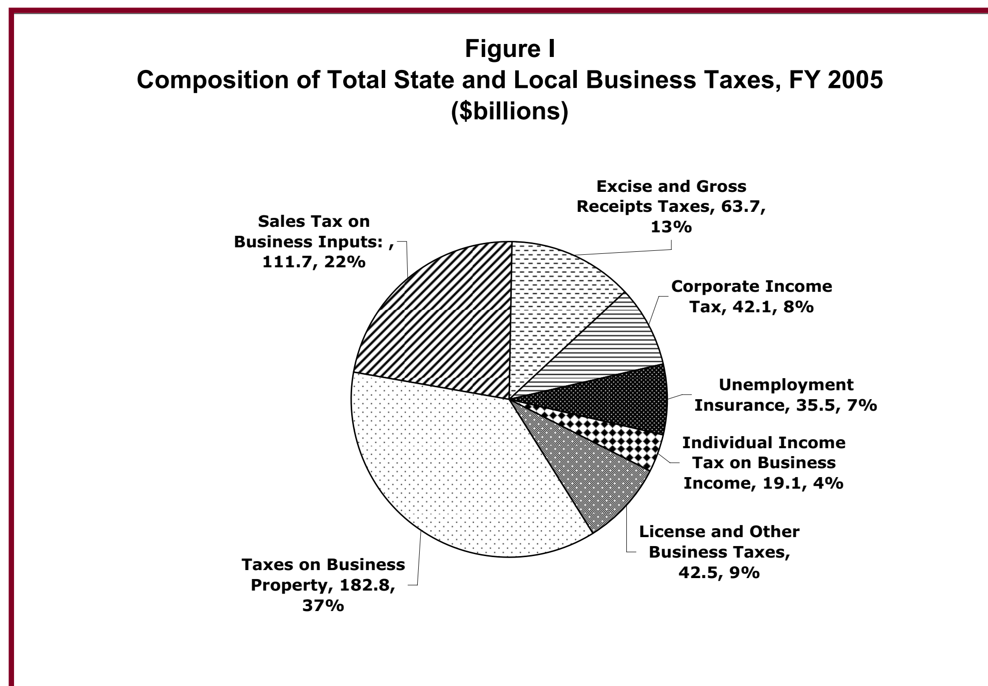
Property and sales taxes paid by business are the largest state and local business taxes faced by businesses nationwide. It is important to note, however, that the composition of business taxes varies significantly by state. State and local business property taxes range from 13% of total state and local business taxes in Delaware to 58% in Maine, but as shown in Table 1 at the state level only business property taxes range from zero in a number of states to 40% in Vermont of total state revenue. Corporate income taxes range from zero in several states to 33% in Alaska of total state revenue.

Origin-based taxes can put in-state producers at a competitive disadvantage compared to producers in lower taxed states. Assuming that a firm is operating in a relatively high origin-based business tax state, the prices the firm charges to both in-state and out-of-state customers would be higher than prices charged by out-of-state firms. This would tend to reduce the market share of in-state firms.

To improve the tax competitiveness of their state and local tax systems, a number of states are shifting their tax system balance toward destination based taxes. Examples include the twenty states that have adopted single sales factor apportionment formulas for the corporate income tax; state exemptions for business inputs from the sales tax; and Ohio, Texas and Michigan that have adopted destination-based, modified gross receipts taxes.

Table 2 presents estimates of the split of state business taxes between origin and destination based taxes. For the U.S. as a whole, 75% of state business taxes can be classified as origin-based taxes. This information will be helpful in interpreting the tax incidence results presented

Figure I
Composition of Total State and Local Business Taxes, FY 2005
($billions)



in later sections. It should be noted, however, that the economic incidence of business taxes, whether origin or destination, depends on the level of a state's taxes relative to those in other states and the markets in which in-state business taxpayers operate (local vs. national or international markets).

III. The Economic Incidence of Single State Business Tax Increases

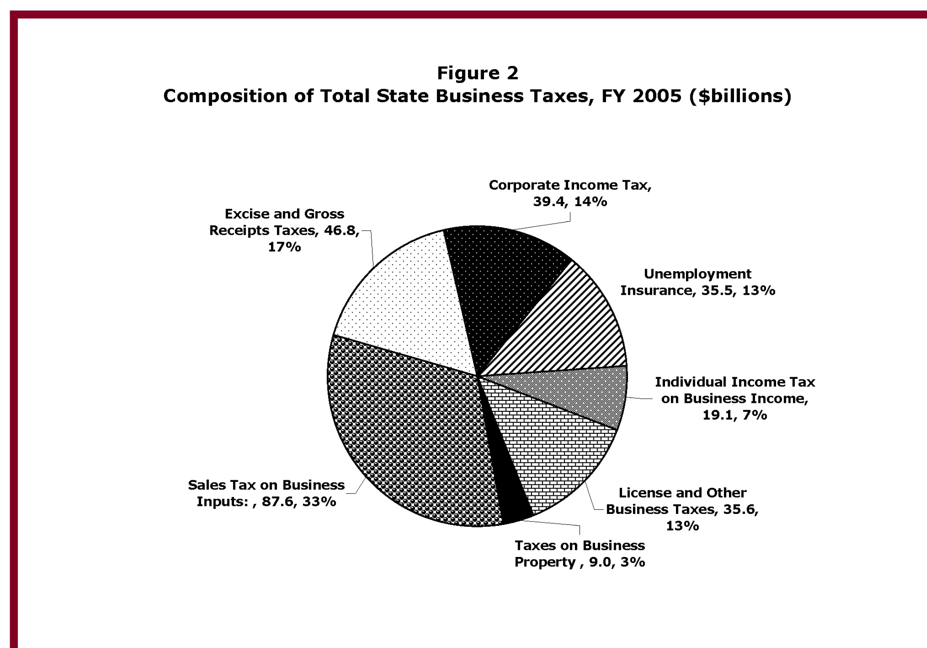
The economic incidence analysis presents the effect of one state increasing its business taxes by 10%. For each of the 50 states, business tax increases were simulated in a single state holding business taxes constant in every other state. The incidence of incremental taxes can differ significantly from the incidence of total existing taxes, as shown in Cline et. al.[7] In an incremental incidence analysis, mobile capital is able to avoid most of the higher level of state business taxes by moving to lower tax states, and thus a greater share of the incremental tax burden is shifted to in-state consumers of local goods, workers and immobile capital.[8]

