

11-12-2013

Cable One v. Idaho State Tax Commission Clerk's Record Dckt. 41305

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

Recommended Citation

"Cable One v. Idaho State Tax Commission Clerk's Record Dckt. 41305" (2013). *Idaho Supreme Court Records & Briefs*. 4764.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/4764

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

CABLE ONE, INC.,

Plaintiff-Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

Supreme Court Case No. 41305

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE JAMES F. JUDD

KELLY A. CAMERON

ATTORNEY FOR APPELLANT

BOISE, IDAHO

ERICK M. SHANER

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Cable One Inc vs. Idaho State Tax Commission

Date	Code	User		Judge
2/17/2011	NCOC	CCRANDJD	New Case Filed - Other Claims	Timothy Hansen
	COMP	CCRANDJD	Complaint Filed	Timothy Hansen
	SMFI	CCRANDJD	Summons Filed	Timothy Hansen
3/10/2011	ANSW	MCBIEHKJ	Answer (E Shaner for Idaho State Tax)	Timothy Hansen
3/23/2011	HRSC	DCOLSOMA	Hearing Scheduled (Status 05/23/2011 04:30 PM)	Timothy Hansen
5/11/2011	NOTS	MCBIEHKJ	Notice Of Service	Timothy Hansen
5/23/2011	HRHD	DCOLSOMA	Hearing result for Status held on 05/23/2011 04:30 PM: Hearing Held - In Chambers	Timothy Hansen
6/2/2011	STIP	CCAMESLC	Stipulation Re Idaho State tax Commission's Amended Answer	Timothy Hansen
	ANSW	CCAMESLC	Amended Answer (Shaner for Idaho State Tax Commission)	Timothy Hansen
6/24/2011	STIP	CCMASTLW	Stipulation for Scheduling and Planning	Timothy Hansen
7/15/2011	NOTS	CCHEATJL	Notice Of Service	Timothy Hansen
7/27/2011	HRSC	DCOLSOMA	Hearing Scheduled (Pretrial Conference 03/12/2012 04:00 PM)	Timothy Hansen
	HRSC	DCOLSOMA	Hearing Scheduled (Court Trial 04/09/2012 09:00 AM) 5 Days	Timothy Hansen
8/19/2011	NOTS	MCBIEHKJ	Notice Of Service	Timothy Hansen
9/14/2011	NOTC	CCVIDASL	Notice of Service of Tax Commissions Second Set of Discovery Requests	Timothy Hansen
9/23/2011	MISC	CCNELSRF	Tax Commission's Disclosure of Expert Witnesses and Notice of Delivery of Expert Witness' Reports and Resumes	Timothy Hansen
10/14/2011	NOTS	CCNELSRF	Notice Of Service	Timothy Hansen
10/17/2011	NOTS	CCWRIGRM	Notice Of Service	Timothy Hansen
10/27/2011	NOTS	MCBIEHKJ	Notice Of Service	Timothy Hansen
11/29/2011	STIP	CCTOLEIL	Stipulation And Order Regarding Trial Date (Stip. Only)	Timothy Hansen
11/30/2011	MISC	CCPINKCN	Cable One, INC's Preliminary Disclosure of Fact Witnesses	Timothy Hansen
12/1/2011	DEWI	CCSWEECE	Tax Commissions Disclosure of Witnesses	Timothy Hansen
12/5/2011	CONT	DCOLSOMA	Continued (Court Trial 06/11/2012 09:00 AM) 5 Days	Timothy Hansen
	ORDR	DCOLSOMA	Order Regarding Trial Date	Timothy Hansen
12/9/2011	STIP	MCBIEHKJ	Amended Stipulation for Scheduling and Planning	Timothy Hansen
12/12/2011	CONT	DCOLSOMA	Continued (Pretrial Conference 05/14/2012 03:00 PM)	Timothy Hansen
	ORDR	DCOLSOMA	Amended Order for Scheduling and Planning	Timothy Hansen
12/16/2011	NOTS	CCVIDASL	Notice Of Service of Tax Commissioners Third Set of Discovery Requests	Timothy Hansen

Cable One Inc vs. Idaho State Tax Commission

Date	Code	User	Judge
12/27/2011	MOTN	CCRANDJD	(2) Motion for Admission of Counsel Pro Hac Vice Timothy Hansen
1/12/2012	MOTN	CCNELSRF	Motion for Admission of Counsel Pro Hac Vice Timothy Hansen
1/17/2012	NOTC	CCDEREDL	Notice of Service Timothy Hansen
	ORDR	DCELLISJ	Order Granting Motion for Admission of counsel to appear pro hac vice (Cherie Kiser) Timothy Hansen
	ORDR	DCELLISJ	Order Granting Motion for Admission of counsel to appear pro hac vice (Angela Collins) Timothy Hansen
1/30/2012	HRSC	DCOLSOMA	Hearing Scheduled (Status 02/13/2012 04:30 PM) Timothy Hansen
2/8/2012	HRVC	DCOLSOMA	Hearing result for Status scheduled on 02/13/2012 04:30 PM: Hearing Vacated Timothy Hansen
2/10/2012	NOTS	TCORTEJN	Notice Of Service Timothy Hansen
2/22/2012	STIP	CCWRIGRM	Stipulation Regarding Status Conference Resetting Timothy Hansen
3/9/2012	NOTS	CCRANDJD	Notice Of Service Timothy Hansen
	NOTS	CCRANDJD	Notice Of Service Timothy Hansen
3/13/2012	NOTC	CCVIDASL	Notice of Delivery of Supplemental Expert Witness Report of Michael Starkey Timothy Hansen
	MISC	CCVIDASL	Tax Commissions First Amended Disclosure of Witnesses Timothy Hansen
3/15/2012	NOTS	MCBIEHKJ	Notice Of Service Timothy Hansen
3/26/2012	HRSC	DCOLSOMA	Hearing Scheduled (Status 03/26/2012 04:00 PM) Timothy Hansen
	HRHD	DCOLSOMA	Hearing result for Status scheduled on 03/26/2012 04:00 PM: Hearing Held - In Chambers Timothy Hansen
3/27/2012	HRSC	DCOLSOMA	Hearing Scheduled (Motion 04/09/2012 02:30 PM) to Continue and for Mediation Timothy Hansen
	ORDR	DCOLSOMA	Order Granting Motion for Admission of Counsel to Appear Pro Hac Vice (Matthew L. Conaty) Timothy Hansen
3/28/2012	MOTN	CCSWEECE	Plaintiffs Motion For Modification of the Scheduling Order and Memorandum in Support Thereof Timothy Hansen
	AFSM	CCSWEECE	Affidavit of Cherie R Kiser In Support Of Motion For Modification of the Scheduling Order Timothy Hansen
	NOHG	CCSWEECE	Notice Of Hearing on Plaintiffs Motion for Modification of teh Scheduling Order (April 9, 2012 @ 2:30 PM) Timothy Hansen
4/9/2012	DCHH	DCOLSOMA	Hearing result for Motion scheduled on 04/09/2012 02:30 PM: District Court Hearing Held Court Reporter: Nicole Omsberg Number of Transcript Pages for this hearing estimated: less than 100 Timothy Hansen
	CONT	DCOLSOMA	Continued (Pretrial Conference 02/11/2013 03:30 PM) Timothy Hansen

Cable One Inc vs. Idaho State Tax Commission

Date	Code	User	Judge
4/9/2012	CONT	DCOLSOMA	Continued (Court Trial 02/25/2013 09:00 AM) 5 Days
	HRSC	DCOLSOMA	Hearing Scheduled (Motion for Summary Judgment 10/23/2012 03:00 PM)
4/10/2012	NOTS	TCORTEJN	Notice Of Service of Tax Commissions Responses to Cable One Incs Second Set of Discovery Requests
	ORDR	DCOLSOMA	Order Governing Proceedings and Setting Trial
4/16/2012	NOTS	CCNELSRF	Notice Of Service
5/3/2012	STIP	DCOLSOMA	Second Amended Stipulation and Order for Scheduling and Planning
7/18/2012	NOTC	CCBOYIDR	Notice of Telephonic Status Conference
	HRSC	CCBOYIDR	Hearing Scheduled (Status Conference 07/23/2012 04:30 PM) Telephonic
7/23/2012	HRHD	DCOLSOMA	Hearing result for Status Conference scheduled on 07/23/2012 04:30 PM: Hearing Held Telephonic - In Chambers
7/26/2012	MOTN	CCWRIGRM	Joint Motion for Leave to File Documents Under Seal and Memorandum in Support
7/30/2012	ORDR	DCOLSOMA	Order RE: Joint Motion for Leave to File Documents Under Seal
8/10/2012	MOTN	CCWEEKKG	Plaintiff Cable One, Inc's Motion for Summary Judgment
	AFFD	CCWEEKKG	Affidavit of James J. Hannan in Support of Cable One, Inc. Motion for Summary Judgment
	AFFD	CCWEEKKG	Affidavit of Tonn K. Petersen in Support of Cable One, Inc. Motion for Summary Judgment
	AFFD	CCWEEKKG	Affidavit of Bradley D. Ottley in Support of Cable One, Inc. Motion for Summary Judgment
	AFFD	CCWEEKKG	Affidavit of Bradley D. Ottley in Support of Cable One, Inc. Motion for Summary Judgment
			Document sealed
	AFFD	CCWEEKKG	Affidavit of Patrick A. Dolohanty in Support of Cable One, Inc. Motion for Summary Judgment
	AFFD	CCWEEKKG	Affidavit of Patrick A. Dolohanty in Support of Cable One, Inc. Motion for Summary Judgment
			Document sealed
	MEMO	CCWEEKKG	Plaintiff Cable One, Inc.'s Memorandum in Support of Motion for Summary Judgment
	MEMO	CCWEEKKG	Plaintiff Cable One, Inc.'s Memorandum in Support of Motion for Summary Judgment
			Document sealed
	STMT	CCWEEKKG	Plaintiff Cable One, Inc.'s Memorandum in Support of Motion for Summary Judgment
	STMT	CCWEEKKG	Plaintiff Cable One, Inc.'s Memorandum in Support of Motion for Summary Judgment
			Document sealed

