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Before the Select Committee on Budget and Tax Reform
Roundtable on Modernizing New York State's Telecommunications Taxes

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Chairwoman Krueger, and members of the Select Committee on Budget and Tax Reform, thank you for the opportunity to participate in today's Roundtable. My name is Jeremy Kudon, and I am an attorney at Orrick, Herrington & Sutcliffe in New York. I am here today on behalf of DIRECTV and DISH Network—the two major providers of satellite TV service in New York, as well as the Satellite Broadcasting & Communications Association, which represents all segments of the consumer satellite industry.

When it comes to pay TV service, we believe ***New York's current tax structure is fair and reasonable***. Pay TV is not subject to the "differing tax treatments" that plague other telecommunications services. Instead, all providers are treated exactly the same: New York does not impose any sales tax on pay TV service—regardless of the provider.

Nonetheless, we applaud the Committee's efforts to look at ways to modernize telecommunications' taxes. No company should be able to base an entire advertising campaign—as we saw with the Sir Charge ads—on the disparity between the taxes and surcharges paid by 2 providers of landline phone service. But that discussion is better left

to the other participants. My clients only provide a single service: Pay TV. Accordingly, my comments today will be limited to that service.

We believe that two principles should frame our discussion today.

First, now is not the time to impose a new tax on television. With budgets stretched and wallets thinning, TV has become the entertainment of last resort for millions of New Yorkers. The best recommendation this Committee can make when it comes to taxing pay TV is to maintain the status quo. As they say, "if it ain't broke, don't fix it."

Second, if the Committee was to recommend a new tax on pay TV, and we strongly urge it not to, that tax should follow a simple principle: **Tax the service, not the provider.** Now I think it's important to stress the difference between a tax and an expense. Franchise fees paid by cable and phone companies to cities and towns to access their public rights of way **are not a tax**, They are a necessary cost of the distribution model those companies use to provide video programming to subscribers.

Simply put, not just anyone can dig up a public street or hang wires from a public utility pole; cities and towns own that property and they charge rent for it, just like any landlord would. You don't call it a tax when a vendor pays the City of New York to run a hot dog stand on the sidewalk. And you don't call it a tax when Time Warner Cable agrees to pay a homeowner in Scarsdale to install their fiber optic wires beneath her lawn. So why would you call it a tax when that same company enters into a heavily negotiated agreement with Schenectady to obtain the same valuable property rights for the same business purpose?

But don't just take my word for it. Let me read you a few quotes from some leading authorities on the subject:

- "Franchise fees . . . are commonly understood to be consideration for the contractual award of a government benefit."
- "[F]ranchise fees [are] a form of 'rent.'"
- Cable's "largest asset[s]" are "cable franchise rights" purchased with franchise fees.
- In contrast, "[t]axes simply have no contractual element; they are a demand of sovereignty."

Are these the words of satellite TV partisans? No. These are the words of *cable companies*. They are taken directly from their SEC filings, franchise agreements, and briefs that they file with state and federal courts.

Because franchise fees are not a tax, but a cost of doing business incurred by some, but not all, pay TV providers, it would violate the principle of "taxing the service, not the provider" to impose a tax only on satellite TV to offset those fees.

Satellite TV providers have developed a technology that allows them to provide video service to consumers in every corner of the state without digging up public streets or parks. I like to think of them as the first green TV providers. Making them pay a tax that is used to subsidize the cost of a property right purchased by competitors would be like making airlines pay a tax for the use of railroad tracks: They don't use them, they shouldn't have to pay for them.

Such a tax is particularly hard to explain to a family who lives in a rural part of the State that the cable industry has deemed too unprofitable to service. For many of those families, satellite TV is their only option. Why should they pay a tax that is solely intended to offset a cost of doing business that cable refuses to even incur in the part of

the State they live. The same is true of the tens of thousands of New Yorkers who subscribe to DIRECTV or DISH to access their more diverse international programming options—satellite TV is the only option they have to see the news or weather in a language they understand. Thank you for your time and attention. I look forward to discussing these issues in greater detail during the Roundtable discussion.