[7]*Ibid.*

[8]A single state incremental analysis would theoretically include an offset for the deductibility of state taxes on federal income taxes paid, thereby increasing the degree of tax exporting. This adjustment is not included in these estimates. This offset is normally excluded from an average analysis as explained in Cline et. al. (2010).

Table 3 presents the shares of the 10% state business tax increases (holding business taxes in all other states constant) borne by in-state residents and exported to other states. The analysis shows that 29% of an incremental state business tax increase is borne by in-state labor in the form of lower wages. Capital bears 29% of an incremental state business tax increase: one percent by in-state capital owners and 28% by out-of-state capital owners. The remaining 42% of an incremental state business tax increase is shifted to consumers in the form of higher prices: (47% to in-state consumers and 8% to non-resident consumers). The next-to-last column shows that, from the perspective of a state's residents, on average, 24% of an incremental business tax burden is exported to residents of other states, primarily through lower returns to capital owned by nonresidents.

Table 3 shows in the second and third columns that the largest share of the business tax increase is borne by residents through higher prices (42% of the tax increase) or lower payments to labor (29% of the tax increase). In other words, 71% of the business tax increase is borne by state residents. In sharp contrast, only one percent of the business increase is borne by in-state owners of capital, on average, if a single state increases its



business taxes while other states' business taxes remain unchanged.

Key findings from the analysis include:

- The ultimate burden of state business taxes ("economic incidence") falls on households in their role of consumers, workers, and capital owners. The ultimate burden of state business taxes depends on the specific business taxes, the specific industries in a state, and the overall business taxes on an industry in a state relative to the national average.

- The economic incidence of state business taxes falls more heavily on capital owners when analyzing existing taxes, compared to analyzing incremental tax policy changes. Capital owners bear an estimated 47% of existing state *and* local business taxes, but would only bear 17% of an incremental state and local business tax increase in a single state. This study finds that capital owners bear 29% of incremental state-only business tax increases, on average.

- Capital owners' share of state business tax increases ranges from a high of 2/3rds in states with substantial reliance on oil, gas, coal and mining to a low of 12% in Hawaii. Capital owners' share of one state's business tax increase is relatively low because mobile capital can move between states to avoid above-average tax liabilities. This metric, capital owners' share of a state business tax increase, is an important measure of the relative competitiveness of a state's business tax system. But it is quite sensitive to a state's industry composition.

- Resident consumers' and workers' share of a state's business tax increase ranges from 30% in Wyoming to 88% in Hawaii. The finding that a state business tax increase would reduce the real disposable income of the state's residents (through lower wages, lower capital returns and higher consumer prices) by 72% on average is consistent with new research on the economic incidence of national corporate income taxes in an increasingly global economy.

- On average, 28% of a state business tax increase is "exported" to non-residents. A portion of a state business tax increase would be shifted to non-resident consumers in higher prices for goods sold in national markets and to non-resident capital owners in the form of reduced profits. In both cases, the higher prices and reduced profits have economic effects that result in less investment and employment in the state.

- Because such a large portion of the business tax increase will be borne by in-state residents in most states, legislators should evaluate business tax increases in the same way that increases in personal income taxes and sales and excise tax increases are evaluated. The converse is also true. Legislators should consider the positive impact that reductions in relative business taxes can have in terms of higher payments to in-state labor and lower prices for their constituents' goods and services.

The results of this study indicate that taxes imposed initially on business are primarily borne by residents in the form of higher prices or reduced wages and jobs, with only a modest share exported to taxpayers in other states (other than in extractive states) or shifted to capital owners. This result reflects the growing reality of increased business tax competitiveness and capital mobility both nationally and internationally.