Cable One Inc vs. Idaho State Tax Commission

Date	Code	User	Judge
9/7/2012	AFFD	CCDEREDL	Timothy Hansen
	AFFD	CCDEREDL	Timothy Hansen
	AFFD	CCDEREDL	Timothy Hansen
	AFFD	CCDEREDL	Timothy Hansen
	ANSW	CCDEREDL	Timothy Hansen
9/24/2012	RPLY	CCAMESLC	Timothy Hansen
	AFFD	CCAMESLC	Timothy Hansen
	AFFD	CCAMESLC	Timothy Hansen
	STMT	CCAMESLC	Timothy Hansen
10/1/2012	REPL	CCMEYEAR	Timothy Hansen
	STMT	CCMEYEAR	Timothy Hansen
	REPL	CCMEYEAR	Timothy Hansen
	MEMO	CCMEYEAR	Timothy Hansen
	BREF	CCSWEECE	Timothy Hansen
10/23/2012	DCHH	DCKORSJP	Timothy Hansen

Cable One Inc vs. Idaho State Tax Commission

Date	Code	User		Judge
11/15/2012	SUPL	CCSWEECE	Plaintiffs Supplement In Support of Plaintiffs Motion for Summary Judgment Document sealed	Timothy Hansen
11/28/2012	MOTN	CCOSBODK	Motion For Leave To File Supplemental Authority In Support Of Plaintiffs Motion For Summary Judgment	Timothy Hansen
11/29/2012	ORDR	TCWEATJB	Order Granting Permission For Supplemental Authority	James F. Judd
12/5/2012	MISC	CCOSBODK	Defendents Response To Supplemental Authority Submitted By Plaintiff	Timothy Hansen
12/19/2012	ORDR	DCLYKEMA	Order Denying Summary Judgment	Timothy Hansen
1/8/2013	ORDR	TCCAMPAM	Order Requiring Service of Copies of Future Filings on Judge	James F. Judd
1/15/2013	MOTN	CCTHIEKJ	Uncontested Motion for Modification of Order Denying Summary Judgment and Memorandum in Support	Timothy Hansen
1/23/2013	MINE	TCCAMPAM	Minute Entry	Timothy Hansen
	ORDR	TCCAMPAM	Corrected Order Denying Summary Judgment	Timothy Hansen
1/24/2013	PTMM	CCSWEECE	Pretrial Memo	Timothy Hansen
	FFCL	CCSWEECE	Document sealed Tax Commissions Proposed Findings Of Fact And Conclusions Of Law	Timothy Hansen
	MEMO	CCMEYEAR	Document sealed Plaintiff Cable One Inc's Pre-Trial Memorandum	Timothy Hansen
	MISC	CCMEYEAR	Plaintiff Cable One Inc's Proposed Findings of Fact and Conclusions of Law	Timothy Hansen
1/28/2013	AMEN	CCVIDASL	Plaintiffs Cable One Incs Amended Proposed Findings of Fact and Conclusions of Law	Timothy Hansen
	DCHH	CCMASTLW	Hearing result for Pretrial Conference scheduled on 01/28/2013 01:00 PM: District Court Hearing Held Court Reporter: Waived Telephonic PTC	James F. Judd
1/29/2013	STIP	CCPINKCN	Original Unredacted Joint Stipulation of Exhibits and Facts	Timothy Hansen
	STIP	CCPINKCN	Joint Stipulation for Exhibits and Facts (Redacted)	Timothy Hansen
2/1/2013	MOTN	CCHOLMEE	Motion to Unseal Numerical Figures	Timothy Hansen
	MEMO	CCHOLMEE	Memorandum in Support of Motion	Timothy Hansen
2/12/2013	BREF	CCTHIEKJ	Plaintiff Cable One, Inc Answering Brief Opposing Defendant's Motion to Unseal Numerical Figures	Timothy Hansen
	AFFD	CCTHIEKJ	Affidavit of Patrick A. Dolohanty In Support of Cable One, Inc's Opposition to Defendant's Motion to Unseal Numerical Figures	Timothy Hansen
2/15/2013	MEMO	CCHEATJL	Plaintiff Cable One, Inc's Amended Pre-Trial Memorandum	Timothy Hansen

Cable One Inc vs. Idaho State Tax Commission

Date	Code	User	Judge
2/19/2013	HRSC	TCHOCA	Hearing Scheduled (Motion 02/19/2013 09:00 AM) to Unseal
	HRHD	TCHOCA	Hearing result for Motion scheduled on 02/19/2013 09:00 AM: Hearing Held to Unseal
2/20/2013	PTMM	TCLYCAAM	Pretrial Order Document sealed
	PTMM	TCLYCAAM	Pretrial Order
2/22/2013	ORDR	TCWEATJB	Order Continuing The Sealing Of Numerical Figures
2/25/2013	DCHH	TCWEATJB	Hearing result for Court Trial scheduled on 02/25/2013 09:00 AM: District Court Hearing Held Court Reporter: Susan Gambie Number of Transcript Pages for this hearing estimated: Over 100 Pages
4/15/2013	BREF	CCMARTJD	Plaintiff Cable One Inc's Post Trial Brief Document sealed
	BREF	CCMARTJD	Plaintiff Cable One Inc's Post Trial Brief (Redacted)
	BREF	CCDEREDL	Tax Commission's Post Trial Brief
4/26/2013	BREF	CCHEATJL	Tax Commission's Post Trial Brief
5/23/2013	FFCL	TCLYCAAM	Findings Of Fact And Conclusions Of Law and Order- Sealed per prder of the court Document sealed
	FFCL	TCLYCAAM	Findings Of Fact And Conclusions Of Law and Order (Redacted)
6/27/2013	STIP	MCBIEHKJ	Stipulation for Entry of Judgment
7/2/2013	JDMT	TCWEATJB	Judgment
	CDIS	TCWEATJB	Civil Disposition entered for: Idaho State Tax Commission, Defendant; Cable One Inc, Plaintiff. Filing date: 7/2/2013
	STAT	TCWEATJB	STATUS CHANGED: closed
7/10/2013	MEMC	CCMEYEAR	Memorandum Of Costs
7/24/2013	OPPO	CCMEYEAR	Plaintiff's Opposition to Defendant's Memorandum of Costs
	AFFD	CCMEYEAR	Affidavit of Cherie R Kiser in Support of Plaintiff's Opposition to Defendant's Memorandum of Costs
8/9/2013	APSC	CCTHIEBJ	Appealed To The Supreme Court
	NOTA	CCTHIEBJ	NOTICE OF APPEAL
	MOTN	CCTHIEBJ	Motion to Stay Execution or Enforcement of Money Judgment Upon Posting of Cash Deposit
8/12/2013	ORDR	DCLYKEMA	Order Fixing Costs
	JDMT	DCLYKEMA	Amended Judgment
	ORDR	DCLYKEMA	Order Staying Execution Upon Posting of Cash Deposit

Cable One Inc vs. Idaho State Tax Commission

Date	Code	User		Judge
8/16/2013	NOTC	TCWEGEKE	Notice of Compliance with Court's August 12, 2013 Order Staying Execution Upon Posting of Cash Deposit	Timothy Hansen
10/11/2013	NOTC	TCWEGEKE	Notice of Transcript Lodged - Supreme Court Docket No. 41305	Timothy Hansen
	NOTC	TCWEGEKE	Notice of Transcript of 147 Pages Lodged - Supreme Court Docket No. 41305	Timothy Hansen

NO. _____
A.M. _____ FILED P.M. 4

FEB 17 2011

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

Kelly A. Cameron, Bar No. 7226
KCameron@perkinscoie.com
Tonn K. Petersen, Bar No. 8385
TKPetersen@perkinscoie.com
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391
Telephone: 208.343.3434
Facsimile: 208.343.3232

Attorneys for Plaintiff
Cable One, Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CABLE ONE, INC., a Delaware
corporation,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. **CV OC 1103406**

COMPLAINT

Fee: \$88.00

Plaintiff Cable One, Inc. ("Cable One"), by and through its counsel of record, Perkins Coie LLP, for a cause of action against Defendant Idaho State Tax Commission, states, alleges, and complains as follows:

1. Cable One is a corporation organized under the laws of the State of Delaware and at all relevant times was domiciled in the State of Arizona.
2. The Idaho State Tax Commission (the "Commission") is an agency of the State of Idaho and is responsible for the collection of the Idaho Corporation Income Tax (the "Tax").

SV

3. The Commission first issued a Notice of Deficiency Determination dated December 16, 2008 asserting a tax deficiency of \$221,389 against Cable One for the 2005 tax year ("Tax Year"). On December 22, 2009, the Commission modified its Notice of Deficiency Determination, changing the amount of deficiency being asserted to \$229,430 ("Notice of Deficiency").

4. Cable One timely filed a petition for redetermination, requesting a redetermination of the alleged deficiency for the Tax Year.

5. This Complaint is instituted by Cable One in response to a decision issued by the Commission in *In the Matter of the Protest of Cable One, Inc.*, Docket No. 21735 (November 18, 2010) (the "Decision"), upholding the Notice of Deficiency.