Table 1
Composition of Business Taxes by State, FY2005

	Property Tax	Sales Tax	Excise and Gross receipts	Corporate Income	Unem-ployment Insurance Tax	Individual Income Tax on Pass-thru Business Income	Licenses and Other Taxes	Total Business Taxes
Alabama	5.1%	21.0%	36.1%	11.3%	9.1%	4.9%	12.5%	100.0%
Alaska	2.4%	0.0%	4.2%	32.9%	8.1%	0.0%	52.4%	100.0%
Arizona	8.0%	48.5%	13.5%	16.1%	5.7%	4.7%	3.5%	100.0%
Arkansas	19.7%	33.5%	12.6%	10.1%	12.0%	7.6%	4.5%	100.0%
California	5.3%	27.6%	12.5%	21.1%	12.7%	9.8%	10.9%	100.0%
Colorado	0.0%	34.2%	14.1%	11.0%	16.5%	15.5%	8.8%	100.0%
Connecticut	0.0%	38.6%	16.8%	13.7%	15.4%	11.1%	4.5%	100.0%
Delaware	0.0%	0.0%	11.8%	15.6%	4.9%	4.0%	63.6%	100.0%
Florida	0.9%	43.1%	29.6%	11.3%	7.4%	0.0%	7.7%	100.0%
Georgia	1.2%	43.1%	11.2%	12.1%	13.9%	11.8%	6.8%	100.0%
Hawaii	0.0%	48.0%	22.5%	9.9%	9.3%	6.0%	4.3%	100.0%
Idaho	0.0%	35.1%	14.9%	12.4%	13.9%	10.8%	12.9%	100.0%
Illinois	0.4%	23.2%	23.6%	19.0%	18.8%	4.6%	10.4%	100.0%
Indiana	0.2%	41.2%	12.4%	21.1%	14.5%	7.6%	2.9%	100.0%
Iowa	0.0%	32.8%	16.1%	10.5%	15.5%	9.8%	15.3%	100.0%
Kansas	2.8%	41.2%	12.9%	8.8%	15.6%	7.6%	11.1%	100.0%
Kentucky	7.3%	31.9%	15.3%	12.6%	9.4%	7.2%	16.3%	100.0%
Louisiana	1.0%	38.2%	16.0%	9.2%	4.4%	5.4%	25.7%	100.0%
Maine	4.5%	35.7%	17.6%	14.1%	9.6%	9.8%	8.8%	100.0%
Maryland	10.3%	22.6%	21.5%	17.0%	10.7%	10.1%	8.0%	100.0%
Massachusetts	0.0%	23.7%	11.2%	22.9%	26.0%	10.6%	5.7%	100.0%
Michigan	14.2%	27.8%	6.1%	18.5%	17.0%	4.8%	11.6%	100.0%
Minnesota	9.9%	29.2%	18.0%	15.0%	13.3%	6.1%	8.5%	100.0%
Mississippi	2.1%	44.9%	15.4%	17.2%	6.9%	4.5%	9.1%	100.0%
Missouri	0.7%	40.2%	17.9%	7.8%	13.6%	9.0%	11.0%	100.0%
Montana	18.1%	0.0%	25.5%	14.2%	10.9%	11.2%	20.1%	100.0%
Nebraska	0.2%	49.2%	10.4%	13.5%	9.1%	10.0%	7.6%	100.0%
Nevada	6.0%	43.2%	14.1%	0.0%	11.9%	0.0%	24.8%	100.0%
New Hampshire	16.4%	0.0%	26.9%	35.2%	6.9%	0.4%	14.3%	100.0%
New Jersey	0.0%	25.2%	17.5%	24.8%	16.5%	6.3%	9.7%	100.0%
New Mexico	1.8%	37.0%	10.5%	9.0%	3.6%	3.4%	34.8%	100.0%
New York	0.0%	32.3%	14.8%	18.0%	14.6%	17.5%	2.9%	100.0%
North Carolina	0.0%	25.5%	22.2%	18.2%	15.9%	8.2%	9.9%	100.0%

Table 1
Composition of Business Taxes by State, FY2005 *continued*

	Property Tax	Sales Tax	Excise and Gross receipts	Corporate Income	Unem-ployment Insurance Tax	Individual Income Tax on Pass-thru Business Income	Licenses and Other Taxes	Total Business Taxes
North Dakota	0.2%	18.1%	18.9%	9.9%	7.6%	4.0%	41.4%	100.0%
Ohio	0.4%	34.5%	15.9%	11.0%	10.2%	7.5%	20.5%	100.0%
Oklahoma	0.0%	28.5%	11.3%	6.3%	9.5%	10.8%	33.5%	100.0%
Oregon	1.2%	0.0%	10.1%	17.8%	37.6%	18.6%	14.8%	100.0%
Pennsylvania	0.2%	24.0%	19.8%	13.7%	20.0%	6.2%	16.1%	100.0%
Rhode Island	0.2%	37.5%	23.2%	10.9%	17.3%	6.1%	5.0%	100.0%
South Carolina	0.4%	41.5%	16.8%	10.6%	12.3%	7.4%	11.0%	100.0%
South Dakota	0.0%	52.3%	21.1%	7.9%	2.9%	0.0%	15.9%	100.0%
Tennessee	0.0%	41.8%	14.1%	15.9%	9.3%	0.3%	18.6%	100.0%
Texas	0.0%	41.7%	22.6%	0.0%	8.3%	0.0%	27.3%	100.0%
Utah	0.0%	37.3%	18.5%	12.3%	12.3%	10.8%	8.8%	100.0%
Vermont	39.5%	15.4%	20.4%	8.6%	6.6%	4.9%	4.6%	100.0%
Virginia	0.4%	25.5%	27.0%	13.8%	12.0%	11.2%	10.2%	100.0%
Washington	8.2%	56.1%	13.9%	0.0%	16.5%	0.0%	5.3%	100.0%
West Virginia	0.2%	17.5%	32.7%	16.0%	7.9%	4.4%	21.3%	100.0%
Wisconsin	2.0%	32.3%	15.9%	17.6%	13.0%	7.0%	12.2%	100.0%
Wyoming	10.6%	20.7%	3.5%	0.0%	2.5%	0.0%	62.8%	100.0%
District of Columbia	37.3%	14.9%	14.2%	9.5%	5.6%	8.4%	10.0%	100.0%
United States	3.3%	32.1%	17.1%	14.4%	13.0%	7.0%	13.0%	100.0%