6. On February 11, 2011, Cable One delivered by certified mail to the Commission the amount of \$47,578, representing a deposit of 20% of the amount assessed ("Deposit Amount"). This amount satisfies the requirement that an appealing taxpayer must deposit an amount equal to twenty percent (20%) of the amount asserted before seeking review of the determination of the Commission.

7. The Decision was received by Cable One at its headquarters in Phoenix, Arizona on November 23, 2010.

8. This Complaint is filed within 91 days of the receipt of the Decision in accordance with Idaho Code Section 63-3049.

9. This Court has jurisdiction over this matter pursuant to Idaho Code Sections 63-3049(a) and 63-3074, and venue is proper with this Court pursuant to Idaho Code Section 63-3049(a).

10. The Decision of the Commission concludes that for the 2005 tax year, Cable One's Idaho internet service revenue under a cost of performance analysis should be assigned to the numerator of the Idaho sales factor.

11. Cable One appeals the Decision of the Commission, affirming the alleged deficiency, pursuant to Idaho Code Section 63-3049, and requests a refund of the Deposit Amount with interest from the time of payment, pursuant to Idaho Code Section 63-3074.

Cable One's Business

12. For the Tax Year, Cable One provided three primary services – cable television, advertising and internet. It provided these services in approximately fourteen states, including both Idaho and Arizona.

13. In providing these services, Cable One performed activities and incurred direct costs in all fourteen states, including Arizona where Cable One is headquartered and operated its centralized consumer call center.

14. In performing its activities relating to internet services, Cable One incurred more direct costs in Arizona than in Idaho.

Idaho's Corporation Income Tax

15. The Idaho taxable income of a corporation doing business both within and without Idaho is determined under Idaho Code Section 63-3027.

16. Business income is apportioned by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus two (2) times the sales factor, and the denominator of which is four (4). Idaho Code Section 63-3027(i)(1).

17. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period. Idaho Code Section 63-3027(p).

18. Sales, other than sales of tangible property, are in this state if the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance. Idaho Code Section 63-3027(r).

19. Income derived from the sale of internet services constitutes "sales, other than sales of tangible personal property."

20. Based on costs of performance, Cable One's sales from internet services is not in this state, and therefore is not included in the numerator of the sales factor.

21. Because Cable One's sales from internet services is not included in the numerator of the sales factor, the Notice of Deficiency is in error and should be cancelled.

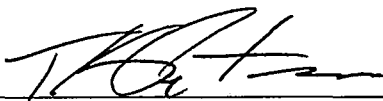
22. As such, the Notice of Deficiency Determination and Decision, and any attempt to enforce the collection or retention of any Tax and related amounts from Cable One for the Tax Year is improper, illegal, and null and void in its entirety. Accordingly, Cable One is entitled to a refund of the entire Deposit Amount, plus interest thereon as provided by

law, including, but not limited to, Idaho Code Section 63-3074, and is further entitled to a cancellation of the Notice of Deficiency.

23. WHEREFORE, Cable One hereby requests that its Complaint be deemed good and sufficient, and that after due proceedings had, there be judgment entered herein in favor of Cable One and against the Commission, abating the deficiency assessment and ordering the Commission to grant the refund for the entire Deposit Amount (\$47,578) with interest from the time of payment as provided by law. Cable One further requests all other general and equitable relief to which it may be entitled, including costs and attorneys fees.

DATED: February 17, 2011

PERKINS COIE LLP

By: 

Kelly A. Cameron, ISB No. 7226
KCameron@perkinscoie.com

Tonn K. Petersen, ISB No. 8385
TKPetersen@perkinscoie.com

Attorneys for Plaintiff Cable One, Inc.

Of Counsel:

Gregg D. Barton
Perkins Coie LLP
1201 Third Avenue, Suite 4000
Seattle, Washington 98101

NO. _____ FILED _____ 1:26
AM _____ PM _____

MAR 10 2011

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL

ERICK M. SHANER [ISB #5214]
PHIL N SKINNER [ISB #8527]
DEPUTY ATTORNEYS GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722-0410
(208) 334-7530
TELEPHONE NO.: (208) 334-7530
FACSIMILE: (208) 334-7844

 ORIGINAL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CABLE ONE, INC., a Delaware corporation,)	
	)	Case No.: CV OC 1103406
Plaintiff,)	
)	
v.	)	IDAHO STATE TAX COMMISSION'S
)	
IDAHO STATE TAX COMMISSION,	)	ANSWER
)	
Defendant.)	
)	

On February 17, 2011, the Plaintiff, Cable One, Inc. (Cable One) filed a Complaint with this Court to appeal a decision issued by the Idaho State Tax Commission (Tax Commission). The decision asserts additional Idaho corporate income tax other than what Cable One included on its return for taxable year 2005 based upon the calculation of the costs of performance relating to its internet services provided to Idaho customers.

Cable One filed its Complaint under the authority of Idaho Code § 63-3049. Service of the Summons and Complaint was completed on February 18, 2011. Pursuant to this Court's summons, the Defendant, the Tax Commission, by and through its legal counsel, now responds to the Complaint.

15

I.

STANDARD AND SCOPE OF REVIEW

This Action Proceeds as an Original De Novo Bench Trial under Idaho Code § 63-3049

An appeal of a Tax Commission decision is governed by Idaho Code § 63-3049. That statute states a taxpayer may appeal a decision of the Tax Commission by filing a complaint with the district court. The case is to proceed as other civil cases, but is to be a bench trial. The standard of review for this appeal is de novo. Parkers v. Idaho State Tax Commission, 148 Idaho 842, 230 P.3d 734 (2010). See Idaho Code § 63-3812(c) (appeal from a decision of the Board of Tax Appeals to the district court “shall be heard and determined by the court without a jury in a trial de novo on the issues in the same manner as though it were an original proceeding in that court.”)

In contrast, a petition for judicial review is governed by I.R.C.P. 84. The rule provides for judicial review of the administrative record created by an agency conducting hearings under the provisions of the Idaho Administrative Procedures Act. However, the hearing before the Tax Commission is not conducted under the Idaho Administrative Procedures Act. Idaho Code § 63-107 (hearings before the Commission concerning a redetermination of taxes “are not contested cases within the meaning of chapter 52, title 67, Idaho Code”). The Commission does not record the hearings or otherwise compile an administrative record. Accordingly, an appeal from a decision of the Tax Commission cannot be confined to a review of the record below, but must proceed as an original action in the district court.

II.

RESPONSES TO COMPLAINT

12(b) Motions

The Complaint fails to state a ground upon which relief can be granted and should be dismissed by this Court pursuant to I.R.C.P. 12(b) (6). The Complaint fails to allege any legal or factual grounds indicating the specific reasons why Cable One believes the Tax Commission erred in determining the refunds due to, and the deficiencies owed by, Cable One for the taxable year in question. The Complaint sets forth broad assertions or conclusions of error, but the Complaint fails to support those conclusions with relevant facts or reasoning.

Specific Responses to Allegations

The Tax Commission specifically responds to the factual allegations in each paragraph of the Complaint as set forth below, and denies each and every allegation not specifically admitted herein. The numbered responses below correspond to the number paragraphs in Cable One's Complaint.

1. The Tax Commission admits that Cable One is a corporation organized under the laws of the State of Delaware and at all relevant times was domiciled in the State of Arizona.

2. The Tax Commission admits that it is an agency of the State of Idaho and is responsible for the collection of the Idaho Corporate Income Tax (the "Tax").

3. The Tax Commission admits that it first issued a Notice of Deficiency Determination ("NODD") dated December 16, 2008, asserting a tax and interest deficiency of \$221,389 on Cable One for taxable year 2005 (Tax Year). On December

22, 2009, the Commission modified the NODD by lowering the taxes owed, however, the interest due still resulted in a higher amount of tax liability due of \$229,430.

4. The Tax Commission admits that Cable One timely filed a petition for redetermination, requesting a redetermination of the alleged deficiency for the Tax Year.

5. The Tax Commission admits it issued a decision titled In the Matter of the Protest of Cable One, Inc., Docket No. 21735 dated November 18, 2010 (Decision), which upheld the NODD.

6. The Tax Commission admits that on February 11, 2011, Cable One delivered by certified mail to the Tax Commission the amount of \$47,578, representing a deposit of 20 percent of the amount assessed (Deposit Amount). This amount satisfies the requirement that an appealing taxpayer must deposit an amount equal to twenty percent of the amount asserted before seeking review of the determination of the Tax Commission.

7. The Tax Commission admits that the Decision was received by Cable One at its headquarters in Phoenix, Arizona on November 23, 2010.

8. The Tax Commission admits that the Complaint by Cable One was filed within 91 days of the receipt of the Decision in accordance with Idaho Code § 63-3049.

9. The Tax Commission admits that this Court has jurisdiction over this matter pursuant to Idaho Code §§ 63-3049(a), and venue is proper with this Court pursuant to Idaho Code § 63-3049(a). The Tax Commission denies that this Court has jurisdiction over this matter pursuant to Idaho Code § 63-3074.

10. The Tax Commission neither admits nor denies the allegations in paragraph 10. The Decision of the Tax Commission speaks for itself.

11. The Tax Commission admits that Cable One is appealing the Decision of the Tax Commission and requesting a refund of the Deposit Amount with interest from the time of payment.

Cable One's Business

12. The Tax Commission lacks sufficient information to admit or deny that for the Tax Year, Cable One provided three primary services: cable television, advertising, and internet. The Tax Commission admits that it provided services in approximately fourteen states, including both Arizona and Idaho.

13. The Tax Commission admits that in providing these services, Cable One performed activities and incurred direct costs in approximately fourteen states, including Arizona where Cable One is headquartered and operates its centralized consumer call center.

14. The Tax Commission denies that in performing its activities relating to internet services, Cable One incurred more direct costs in Arizona than in Idaho for purposes of apportioning income to Idaho.

Idaho's Corporate Income Tax

15. The Idaho taxable income of a corporation doing business both within and without Idaho is determined under Idaho Code § 63-3027 and other Idaho statutes as applicable.

16. For corporations under Idaho Code § 63-3027(i)(1), business income is apportioned by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus two (2) times the sales factor, and the denominator of which is four (4).

17. For corporations computing business income under Idaho Code § 63-3027(p) the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

18. Under Idaho Code § 63-3027(r) sales, other than sales of tangible property, are in this state if the income-producing activity is performed both inside and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

19. The Tax Commission lacks sufficient information to admit or deny that the income derived from the sale of internet services for Cable One constitutes “sales, other than sales of tangible personal property.”

20. The Tax Commission denies that based on costs of performance, Cable One’s sales from internet services is not in this state, and therefore is not included in the numerator of the sales factor.

21. The Tax Commission denies that because Cable One’s sales from internet services is not included in the numerator of the sales factor, the Notice of Deficiency is in error and should be cancelled, but instead that sales from internet services are correctly included in the numerator.

22. The Tax Commission denies that the NODD and Decision and any attempt to enforce the collection or retention of any tax and related amounts from Cable One for the Tax Year is improper, illegal, and null and void in its entirety. Accordingly, Cable One is not entitled to a refund of the entire Deposit Amount, plus interest thereon as provided by

law, including, but not limited to, Idaho Code § 63-3074, and is further not entitled to a cancellation of the NODD.

PRAYER

WHEREFORE, Defendant, the Idaho State Tax Commission, asks this Court for the following relief:

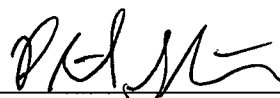
1. Dismiss the Complaint for failure to state a ground upon which relief can be granted, or in the alternative, grant a judgment in favor of the Commission based on the pleadings;
2. Affirm the Decision of the Tax Commission;
3. Order Cable One to pay the Commission's costs and reasonable attorney's fees incurred in defending this action pursuant to Idaho Code § 63-3049, § 12-117 and § 12-121, and
4. Grant such other and further relief as this Court deems reasonable and necessary to accomplish the demands of justice

DATED this 10th day of March 2011.

IDAHO STATE TAX COMMISSION



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL



PHIL N SKINNER
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2011, I have served a true and correct copy of the within and foregoing ANSWER upon counsel of record by depositing the same in the United States Mail in a properly addressed envelope with adequate postage thereon to insure delivery to the following:

KELLY A CAMERON
TONN K PETERSEN
PERKINS COIE LLP
1111 WEST JEFFERSON ST
SUITE 500
BOISE ID 83702-5391


ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

NO. 1013 FILED
A.M. P.M.

JUN 02 2011

CHRISTOPHER D. RICH, Clerk
By LARA AMES
DEPUTY

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL

ERICK M. SHANER [ISB #5214]
PHIL N SKINNER [ISB #8527]
DEPUTY ATTORNEYS GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722-0410
(208) 334-7530
TELEPHONE NO.: (208) 334-7530
FACSIMILE NO.: (208) 334-7844

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CABLE ONE, INC., a Delaware corporation,)	
Plaintiff,	)	Case No.: CV OC 1103406
v.	)	IDAHO STATE TAX COMMISSION'S
IDAHO STATE TAX COMMISSION,	)	AMENDED ANSWER
Defendant.)	

On February 17, 2011, the Plaintiff, Cable One, Inc. (Cable One) filed a Complaint with this Court to appeal a decision issued by the Idaho State Tax Commission (Tax Commission). The decision asserts additional Idaho corporate income tax other than what Cable One included on its return for taxable year 2005 based upon the calculation of the costs of performance relating to its internet services provided to Idaho customers.

Cable One filed its Complaint under the authority of Idaho Code § 63-3049. Service of the Summons and Complaint was completed on February 18, 2011. Pursuant to this Court's summons, the Defendant, the Tax Commission, by and through its legal counsel, now responds to the Complaint.

ORIGINAL

11

I.

STANDARD AND SCOPE OF REVIEW

This Action Proceeds as an Original De Novo Bench Trial under Idaho Code § 63-3049

An appeal of a Tax Commission decision is governed by Idaho Code § 63-3049. That statute states a taxpayer may appeal a decision of the Tax Commission by filing a complaint with the district court. The case is to proceed as other civil cases, but is to be a bench trial. The standard of review for this appeal is de novo. Parkers v. Idaho State Tax Commission, 148 Idaho 842, 230 P.3d 734 (2010). See Idaho Code § 63-3812(c) (appeal from a decision of the Board of Tax Appeals to the district court “shall be heard and determined by the court without a jury in a trial de novo on the issues in the same manner as though it were an original proceeding in that court.”)

In contrast, a petition for judicial review is governed by I.R.C.P. 84. The rule provides for judicial review of the administrative record created by an agency conducting hearings under the provisions of the Idaho Administrative Procedures Act. However, the hearing before the Tax Commission is not conducted under the Idaho Administrative Procedures Act. Idaho Code § 63-107 (hearings before the Commission concerning a redetermination of taxes “are not contested cases within the meaning of chapter 52, title 67, Idaho Code”). The Commission does not record the hearings or otherwise compile an administrative record. Accordingly, an appeal from a decision of the Tax Commission cannot be confined to a review of the record below, but must proceed as an original action in the district court.

II.

RESPONSES TO COMPLAINT

12(b) Motions

The Complaint fails to state a ground upon which relief can be granted and should be dismissed by this Court pursuant to I.R.C.P. 12(b) (6). The Complaint fails to allege any legal or factual grounds indicating the specific reasons why Cable One believes the Tax Commission erred in determining the refunds due to, and the deficiencies owed by, Cable One for the taxable year in question. The Complaint sets forth broad assertions or conclusions of error, but the Complaint fails to support those conclusions with relevant facts or reasoning.

Specific Responses to Allegations

The Tax Commission specifically responds to the factual allegations in each paragraph of the Complaint as set forth below, and denies each and every allegation not specifically admitted herein. The numbered responses below correspond to the number paragraphs in Cable One's Complaint.

1. The Tax Commission admits that Cable One is a corporation organized under the laws of the State of Delaware and at all relevant times was domiciled in the State of Arizona.
2. The Tax Commission admits that it is an agency of the State of Idaho and is responsible for the collection of the Idaho Corporate Income Tax (the "Tax").
3. The Tax Commission admits that it first issued a Notice of Deficiency Determination ("NODD") dated December 16, 2008, asserting a tax and interest deficiency of \$221,389 on Cable One for taxable year 2005 (Tax Year). On December

22, 2009, the Commission modified the NODD by lowering the taxes owed, however, the interest due still resulted in a higher amount of tax liability due of \$229,430.

4. The Tax Commission admits that Cable One timely filed a petition for redetermination, requesting a redetermination of the alleged deficiency for the Tax Year.

5. The Tax Commission admits it issued a decision titled In the Matter of the Protest of Cable One, Inc., Docket No. 21735 dated November 18, 2010 (Decision), which upheld the NODD.

6. The Tax Commission admits that on February 11, 2011, Cable One delivered by certified mail to the Tax Commission the amount of \$47,578, representing a deposit of 20 percent of the amount assessed (Deposit Amount). This amount satisfies the requirement that an appealing taxpayer must deposit an amount equal to twenty percent of the amount asserted before seeking review of the determination of the Tax Commission.

7. The Tax Commission admits that the Decision was received by Cable One at its headquarters in Phoenix, Arizona on November 23, 2010.

8. The Tax Commission admits that the Complaint by Cable One was filed within 91 days of the receipt of the Decision in accordance with Idaho Code § 63-3049.

9. The Tax Commission admits that this Court has jurisdiction over this matter pursuant to Idaho Code §§ 63-3049(a), and venue is proper with this Court pursuant to Idaho Code § 63-3049(a). The Tax Commission denies that this Court has jurisdiction over this matter pursuant to Idaho Code § 63-3074.

10. The Tax Commission neither admits nor denies the allegations in paragraph 10. The Decision of the Tax Commission speaks for itself.

11. The Tax Commission admits that Cable One is appealing the Decision of the Tax Commission and requesting a refund of the Deposit Amount with interest from the time of payment.

Cable One's Business

12. The Tax Commission lacks sufficient information to admit or deny that for the Tax Year, Cable One provided three primary services: cable television, advertising, and internet. The Tax Commission admits that it provided services in approximately fourteen states, including both Arizona and Idaho.

13. The Tax Commission admits that in providing these services, Cable One performed activities and incurred direct costs in approximately fourteen states, including Arizona where Cable One is headquartered and operates its centralized consumer call center.

14. The Tax Commission denies that in performing its activities relating to internet services, Cable One incurred more direct costs in Arizona than in Idaho for purposes of apportioning income to Idaho.

Idaho's Corporate Income Tax

15. The Idaho taxable income of a corporation doing business both within and without Idaho is determined under Idaho Code § 63-3027 and other Idaho statutes as applicable.

16. For corporations under Idaho Code § 63-3027(i)(1), business income is apportioned by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus two (2) times the sales factor, and the denominator of which is four (4).

17. For corporations computing business income under Idaho Code § 63-3027(p) the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

18. Under Idaho Code § 63-3027(r) sales, other than sales of tangible property, are in this state if the income-producing activity is performed both inside and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

19. The Tax Commission lacks sufficient information to admit or deny that the income derived from the sale of internet services for Cable One constitutes "sales, other than sales of tangible personal property."