Table 2
Origin and Destination State Business Tax Shares by State, FY2005

State	Origin	Destination
Alabama	74.8%	25.2%
Alaska	73.6%	26.4%
Arizona	77.3%	22.7%
Arkansas	81.1%	18.9%
California	73.8%	26.2%
Colorado	74.7%	25.3%
Connecticut	75.4%	24.6%
Delaware	50.6%	49.4%
Florida	82.5%	17.5%
Georgia	77.6%	22.4%
Hawaii	78.6%	21.4%
Idaho	75.8%	24.2%
Illinois	73.6%	26.4%
Indiana	72.0%	28.0%
Iowa	73.4%	26.6%
Kansas	79.0%	21.0%
Kentucky	72.9%	27.1%
Louisiana	75.3%	24.7%
Maine	73.0%	27.0%
Maryland	67.9%	32.1%
Massachusetts	62.7%	37.3%
Michigan	79.8%	20.2%
Minnesota	71.6%	28.4%
Mississippi	74.6%	25.4%
Missouri	73.3%	26.7%
Montana	68.4%	31.6%

Table 2
Origin and Destination State Business Tax Shares by State, FY2005
continued

State	Origin	Destination
Nebraska	81.2%	18.8%
Nevada	85.4%	14.6%
New Hampshire	58.8%	41.2%
New Jersey	69.6%	30.4%
New Mexico	86.2%	13.8%
New York	69.8%	30.2%
North Carolina	63.4%	36.6%
North Dakota	81.4%	18.6%
Ohio	73.6%	26.4%
Oklahoma	83.9%	16.1%
Oregon	59.9%	40.1%
Pennsylvania	71.8%	28.2%
Rhode Island	76.3%	23.7%
South Carolina	76.6%	23.4%
South Dakota	78.3%	21.7%
Tennessee	70.0%	30.0%
Texas	78.1%	21.9%
Utah	73.6%	26.4%
Vermont	77.3%	22.7%
Virginia	64.5%	35.5%
Washington	91.3%	8.7%
West Virginia	70.1%	29.9%
Wisconsin	78.3%	21.7%
Wyoming	97.2%	2.8%
District of Columbia	87.2%	12.8%
United States	**74.9%**	**25.1%**

Table 3. Economic Incidence of Single State Business Tax Increases

_____Percent Borne by the State's Residents_____

Business Taxes	Shifted Forward in Prices	Shifted Back to Labor	Total Shifted to Labor & Consumers	Shifted Back to Resident Capital	Exported to Non-Residents	Total Marginal Tax
	(1)	(2)	(3)	(4)	(5)	(6)
			(1) + (2)			(3)+(4)+(5)
Alabama	42%	31%	74%	0%	26%	100%
Alaska	16%	15%	32%	0%	68%	100%
Arizona	48%	26%	74%	1%	25%	100%
Arkansas	47%	30%	76%	0%	24%	100%
California	42%	34%	76%	3%	20%	100%
Colorado	52%	27%	79%	1%	21%	100%
Delaware	48%	25%	72%	0%	27%	100%
Connecticut	20%	30%	50%	0%	50%	100%
Florida	56%	25%	80%	2%	18%	100%
Georgia	49%	29%	78%	1%	22%	100%
Hawaii	63%	26%	88%	0%	12%	100%
Idaho	44%	27%	71%	0%	29%	100%
Illinois	45%	24%	68%	1%	31%	100%
Indiana	43%	31%	74%	0%	25%	100%
Iowa	44%	24%	68%	0%	32%	100%
Kansas	46%	27%	73%	0%	26%	100%
Kentucky	37%	33%	70%	0%	30%	100%
Louisiana	24%	25%	49%	0%	52%	100%
Maine	56%	26%	82%	0%	18%	100%
Maryland	56%	22%	79%	0%	21%	100%
Massachusetts	44%	27%	71%	0%	29%	100%
Michigan	44%	24%	69%	0%	31%	100%
Minnesota	49%	25%	74%	0%	26%	100%
Mississippi	46%	29%	75%	0%	25%	100%
Missouri	50%	28%	77%	0%	22%	100%
Montana	26%	25%	51%	0%	48%	100%
Nebraska	44%	30%	74%	0%	26%	100%
Nevada	56%	24%	79%	0%	21%	100%
New Hampshire	43%	26%	69%	0%	31%	100%

Table 3. Economic Incidence of Single State Business Tax Increases

_____Percent Borne by the State's Residents_____

continued

Business Taxes	Shifted Forward in Prices	Shifted Back to Labor	Total Shifted to Labor & Consumers	Shifted Back to Resident Capital	Exported to Non-Residents	Total Marginal Tax
	(1)	(2)	(3)	(4)	(5)	(6)
			(1) + (2)			(3)+(4)+(5)
New Jersey	49%	29%	78%	1%	22%	100%
New Mexico	24%	19%	42%	1%	57%	100%
New York	39%	33%	72%	2%	26%	100%
North Carolina	40%	31%	72%	1%	28%	100%
North Dakota	25%	25%	50%	0%	50%	100%
Ohio	46%	30%	76%	1%	23%	100%
Oklahoma	30%	24%	54%	1%	45%	100%
Oregon	37%	19%	56%	0%	44%	100%
Pennsylvania	44%	29%	73%	1%	26%	100%
Rhode Island	50%	30%	80%	0%	20%	100%
South Carolina	52%	27%	79%	0%	21%	100%
South Dakota	38%	31%	69%	0%	31%	100%
Tennessee	50%	31%	81%	0%	19%	100%
Texas	30%	27%	58%	3%	39%	100%
Utah	45%	27%	72%	0%	28%	100%
Vermont	54%	24%	78%	0%	22%	100%
Virginia	50%	25%	75%	1%	24%	100%
Washington	51%	32%	83%	1%	16%	100%
West Virginia	33%	30%	63%	0%	37%	100%
Wisconsin	45%	32%	76%	0%	23%	100%
Wyoming	7%	23%	30%	0%	70%	100%
District of Columbia	55%	25%	80%	0%	20%	100%
United States	42%	29%	71%	1%	28%	100%

No. 2009 – 0627
In the Supreme Court of Ohio

DIRECTV, INC. and ECHOSTAR SATELLITE, L.L.C.,
***Plaintiffs – Appellants,* v.**

RICHARD LEVIN, Tax Commissioner of Ohio,
Defendant – Appellee.

ON APPEAL FROM THE COURT OF APPEALS,
TENTH APPELLATE DISTRICT
CASE NO. 08AP – 32

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT – APPELLEE

DirecTV and Echostar, two providers of satellite television, are challenging Ohio's tax treatment of cable and satellite television. The companies contend that Ohio's state transaction tax on satellite television services violates the "dormant" Commerce Clause because cable is not subject to the state tax.[1] The satellite providers contend that satellite television is inherently an interstate enterprise because the signal to the consumer is transmitted from space, whereas cable is predominantly a local enterprise because of the local infrastructure required to transmit a TV signal to the consumer via cable.

The MTC's brief asserts that the "dormant" Commerce Clause is not relevant in this case, because Congress has authorized the precise tax scheme that Ohio has adopted. Congress has forbidden localities to tax satellite television, while specifically authorizing the states to do so. At the same time, Congress has allowed localities to impose franchise fees on cable television. Therefore, Congress has approved the precise compensatory tax scheme that Ohio and other states have adopted – cable is taxed exclusively at the local level and satellite is exclusively taxed at the state level. The MTC cites long-standing Supreme Court precedent in support of its argument that when Congress has exercised its affirmative Commerce Clause power to approve the state tax scheme at issue, the "dormant" Commerce Clause has no role to play.

[1]The Commerce Clause of the U.S, Constitution grants Congress the authority to regulate interstate commerce. The Supreme Court has long construed the Commerce Clause as containing a "dormant" or "implied" component that allows the Court to strike down state legislation that it views as so burdening interstate commerce as to be prohibited by the Commerce Clause even in the absence of congressional action.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of Defendant-Appellant, Ohio Tax Commissioner. The Multistate Tax Commission supports the view of the Tax Commissioner, and the Court of Appeals, that Ohio's imposition of its retail sales tax on the sale of direct-to-home satellite broadcasting services does not violate the Commerce Clause of the United States Constitution, Art. 1, §8, cl. 3.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967 when the required minimum threshold of seven states enacted it.[1] Today, forty-seven states and the District of Columbia participate in the Commission. Twenty of those jurisdictions have adopted the Multistate Tax Compact by statute. Another twenty-eight have joined the Commission as either sovereignty or associate members.[2] The purposes of the Compact are to: (1) facilitate proper determination of State and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration, and (4) avoid duplicative taxation.[3]

These purposes are central to the very existence of the Compact, which was the States' answer to an urgent need for reform in state taxation of interstate commerce. *See e.g.,* H.R. Rep. No. 952, 89th Cong. 1st Sess., Pt. VI, at 1143 (1965). By the mid-1960's, substantial lack of uniformity had resulted in burdensome complexity and uncertainty, and an elevated risk of duplicate taxation or less than full apportionment of income. If the States failed to act, Congress stood ready to impose reform itself through federal legislation that would preempt and regulate state taxation.[4]

The promise of increased uniformity

[1] *See, United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), upholding the validity of the Compact.