20. The Tax Commission denies that based on costs of performance, Cable One's sales from internet services is not in this state, and therefore is not included in the numerator of the sales factor.

21. The Tax Commission denies that because Cable One's sales from internet services is not included in the numerator of the sales factor, the Notice of Deficiency is in error and should be cancelled, but instead that sales from internet services are correctly included in the numerator.

22. The Tax Commission denies that the NODD and Decision and any attempt to enforce the collection or retention of any tax and related amounts from Cable One for the Tax Year is improper, illegal, and null and void in its entirety. Accordingly, Cable One is not entitled to a refund of the entire Deposit Amount, plus interest thereon as provided by

law, including, but not limited to, Idaho Code § 63-3074, and is further not entitled to a cancellation of the NODD.

III.

AFFIRMATIVE DEFENSE

To the extent that the allocation and apportionment provisions of Idaho Code Section 63-3027 do not fairly represent the extent of the taxpayer's business activity in Idaho, the state tax commission will use, in respect to all or any part of the taxpayer's business activity, any reasonable method(s) of allocation and apportionment set out in Idaho Code § 63-3027(s).

IV.

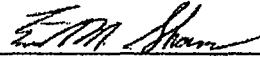
PRAYER

WHEREFORE, Defendant, the Idaho State Tax Commission, asks this Court for the following relief:


1. Dismiss the Complaint for failure to state a ground upon which relief can be granted, or in the alternative, grant a judgment in favor of the Commission based on the pleadings;
2. Affirm the Decision of the Tax Commission;
3. Order Cable One to pay the Commission's costs and reasonable attorney's fees incurred in defending this action pursuant to Idaho Code §§ 63-3049, 12-117 and 12-121; and
4. Grant such other and further relief as this Court deems reasonable and necessary to accomplish the demands of justice.

DATED this 2ND day of June 2011.

IDAHO STATE TAX COMMISSION



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL



PHIL N SKINNER
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 2ND day of June 2011, I have served a true and correct copy of the within and foregoing AMENDED ANSWER upon counsel of record by depositing the same in the United States Mail in a properly addressed envelope with adequate postage thereon to insure delivery to the following:

KELLY A CAMERON
TONN K PETERSEN
PERKINS COIE LLP
1111 WEST JEFFERSON ST
SUITE 500
BOISE ID 83702-5391



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

Kelly A. Cameron, Bar No. 7226
KCameron@perkinscoie.com
Tonn K. Petersen, Bar No. 8385
TKPetersen@perkinscoie.com
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391
Telephone: 208.343.3434
Facsimile: 208.343.3232

NO. _____
A.M. _____ P.M. 331

AUG 10 2012

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

Chérie R. Kiser, DC Bar No. 415009, *pro hac vice*
ckiser@cahill.com
Angela F. Collins, DC Bar No. 473891, *pro hac vice*
acollins@cahill.com
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
Telephone: 202.862.8900
Facsimile: 866.255.0185

Attorneys for Plaintiff Cable One, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV OC 11-03406

**PLAINTIFF CABLE ONE, INC.'S
MOTION FOR SUMMARY JUDGMENT**

(Oral Argument Requested)

HEARING DATE: October 23, 2012

HEARING TIME: 3:00 p.m. (local time)

Pursuant to Idaho Rule of Civil Procedure 56 and the Second Amended Stipulation and Order for Scheduling and Planning dated May 3, 2012 ("Scheduling Order"), Plaintiff Cable One, Inc. ("Cable One"), moves for entry of summary judgment in its favor on its claims set forth in the Complaint including the following legal issues:

(1) whether the Idaho State Tax Commission ("ISTC") erred when it found that Cable One's Internet access service income for taxable year 2005 should be included in the numerator

of the Idaho sales factor for apportionment purposes, when that income was generated primarily by Cable One's activities in Arizona, not Idaho; and

(2) whether the ISTC erred when it reserved the right to apply an alternative apportionment method under Idaho Code § 63-3027(s) to determine Cable One's tax liability, when there is no legal basis for alternative apportionment and when the ISTC made none of the statutory and legal findings that would be required for such apportionment.

Summary judgment in Cable One's favor is appropriate because no genuine issues of material fact exist that would preclude summary judgment. Plaintiff is entitled to judgment as a matter of law because Idaho law supports Cable One's determination of where the direct costs associated with its Internet access service were incurred, Idaho law does not permit the ISTC to require Cable One to include capital expenditures and depreciation as direct costs under a cost of performance analysis, and Idaho law does not permit the ISTC to apply in this case special rules for alternative apportionment if its challenged ruling is not upheld on appeal.

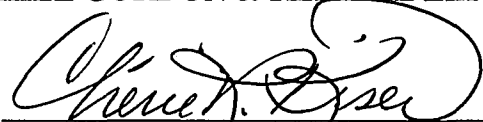
This Motion is supported by Plaintiff's Memorandum in Support of Motion for Summary Judgment, Plaintiff's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, the Affidavits of Patrick A. Dolohanty, Bradley D. Ottley, and James J. Hannan, all of which are being filed contemporaneously herewith, and the Joint Appendix (to be compiled and filed pursuant to paragraph 3(d) of the Scheduling Order), all of which are incorporated herein by this reference.

Oral argument is requested and a hearing on this Motion has been scheduled for October 23, 2012 at 3:00 p.m. (local time).

DATED: August 10, 2012

CAHILL GORDON & REINDEL LLP

By:



Cherie R. Kiser, *pro hac vice*
Angela F. Collins, *pro hac vice*

PERKINS COIE LLP

Kelly A. Cameron, ISB No. 7226
Tonn K. Petersen, ISB No. 8385

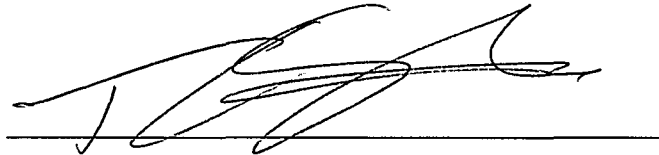
Attorneys for Plaintiff Cable One, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on August 10, 2012, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Idaho Rules of Procedure, to the following person(s):

Erick M. Shaner
Phil Skinner
Deputy Attorneys General
State of Idaho
P.O. Box 36
Boise, ID 83722-0410
FAX: 208-334-7844
Erick.Shaner@tax.idaho.gov
Phil.Skinner@tax.idaho.gov
Attorneys for Defendant

Hand Delivery	_____
U.S. Mail	_____X_____
Facsimile	_____
Overnight Mail	_____
Electronic Mail	_____



A handwritten signature in black ink, appearing to read 'Erick M. Shaner', is written over a solid horizontal line.

N
A.M. FILED 331 P.M.

AUG 10 2012

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

Kelly A. Cameron, Bar No. 7226
KCameron@perkinscoie.com
Tonn K. Petersen, Bar No. 8385
TKPetersen@perkinscoie.com
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391
Telephone: 208.343.3434
Facsimile: 208.343.3232

Chérie R. Kiser, DC Bar No. 415009, *pro hac vice*
ckiser@cahill.com
Angela F. Collins, DC Bar No. 473891, *pro hac vice*
acollins@cahill.com
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
Telephone: 202.862.8900
Facsimile: 866.255.0185

Attorneys for Plaintiff Cable One, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV OC 11-03406

**AFFIDAVIT OF JAMES J. HANNAN IN
SUPPORT OF CABLE ONE, INC.
MOTION FOR SUMMARY JUDGMENT**

STATE OF ARIZONA)
) : ss.:
COUNTY OF MARICOPA)

JAMES J. HANNAN, being first duly sworn, upon his oath deposes and states as follows:

1. I submit this Affidavit in support of the Motion for Summary Judgment filed by Plaintiff Cable One, Inc. ("Cable One") before the District Court of the Fourth Judicial District

of the State of Idaho, in and for the County of Ada. I am authorized to make this Affidavit on Cable One's behalf. The facts stated herein are within my personal knowledge.

2. I am Vice President - Engineering of Cable One, and I have specific knowledge of the facts and controversies forming the basis for this appeal. I am responsible for managing Cable One's cable television broadband network, including designing that network and selecting the equipment needed to run the network. I manage a group of engineers that is responsible for the policies and procedures used to maintain Cable One's cable television broadband network, the reliability of that network, and the quality of the signals transmitted to customers using that network.

3. Cable One's cable television broadband network is used primarily to provide cable television service or video programming to Cable One's customers. Cable One also uses its cable television broadband network to provide Internet access services and Voice over Internet Protocol ("VoIP") services to customers. Cable One, however, did not provide VoIP services to Idaho customers in 2005, which is the relevant year for the current matter.

4. The cable television broadband network can carry many different channels, each of which is a unique signal. In most cases, the vast majority of the channels on Cable One's cable television broadband network are used to transmit video programming (HBO, ESPN, TNT, local broadcast networks) to customers. In 2005, one (1) channel on Cable One's cable television broadband network was used to provide Internet access services to customers.

5. Cable One has six (6) cable systems in Idaho, each of which covers a specific geographically defined area pursuant to Cable One's franchises granted by local Idaho authorities for the provision of cable television services in these geographic areas. Each of those cable systems has its own headend, which serves as a collection system for signals over the cable

television broadband network. Cable One receives video programming signals from third-party sources at the headend, processes those signals, and places them on the proper channel of the cable television broadband network for distribution to customers. The headend also houses equipment used to provide Internet access services to customers, which is provided over the same cable television broadband network. The vast majority of the equipment in a headend, however, is used solely for the provision of cable television services and has nothing to do with the provision of Internet access services.