[2] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, Maryland, New Jersey, and West Virginia. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

[3] Multistate Tax Compact, Art. I.

[4] The Willis Committee, a congressional study of state taxation mandated by Title II of Pub. L. No. 86-272, 73 Stat. 555, 556 (1959), made extensive recommendations as to how Congress could regulate state taxation of interstate and foreign commerce. *See generally Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills Before Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966).

established by the States' adoption of the Compact was critical to reducing the risk of duplicative taxation and preserving the recognized sovereignty the states enjoy with respect to taxation of interstate commerce. Preserving state tax sovereignty under our vibrant federalism remains a key purpose of the Commission.

The importance the Commission attaches to the present case, and our motivation for filing this brief today, lies in this goal of preserving States' sovereignty and protecting it from an erroneously expansive interpretation of federal limitations. The application of the dormant Commerce Clause suggested by the satellite broadcasters in this case would result in harmful and unfounded limitation on the State's sovereign authority to define its tax base based on a careful weighing of relevant policy determinations made by the peoples' representative, the Ohio legislature. The relative degree of local infrastructure standard proposed by the satellite broadcasters for determining whether an industry is interstate and entitled to protection under the dormant Commerce Clause is entirely irrelevant and unworkable in practice.

More fundamentally, the Commission submits that this Court cannot reach the dormant Commerce Clause issue raised by the satellite broadcasters at all, because Congress has acted pursuant to its affirmative commerce clause powers to explicitly authorize the specific tax scheme that Ohio has adopted – taxation of cable broadcasting at the local level and taxation of satellite broadcasting at the state level. 47 U.S.C. §542(b), Pub. L. No. 104 – 104, Title VI, §602(a) and (c) (reprinted at 47 U.S.C. §152, historical and statutory notes). Where Congress has spoken on an issue, there is no dormant Commerce Clause inquiry to be made. *Western & Southern Life Insurance Company v. State Board of Equalization,* 451 U.S. 648, 652 – 653 (1981), *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 154 – 155 (1982). The Commission therefore files this brief in furtherance of the interest of its members that the dormant Commerce Clause not be erroneously extended to cases where Congress has explicitly approved the very tax structure that the satellite broadcasters challenge.

I.
Congress Explicitly Authorized the Tax Scheme Employed by Ohio and Other States to Tax Satellite at the State Level While Subjecting Cable to Local Franchise Fees

Section 602(a) of the Telecommunications Act of 1996 (hereafter, "the Act") provides;

> Preemption. A provider of direct-to-home satellite service 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 service.

Pub. L. No. 104 – 104, Title VI, §602(a) (reprinted at 47 U.S.C. §152, historical and statutory notes).

The legislative history of Section 602(a) demonstrates that, in preempting the authority of local taxing jurisdictions to impose a tax or fee on satellite broadcasting, Congress recognized that satellite broadcasting did not require the use of public rights-of-way or the physical facilities of a community.[5] At its essence, this is the basis for the satellite broadcasters argument in this case – unlike cable, satellite does not require the use of extensive local infrastructure that burdens public facilities. Although Congress specifically noted this relative infrastructure rationale for preempting local taxes and fees, Congress, at the same time, explicitly allowed state taxation of satellite broadcasting. Section 602(c) of the Act provides;

> Preservation of State authority. This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed by a State.

Clearly, in preempting local authority to directly tax satellite broadcasting, Congress chose not to similarly preempt the states' authority to tax satellite broadcasting. Indeed, the statute endorses state taxation of satellite service. Congress did not limit its state tax permission to situations where the states similarly tax cable. In the absence of such a limitation, Congress's unqualified statement that the states are free to tax satellite broadcasting must be construed as not requiring the states to similarly tax cable.

Here, Congress has created a limited immunity from tax for satellite broadcasters. We know from U.S. Supreme Court precedent, that where Congress creates a limited immunity from tax, congressional silence as to a broader immunity indicates by negative implication that Congress created no such broader immunity. *Director of Revenue of Missouri v. CoBank ACB,* 531 U.S. 316, 323 – 325 (2001) (structure of Farm Credit Act granting state tax immunity to some Farm Credit institutions indicates by negative implication that other Farm Credit institutions not so immunized remain subject to state tax). *See also, Farm Credit Services of Mid-America v. Zaino,* 91 Ohio St. 3d 564, 2001 Ohio 113, 747 N.E. 2d 814 (2001) (same). *Cf., General*

[5] "The conference agreement adopts the House provisions with modifications. This section exempts DTH [direct-to-home] satellite service providers from collecting and remitting local taxes and fees on DTH satellite services. DTH satellite service is programming delivered directly to subscribers equipped with satellite receivers at their premises; it does not require the use of public rights-of-way or the physical facilities or services of a community. The conferees adopt the House language …. States are free to tax the sale of the service and they may rebate some or all of those monies to localities if they so desire." H.R. Conf. Rep. No. 104 – 458, at 201 – 202 (1996).