6. The Idaho State Tax Commission (“ISTC”) has suggested that Cable One include the depreciation associated with certain pieces of equipment in Cable One’s network and certain operating expenses associated with that equipment as direct costs associated with Cable One’s provision of Internet access service. The ISTC selected the equipment and operating expenses it proposes to be included as direct costs from Cable One’s Chart of Accounts that was provided during discovery and has been marked as CB 001954-1988. The Chart of Accounts explains various accounting categories and what equipment and/or operating expenses are included in each accounting category. Based on ISTC testimony, I understand that the ISTC’s proposed list of equipment and operating expenses was intended to capture any piece of equipment (and associated operating expenses) located in Cable One’s headends based on the ISTC’s belief that the headends are used in the provision of Internet access service.

7. The ISTC’s proposal is inaccurate because it includes equipment that has nothing to do with the provision of Internet access service.

8. For example, the ISTC proposes to include equipment contained in the “tower and antenna headend” account. This account relates to the cost of tower and antenna equipment utilized at a headend site. Towers and antennas are used to receive third-party video

programming at the headend location. It is very common for the video stream from local broadcasters to be picked up using antennas, and these antennas are placed on towers for better reception. Towers and antennas have nothing to do with the provision of Internet access services.

9. Similarly, the ISTC proposes to include equipment contained in the “headend and earth station equipment” account, which is the cost of electronic equipment components and accessories in relation to a headend site or satellite receiving station. When the origination point for video programming signals is too distant to be captured by an antenna, a receive-only satellite earth station is utilized to obtain the video programming. Larger, nationwide programming distributors such as HBO and ESPN typically transmit video signals using satellite technology. The “earth station” is a large satellite dish located at the headend site that receives the video programming, which is then processed in the headend and transmitted to customers over the cable television broadband network. Earth station equipment and receive-only satellites are not used in the provision of Internet access service.

10. Prior to the advent of satellite technology for the transmission of distant video programming signals, it was very common to use terrestrial FM microwave technology to bring signals to the headend from distant locations. This is represented by the “headend and microwave buildings” account in Cable One’s accounting system. The ISTC also seeks to include this equipment in its depreciation calculation. This equipment is used to obtain video programming for cable television services, and is not used in the provision of Internet access service.

11. Another account included by the ISTC in its calculation is the “digital headend” account, which is the cost of electronic equipment components and accessories in relation to the

headend site or satellite receiving station specifically for a digital channel. At the advent of cable television, video programming was in analog format. As technology improved, video programming could be transmitted in digital format. The digital channel in this case is a digital video programming channel. Again, this account relates solely to cable television service and has nothing to do with Internet access service.

12. The fallacies in the ISTC's proposal are best demonstrated by its inclusion of the "land improvements" account in its proposed depreciation calculation. The "land improvements" account reflects the cost of depreciable land improvements, such as fencing, paving, landscaping, etc. These items have nothing to do with the provision of Internet access services.

13. The ISTC's proposal is inherently unreliable because it does not take into account whether the identified equipment and operating expenses are actually used in the provision of Internet access. As I stated above, the significant majority of equipment (and associated operating expenses) located at a headend location is utilized for the provision of cable television services and is not associated with the provision of Internet access service.

FURTHER AFFIANT SAYETH NOT.

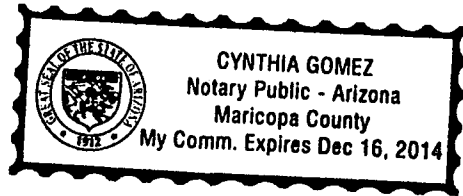
DATED: August 3, 2012



James J. Hannan
Vice President - Engineering
Cable One, Inc.

SUBSCRIBED AND SWORN to before me this
3rd day of August, 2012, by James J. Hannan.


Notary Public



My Commission Expires:

Dec 16, 2014

SEP 24 2012

CHRISTOPHER D. RICH, Clerk
By LARA AMES
DEPUTY

Kelly A. Cameron, Bar No. 7226
KCameron@perkinscoie.com
Tonn K. Petersen, Bar No. 8385
TKPetersen@perkinscoie.com
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391
Telephone: 208.343.3434
Facsimile: 208.343.3232

Cherie R. Kiser, DC Bar No. 415009, *pro hac vice*
ckiser@cahill.com
Angela F. Collins, DC Bar No. 473891, *pro hac vice*
acollins@cahill.com
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
Telephone: 202.862.8900
Facsimile: 866.255.0185

Attorneys for Plaintiff Cable One, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV OC 11-03406

**REPLY AFFIDAVIT OF STEVEN F. ARLUNA
IN SUPPORT OF CABLE ONE, INC. MOTION FOR SUMMARY JUDGMENT**

STATE OF VIRGINIA)
) : ss.:
COUNTY OF FAIRFAX)

STEVEN F. ARLUNA, being first duly sworn, upon his oath deposes and states as follows:

GA

1. I am a tax partner with PricewaterhouseCoopers LLP (“PwC”). I assisted Cable One, Inc. (“Cable One”) in its appeal of the Notice of Deficiency Determination (“NODD”) before the Idaho State Tax Commission (“ISTC”). I have specific knowledge of the facts and controversies forming the basis for Cable One’s appeal to this court. The facts stated herein are within my personal knowledge.

2. Cable One is a wholly owned subsidiary of The Washington Post Company, a publicly traded company. Cable One’s financial statements are reported as part of The Washington Post Company’s consolidated financial statements as reflected in the Securities and Exchange Commission (“SEC”) filings of The Washington Post Company.

3. The most recent 10-K filing of The Washington Post Company states that its “Consolidated Financial Statements have been prepared in accordance with generally accepted accounting principles (GAAP) in the United States and include the assets, liabilities, results of operations and cash flows of the Company and its majority-owned and controlled subsidiaries.” The Washington Post Co., 2011 Annual Report (Form 10-K), at 77. The Washington Post Company’s 10-K filing for calendar year 2005 makes a similar statement. The Washington Post Co., 2005 Annual Report (Form 10-K), at 27 (“The Company’s internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles.”).

4. IDAPA 35.01.01.550.03 states “Costs of performance are the direct costs determined in a manner consistent with generally accepted accounting principles and according to accepted conditions or practices of the taxpayer’s trade or business to perform the income producing activity that gives rise to the particular item of income.” The reference to “generally

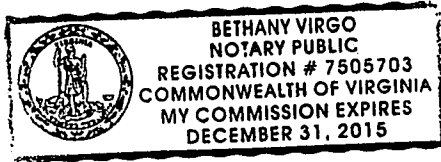
accepted accounting principles” typically refers to GAAP, which is an accounting framework promulgated by the Financial Accounting Standards Board (“FASB”). GAAP does not specifically define “direct costs,” and the Idaho regulation requires only that direct costs be determined “consistent with” GAAP.

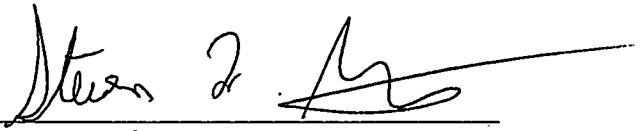
5. Based on the language of the regulation, one must look at what is typically accepted and the conditions and practices of the taxpayer’s business to determine direct costs. In determining direct costs, it is helpful to look at cost accounting or managerial accounting principles, which say that direct costs directly relate to a cost center, a service, or some other type of division of a business. A company’s profit and loss statements typically identify costs associated with a particular cost center, service, or business division.

6. Each state can take a different approach to taxing corporate income in its state. Some states have implemented a cost of performance approach under the Uniform Division of Income for Tax Purposes Act (“UDITPA”) and some states have adopted a market sourcing approach. Even those states that have implemented UDITPA may apply the law differently or adopt different provisions. A company must comply with each state’s individual laws implementing UDITPA. For example, in Idaho, how a company is taxed under the provisions of UDITPA is pursuant to what statutes and regulations are adopted and how they are interpreted by the State of Idaho. It is not relevant how the company is taxed in another UDITPA state. It is understood that UDITPA involves no consideration of the aggregate taxes imposed by the various states and that apportionment and the sales factor is not an exact science, but rather an approximation of the activity occurring in a specific state.

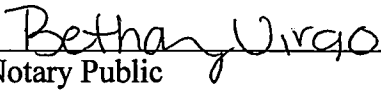
FURTHER AFFIANT SAYETH NOT.

DATED: September 20, 2012




Steven F. Arluna
Partner
PricewaterhouseCoopers LLP

SUBSCRIBED AND SWORN to before me this
20 day of September, 2012, by Steven F. Arluna.


Notary Public

My Commission Expires:

December 31, 2015

ORIGINAL

NO. _____ FILED _____
A.M. _____ P.M. 345

OCT 01 2012

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

Kelly A. Cameron, Bar No. 7226
KCameron@perkinscoie.com
Tonn K. Petersen, Bar No. 8385
TKPetersen@perkinscoie.com
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391
Telephone: 208.343.3434
Facsimile: 208.343.3232

Chérie R. Kiser, DC Bar No. 415009, *pro hac vice*
ckiser@cahill.com
Angela F. Collins, DC Bar No. 473891, *pro hac vice*
acollins@cahill.com
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
Telephone: 202.862.8900
Facsimile: 866.255.0185

Attorneys for Plaintiff Cable One, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV OC 11-03406

**FINAL VERSION
PLAINTIFF CABLE ONE, INC.'S REPLY STATEMENT OF FACTS
IN SUPPORT OF CABLE ONE'S MOTION FOR SUMMARY JUDGMENT**

AM

Plaintiff Cable One, Inc. (“Cable One”) hereby provides the following reply to each of the so-called “Disputed Material Facts” set forth in the Answering Brief Opposing Cable One, Inc.’s Motion for Summary Judgment (“ISTC Br.”) filed by Defendant Idaho State Tax Commission (“ISTC”). As explained in Cable One’s Reply in Support of Motion for Summary Judgment (“Cable One Reply”) filed contemporaneously herewith, each of the ISTC’s alleged disputed material facts are contradicted by the record in this case or represent legal issues to be decided by this Court. For the reasons demonstrated in Cable One’s Motion for Summary Judgment (“Cable One Mot.”), Cable One’s Memorandum in Support of Motion for Summary Judgment (“Cable One Mem.”), Cable One’s Statement of Undisputed Material Facts (“PSOF”), Cable One’s Reply, and herein, there are no genuine issues of disputed material fact that would bar grant of summary judgment in Cable One’s favor.

1. The ISTC claims the Internet backbone service Cable One obtains from Qwest and AT&T “is a service performed in Idaho and should be considered an Idaho cost for purposes of the costs of performance analysis.” ISTC Br. at 4. Questions concerning whether the Internet backbone service costs are “direct” costs, whether the Internet backbone services are “performed” in Idaho, and whether the Internet backbone service costs should be treated as Arizona costs or Idaho costs are legal issues to be decided by this Court. Resolution of these legal issues concerning treatment of the Internet backbone services turns on an analysis of Idaho tax statutes, Idaho tax regulations, applicable case law, and the treatment of such services under federal law. Cable One Reply at 5, 9-12; *see also* Cable One Mem. at 22-28.

2. The ISTC claims that the “nature and function of the ‘Internet Backbone Service’ is in dispute” based on the ISTC’s claim that Internet traffic destined for Cable One’s Arizona headquarters travels over the public Internet. ISTC Br. at 4. How traffic destined for Cable

One's Arizona headquarters is transported by Qwest or AT&T has no bearing on how the Internet backbone service costs are treated in Cable One's cost of performance analysis, which is a legal issue to be decided by this Court. *See* Cable One Mem. at 26-28. Moreover, the ISTC has no way of knowing how traffic is transported by Qwest and AT&T to Cable One's Arizona headquarters, and offers no factual or legal support for its assertions. Idaho law does not permit the ISTC to use mere "allegations" to create disputed facts where none exist. I.R.C.P. 56(e); *see also* Cable One Reply at Section I.

3. The ISTC alleges that Cable One witness Hannan's transcript fails to support the contention that the vast majority of the equipment in Cable One's headend has nothing to do with the provision of Internet access services. ISTC Br. at 4-5. Mr. Hannan's affidavit makes exactly this point. *See* Cable One - Hannan Aff. ¶ 5 ("The headend also houses equipment used to provide Internet access services to customers, which is provided over the same cable television broadband network. The vast majority of the equipment in a headend, however, is used solely for the provision of cable television services and has nothing to do with the provision of Internet access services."). Mr. Hannan made the same point during his deposition as reflected by the testimonial citations provided by Cable One in its PSOF. *See* Cable One - Hannan Dep. Tr. 71:5-73:10 (noting that "combining network" in headend supports provision of both cable television and Internet access service, and was implemented prior to Cable One's initial offering of Internet access service), 98:14-99:9 (noting that "vast majority" of Cable One's investment is in laying new cable, in response to question about Cable One's "total investment" in "head-end equipment [that] in 2005 was required to provide Internet services versus the earlier years") (J.A. 8); *see also* PSOF ¶¶ 5-6.

4. The ISTC takes issue with Cable One's statements regarding the transmission of e-mail communications using the Internet backbone services but then admits that Cable One's statement is correct. ISTC Br. at 5. As stated in paragraph 1 above, the treatment of the Internet backbone services Cable One purchases from Qwest and AT&T is a legal issue to be decided by this Court. *See* Cable One Reply at 5, 9-12.

5. The ISTC questions Cable One's statement that, if Cable One did not offer Internet access services, the Internet backbone services would still be necessary to ensure Cable One employees could communicate amongst themselves, with the worldwide web, and to support Cable One's provision of cable television services. ISTC Br. at 5-6. The ISTC ultimately admits that Cable One's statement "may be true to some extent as a general statement" and "is probably true." ISTC Br. at 6. There is no dispute here, and as stated in paragraph 1 above, the treatment of the Internet backbone services Cable One purchases from Qwest and AT&T concerns legal issues to be decided by this Court. Cable One Reply at 5, 9-12.

6. The ISTC alleges that "definitional disputes" over generally accepted accounting principles or GAAP "have left the factual issues in great dispute as to what bookkeeping methods of Cable One would satisfy rule 550.03's instruction to follow 'generally accepted accounting principles.'" ISTC Br. at 6. The scope and meaning of "generally accepted accounting principles" as used in IDAPA 35.01.01.550.03 is a legal question subject to this Court's interpretation of the intended meaning of that term. *See, e.g.,* Cable One - Arluna Dep. Tr. 25:17-27:25 (J.A. 10) (defining "generally accepted accounting principles" with specific reference to term's use in IDAPA 35.01.01.550.03). The record reflects that ISTC counsel proffered an objection "based upon a legal conclusion" when ISTC witness Fischer was asked, "Even that Idaho Rule 35.01.01.550.03 requires direct costs to be determined in a manner

consistent with GAAP, how is it possible to comply with the rule if, as you claim, direct costs are not defined in GAAP?” ISTC - Fischer Dep. Tr. 30:11-19 (J.A. 6) (“That is an excellent question. I’m not sure how to square what I understand GAAP to be with this requirement in the Idaho rules.”). Further, the ISTC’s question of whether “generally accepted accounting principles” refers to the Generally Accepted Accounting Principles promulgated by the Financial Accounting Standards Board (“FASB”) or to some other, less demanding set of principles is irrelevant. ISTC Br. at 6. As stated in response to the ISTC’s first discovery request, Cable One complies with the FASB version of GAAP. Cable One First Discovery Responses at 11 (J.A. 19).¹ The ISTC neither challenged this disclosure nor the subsequent testimony of Cable One witnesses. *See, e.g.*, Cable One - Dolohanty Dep. Tr. 17:25-18:7, 35:25-36:14 (J.A. 12); Cable One - Arluna Dep. Tr. 25:17-27:25 (J.A. 10). Securities filings of Cable One’s parent company further demonstrate this point. *See* The Washington Post Co., 2005 Annual Report (Form 10-K), at 1 (defining the “Company” as engaged in, *inter alia*, “the ownership and operation of cable television systems”), 27 (“The Company’s internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles”), 39 (noting that financial statements are prepared “in conformity with generally accepted accounting principles”), 42 (PricewaterhouseCoopers LLP audit report) (Mar. 3, 2006); *cf.* ISTC - Fischer Dep. Tr. 25:1-16 (J.A. 6); *see also* Reply Affidavit of Steven F. Arluna ¶ 3. Likewise, “whether or not the information contained in Cable One’s profit and loss statement is sufficient to determine the direct costs in this case” (ISTC Br. at 7) is a legal issue dependent on the Court’s legal interpretation of IDAPA 35.01.01.550.03. The ISTC’s challenge

¹ Case No. CV OC 11-03406, *Cable One, Inc. v. Idaho State Tax Commission*, Plaintiff’s Responses to Defendant’s First Set of Interrogatories, Requests for Production and Requests for Admission (July 13, 2011) (“Cable One First Discovery Responses”) (J.A. 19).

to Cable One's use of profit and loss statements to determine its direct costs also contradicts the ISTC's own testimony that the ISTC relies on company profit and loss statements when reviewing determinations of costs of performance and such statements have been routinely accepted by the ISTC as support for a taxpayer's direct costs. *See, e.g.*, ISTC - Inouye Dep. Tr. 28:9-29:7 (J.A. 13) (stating that, in other cost of performance audits involving taxpayers headquartered outside of Idaho, taxpayers provided "profit and loss statements for each cost center," meaning "[e]ach location" in Idaho and "whole company information"); ISTC - Nichols Dep. Tr. 18:3-18 (J.A. 14) (indicating that, in other cost of performance audits, taxpayers provided "[v]ery similar to what was provided and expected of Cable One. The branch detail, Idaho specific information, operations we were auditing, the activity within Idaho, not the company as a whole"); ISTC - McConnell Dep. Tr. 18:13-21 (J.A. 17) (acknowledging that the ISTC receives a taxpayer's profit and loss statements as part of an audit "[i]f we ask for certain documentation of certain items or certain expenses").

7. The ISTC alleges that "[i]t is . . . not an established fact that there has been no administrative or judicial review of Cable One's cost of performance methodology in any other state." ISTC Br. at 7-8. The also ISTC claims that "[w]hether Cable One's cost of performance analysis in other states was the same as in Idaho is much disputed." ISTC Br. at 7. The ISTC does not provide any factual record evidence to which it can tether a factual dispute regarding these statements, which were verified by multiple witnesses. Cable One - Dolohanty Dep. Tr. 23:12-17 (J.A. 12); Cable One - Fain Dep. Tr. 14:13-21 (J.A. 11); Dolohanty Aff. ¶ 7.