Motors Corporation v. Tracy, 519 U.S. 278, 291 – 294 (1997) (congressional exemption of local distribution of natural gas from federal regulation authorized Ohio to impose its sales tax on natural gas purchases from out-of-state independent marketers notwithstanding that purchases from in-state local gas distributors were exempt).[6] In this case, had Congress been ***silent*** as to state taxation of satellites, there would be a need to argue the negative inference is that there is no such immunity at the state level. But, in this case, Congress left no need for interpretation by negative inference. Congress ***explicitly*** stated that the immunity extends only to local taxes.

In explicitly permitting states to tax satellite broadcasting, Congress exercised its affirmative authority under the Commerce Clause. This affirmative approval is in no way conditioned upon the states similarly taxing cable at the state level. Having exercised its ***affirmative*** commerce clause authority to grant states ***unqualified*** permission to tax, there is no basis for a ***dormant*** commerce clause inquiry into inferred qualifications.

II.

The Satellite Broadcasters Urge this Court to use the dormant Commerce Clause to Adopt a Rule That Will Inevitably Give Satellite An Unfair Competitive Advantage in Ohio, Contrary to the Purposes of the Clause.

Where cable is concerned, however, Congress chose a very different approach. Rather than totally preempting local authority to levy a franchise fee on cable, Congress specifically authorized local franchising authorities to impose a cable franchise fee, subject to a maximum rate of no more than 5% of the cable operator's annual gross receipts. 47 U.S.C. §542(a) and (b). In doing so, Congress struck a balance in the tax treatment of cable and satellite, to reflect the different demands that the two broadcast formats make on local infrastructure -- satellite cannot be required to pay a local franchise fee while cable can.[7]

[6]The State of Ohio has persuasively demonstrated that its tax structure does not discriminate against satellite broadcasting within the meaning of the dormant Commerce Clause. But even if Ohio's tax scheme were so construed, Congress in the exercise of its authority under the affirmative Commerce Clause may authorize discriminatory taxation, as long as its intention to do so is clearly expressed. *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408 (1946), *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 91 – 92 (1984). By preempting state authority to impose a local tax or fee on satellite broadcasting, while at the same time both authorizing local taxation of cable and allowing state taxation of satellite, Congress has authorized precisely the taxing structure that Ohio has adopted.

[7]The satellite broadcasters would have this Court ignore the congressional preemption of state authority to impose a local franchise fee on satellite broadcasting while allowing such a fee to be imposed on cable. The satellite broadcasters assert that a franchise fee is somehow different than a tax. But Congress explicitly chose to preempt local authority to impose either a tax **or** fee on satellite broadcasting while allowing localities to impose a franchise fee on cable. Section 602(b) of the Act makes clear that the term "tax or fee" encompasses both a local sales or use tax and a franchise fee. Whatever differences may exist between a fee and a tax under state law, Congress in the exercise of its Commerce Clause authority has decreed that for purposes of the preemption, they are to be treated the same.

The satellite providers propose to upset the balance that Congress struck by seeking to obtain the very same competitively skewed tax advantage that Congress eschewed in Section 602 – relief from taxation at the state level unless cable is taxed as well, while maintaining its immunity from taxation at the local level. Clearly, in relieving satellite from a local tax burden to fund local services it does not require, Congress did not intend to give satellite a competitive advantage by conditioning a state's ability to tax satellite on its willingness to create an uneven playing field by either taxing both cable and satellite or taxing neither.

Thus the Court should note that the satellite broadcasters are not seeking to level the playing field regarding the tax treatment of satellite and cable broadcasters in the State of Ohio. Cable TV providers in Ohio are subject to a franchise fee levied by each local franchising authority (LFA) in order to be granted a license to provide cable TV within that LFA.[8] Rather, the satellite providers' position, if accepted by this Court, would result in satellite providers having a competitive *advantage* over their cable competitors. Should the satellite providers prevail in this case, one of two results will flow from that outcome. Either the State will extend the sales tax to cable, or the State will repeal the sales tax on satellite broadcasting. In either event, cable will remain subject to the local franchise fees authorized by Congress in 47 U.S.C §542. As Congress has also preempted the authority of local franchising authorities to impose franchise fees on satellite providers, the effect of a ruling in favor of the satellite broadcasters will be to grant them a tax advantage in Ohio over cable providers.[9] This would be contrary to the taxation scheme for cable and satellite expressly established by Congress, in the exercise of its plenary authority under the affirmative Commerce Clause.

Ohio's current tax scheme – taxing satellite broadcasting at the state level and subjecting cable broadcasting to local franchise fees -- assures that Ohio's tax structure does not create an unfair competitive advantage for either cable or satellite broadcasting, both of whom compete for essentially the same market. It is the satellite providers that seek to take advantage of the federal preemption on the imposition of local taxes or fees on satellite broadcasting to create a tax

[8]The majority of Ohio cable franchise agreements provide for a 5% franchise fee. Since July 1, 2005, the Ohio retail sales tax rate has been 5.5% of the gross receipts from each sale. The overall tax treatment of satellite and cable in Ohio is therefore substantially equivalent.

[9]This issue is not confined to Ohio. The satellite broadcasters have challenged, or are planning to challenge, the imposition of state sales tax on satellite broadcasting in at least six other states -- Florida, Kentucky, Massachusetts, North Carolina, Tennessee and Utah. See the satellite providers' website, Stop Satellite Tax, at http://stopsatellitetax.com (last visited on November 24, 2009).

advantaged position for themselves, contrary to the intent of Congress in specifically allowing for the state-level taxation of satellite providers.

III.
The Specific Dormant Commerce Clause Analysis Proposed By the Satellite Broadcasters in this Case is Fundamentally Flawed.

The dormant Commerce Clause protects competitive national markets by prohibiting discrimination against interstate commerce in favor of instate or local commerce. The test urged by the satellite broadcasters for determining whether an industry is an instate or inter-state industry for purposes of applying the dormant commerce clause analysis would require this Court to weigh the relative degree of infrastructure both cable and satellite maintain within and without the State. There are two major problems with this proposed relative infrastructure test.

First, comparing the level of two industries' infrastructure in a state tells us nothing about whether the markets served by those industries are instate or interstate markets.[10]

[10]The Tax Commissioner's analysis of this issue in his Merits Brief cogently explains why the relative degree of infrastructure in the taxing state of two competitors in the same market is irrelevant in determining whether those competitors serve an instate or interstate market. Merit Brief of Defendant-Appellee of Richard A. Levin, Tax Commissioner of Ohio, at 23 – 30. There is no need for the Commission to repeat or augment the Tax Commissioner's argument here.

Second, even if relative infrastructure were relevant to the dormant commerce clause, there is no principled basis to determine how much infrastructure variance between competitors is enough to trigger discrimination – must one competitor have 100% of its infrastructure within the state while the other has none? Or is a 75% - 25% variance enough? What about 60% -- 40%? Or is it more appropriate to determine the variance by the relative value of the infrastructure as opposed to percentages? If so, what is the measure of value – original cost, or fair market value? Should depreciation be factored in and, if so, what depreciation method should be used? Finally, whatever yardstick is used the infrastructure variance is highly unlikely to remain constant over time. Would a variance that met the test initially eventually be considered discriminatory as the two competitors compete for market share? Is it not more likely that the changing nature of local infrastructure is a function of the success – or failure – of the competitors to build market share and the degree of productivity efficiencies each competitor has achieved than it is due to state tax policy? Local infrastructure can vary widely due to fluctuations in market share and changes in the labor/capital ratio. For example, the infrastructure required to support the domestic

American automobile industry has fallen rapidly in recent years. This is most likely due to competition from foreign carmakers and technological innovations that have reduced the manual labor required to produce cars. Whether that infrastructure is properly considered as "local" to a particular state or "interstate" has had nothing to do with its decline.

This case presents no occasion for the Court to enter the morass of weighing the relative degree of local infrastructure required by satellite and cable broadcasting as urged by the satellite broadcasters. Instead, this Court must sustain Ohio's tax scheme because Congress, in the exercise of its affirmative Commerce Clause power, has authorized that precise tax scheme. The dormant Commerce Clause therefore has no role whatsoever to play in this case.

CONCLUSION

Your *amicus* therefore respectfully urges this Court to affirm the decision of the Tenth District sustaining Ohio's sales and use taxation of satellite broadcasting services, while excluding cable broadcasting services, on the ground that Congress, in the exercise of its affirmative Commerce Clause power, has explicitly approved the tax scheme that Ohio has adopted.

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MTC Offers

Statistical Sampling and Corporate Income Tax Course

Ken Beier, Director of Training

Corporate Income Tax
May 17-20, 2010 in Montgomery, Alabama
(at the Alabama Department of Revenue)

This course provides an understanding constitutional principles and mechanics that apply to corporate income tax apportionment. Part One of the course is appropriate for any tax personnel who deal with the state corporate income taxes. Part Two of the course focuses on techniques for audit of multistate businesses and includes a segment on bank taxation. Part Two students also take Part One of the course. Since Alabama is a "separate entity" state for the corporate income tax, the course is especially appropriate for tax personnel from states that use separate entity reporting.

Statistical Sampling for Sales and Use Tax Audits
June 14-17, 2010 in Atlanta, Georgia
(at the Georgia Department of Revenue)

From our experience with state audits, it is clear that appropriate use of sampling techniques contributes to reduced audit cost and improved audit results—for the taxpayer and the tax agency. This session of the course is open to private sector participants, in addition to state and local government personnel.

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We expect to be scheduling additional MTC Courses—including the **Nexus School, Computer Assisted Audit Techniques Using Excel, and Basic Random Sampling** for 2010. Current course and registration information are available at http://www.mtc.gov/Events.aspx?id=1616

The Multistate Tax Commission is registered with the National Association of State Boards of Accountancy (NASBA), as a sponsor of continuing professional education on the National Registry of CPE Sponsors. State boards of accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be addressed to the National Registry of CPE Sponsors, 150 Fourth Avenue North, Suite 700, Nashville, TN, 37219-2417. Website: www.nasba.org.

Calendar of Events

43rd Annual Conference & Committee Meetings
July 25-29, 2010
Hood River, Oregon

For further details of these and future meetings, please visit our website at *www.mtc.gov*.

Help Keep Our Database Up-To-Date

If you would like to be notified of upcoming meetings, hearings, and teleconferences, please send an email to Teresa Nelson at tnelson@mtc.gov. Include your full name, mailing address, telephone, fax and email.