8. The ISTC alleges that "[t]he dispute about what are the direct costs of generating the Idaho Internet service income is one of the most disputed key factual issues in this case." ISTC Br. at 8. The scope and nature of Cable One's "direct costs" is a legal question subject to

this Court's interpretation of that term as found in IDAPA 35.01.01.550.03. *See* Cable One - Arluna Dep. Tr. 25:22-27:25 (J.A. 10) (relying upon references to "costs of performance," "generally accepted accounting principles," and "accepted conditions or practices of the . . . taxpayer's trade or business" in IDAPA 35.01.01.550.03 when asked to define "direct costs"); ISTC - Fischer Aff. ¶ 3 (noting Arluna reliance on IDAPA 35.01.01.550.03 to define "direct costs"); *cf.* ISTC - Fischer Dep. Tr. 30:11-19 (J.A. 6) (ISTC witness Fischer's inability to define how direct costs may be determined in a manner consistent with GAAP under IDAPA 35.01.01.550.03, per his claim that the term "direct costs" is not defined by GAAP); *see also* Cable One Reply at 7-9.

9. The ISTC claims that there is a dispute as to whether Cable One's Internet backbone service costs are properly categorized as direct costs for purposes of Cable One's cost of performance analysis. ISTC Br. at 8. This is contrary to record evidence. Both the Modified Notice of Deficiency Determination ("NODD") and the ISTC Decision² listed the Internet backbone service costs as direct costs to be included in the cost of performance analysis. TC 003210 (J.A. 30); ISTC Decision at 5, 7 (J.A. 1); *see also* ISTC - Inouye Dep. Tr. 58:4-59:19 (J.A. 13) (explaining that the cost of performance analysis contained in the NODD included the Internet backbone costs from Qwest and AT&T).

10. The ISTC alleges that the direct costs identified in Cable One's second cost of performance method - *see* PSOF ¶¶ 23-24 - "are in dispute, [as] the main dispute of this case is the factual question of what are Cable One's direct costs for performing the income producing activity of providing [I]nternet access service." ISTC Br. at 9. Questions concerning the scope and nature of "direct costs" and "income producing activity" are legal questions subject to this

² Idaho State Tax Commission Docket No. 21735, *Protest of Cable One, Inc., Petitioner*, Decision (Nov. 18, 2010) ("ISTC Decision") (J.A. 1). This decision upheld a December 22, 2009 Income Tax Audit Bureau ("ITA") NODD against Cable One. (J.A. 30).

Court's interpretation of those terms as used in Idaho Code § 63-3027 and IDAPA

35.01.01.550.01-550.03. *See* Cable One Reply at 5, 6-9. The legal question concerns how these terms are defined for purposes of applying the statute and rules. It is the legal analysis that will determine whether Cable One appropriately identified the direct costs associated with its income producing activity under the statute, rules, and ISTC past practices.

11. The ISTC claims that no "documentation" has "been provided to clearly establish" that Cable One's cable modem leasing revenue was included in the sales factor numerator set forth on Cable One's Idaho tax return. ISTC Br. at 9. This statement contradicts the ISTC's admission in its brief and through its witnesses during depositions that Cable One had included its cable modem leasing revenue in the sales factor numerator as reported on the 2005 tax return. ISTC Br. at 9; *see also* ISTC - Inouye Dep. Tr. 90:2-91:8 (J.A. 13); ISTC - Nichols Dep. Tr. 52:14-17 (J.A. 14); ISTC - Wynn Dep. Tr. 67:24-68:3 (J.A. 15). The sales factor numerator in Cable One's 2005 income tax filing included Cable One's 2005 cable modem leasing revenue. *See* Reply Affidavit of Patrick A. Dolohanty ¶¶ 2-7 ("Dolohanty Reply Aff.") (demonstrating that Cable One's cable modem leasing revenue is reflected in the sales factor numerator set forth in Cable One's 2005 income tax filing); *see also* TC 002889-890 (J.A. 28) (discussing Cable One's cross-border sales); TC 002896 (J.A. 28) (explaining the sales factor numerator reported on Cable One's 2005 income tax return). Moreover, under Idaho law, "[g]ross receipts from the rental, lease or licensing of tangible personal property are in Idaho if the property is located in Idaho." IDAPA 35.01.01.550.05.b. The cable modems were leased and used in Idaho, and thus the revenues from such leases were included in the sales factor numerator of Cable One's 2005 income tax filing. Dolohanty Reply Aff. ¶¶ 2-3.

12. The ISTC alleges that “the issue of what the ‘direct costs’ are is the key factual dispute of this case,” and questions whether Cable One’s “profit and loss statements provided to the Tax Commission” correctly identify them. ISTC Br. at 10. As explained in paragraph 10 above, questions concerning the scope and nature of “direct costs” and “income producing activity” are *legal* questions subject to this Court’s interpretation of those terms as used in Idaho Code § 63-3027 and IDAPA 35.01.01.550.01-550.03. The legal analysis will determine whether Cable One’s profit and loss statements sufficiently identify Cable One’s direct costs consistent with the statute, rules, and ISTC past practices. Further, as explained in paragraph 6 above, the ISTC has routinely accepted profit and loss statements as a demonstration of direct costs.

13. The ISTC alleges that Cable One is incorrect in stating that the ISTC has no standards, policies, or procedures defining an acceptable cost of performance analysis, as it “mischaracterizes a statement that Ms. Nichols made in her deposition.” ISTC Br. at 10. When asked whether there is “an Idaho State Tax Commission policy or procedure defining what type of analysis is accepted as an official cost of performance analysis,” Ms. Nichols responded, “There is no specific policy.” ISTC - Nichols Dep. Tr. 20:2-5 (J.A. 14). Ms. Nichols further stated that no “specific policy to cover all cost of performance cases” exists. ISTC - Nichols Dep. Tr. 20:9-14 (J.A. 14); *accord* ISTC - Nichols Aff. ¶ 5. Cable One’s factual statement specifically concerned standards, policies, and procedures for an “acceptable” cost of performance analysis. PSOF ¶ 30. Ms. Nichols protestation that her testimony “does not mean that the Tax Commission does not have *any* standards, policies, and procedures for costs of performance analyses” is irrelevant. ISTC - Nichols Aff. ¶ 5 (emphasis added).

14. The ISTC alleges that auditor “Ms. Inouye was and is familiar” with Cable One’s primary line of business. ISTC Br. at 10. While the parties agree that Cable One’s primary line

of business is cable television (*compare* Cable One Mem. at 2 *with* ISTC - Inouye Aff. ¶ 5), Ms. Inouye evinced substantial confusion over Cable One's business during her deposition. *See* ISTC - Inouye Dep. Tr. 52:22-53:1 (statement that "[e]xcept for Internet services," Cable One "I believe [provides] advertising and I believe there is another service, but *I do not remember*") (emphasis added), 82:2-8 (responding that "[f]rom Cable One's profit and loss statements I can tell there's advertising services, Internet services, and *I don't remember another one*" when asked about "Cable One's business activity in Idaho") (J.A. 13) (emphasis added). ISTC witness Inouye failed to identify Cable One's primary line of business twice before finally remembering it at the end of her deposition. ISTC - Inouye Dep. Tr. 143:23-144:1 (J.A. 13) ("Cable One is in the business of Internet service provider, advertising, and cable TV provider").

15. The ISTC alleges that ITA auditor Ms. Inouye requested by e-mail that Cable One provide her with "information on each Idaho customer. . . . because she was specifically seeking to examine Cable One's direct costs on a per-customer basis." ISTC Br. at 10-11 (citing PSOF ¶¶ 32, 34). When asked whether the ISTC "ever ask[ed] Cable One for customer-by-customer information in order to support a customer-by-customer analysis," Ms. Inouye's immediate supervisor responded, "No, we did not." ISTC - Nichols Dep. Tr. 83:21-84:7 (J.A. 14). The ISTC has noted "the administrative burden that a customer-by-customer evaluation could create" (ISTC Br. at 18), which is reflected in the statements of its deponents. *See, e.g.*, ISTC - Fischer Dep. Tr. 33:2-18 (J.A. 6) (opining that direct costs should be identified "in an economically feasible manner," meaning "without an unreasonable amount of time" or "amount of expense associated with determining that cost"); ISTC - Starkey 2nd Dep. Tr. 14:21-15:17 (J.A. 18) (noting that grouping transactions "may be administratively expedient"); ISTC - Nichols Dep. Tr. 90:9-16 (J.A. 14) (disagreeing that customer-by-customer approach is "a practical

application”); ISTC - Starkey 2nd Dep. Tr. at 18:25 (J.A. 18) (“Administrative efficiency plays a role.”). The ISTC accordingly evaluated Cable One’s sales of Internet access services pursuant to profit and loss statements generated by Cable One’s “branches” or individual operating locations. ISTC - Nichols Dep. Tr. 82:10-84:7, 90:9-16 (J.A. 14). The ISTC has subsequently acknowledged that it is not “required to do [cost of performance] on a customer-by-customer or . . . on a transaction-by-transaction basis.” ISTC - Starkey First Dep. Tr. 38:19-39:23 (J.A. 16). The ISTC further alleges that Cable One “never provided” the requested subscriber counts, which rendered Ms. Inouye “unable to conduct the per-customer examination.” ISTC Br. at 11. Cable One, however, did provide the ISTC with per-state Internet access service revenue breakdowns. TC 004594, 004598, 004600 (J.A. 42); CB 002003 (J.A. 46). Revenues within these breakdowns were classified by state according to the billing addresses of the customers who had generated them. Cable One - Dolohanty Dep. Tr. 56:10-58:15 (J.A. 12). Ms. Inouye was afforded the means to determine Cable One’s subscriber counts.

16. The ISTC alleges that Cable One’s case was not “the first instance in which the Idaho State Tax Commission determined that costs of performance included capitalized costs.” ISTC Br. at 11 (citing PSOF ¶ 35). According to the ISTC Decision, however, capitalized costs are a component of “the income producing activity ‘separate item of income’ test,” which “is an issue of first impression in this state.” ISTC Decision at 11 (J.A. 1). According to the ISTC, “Ms. Nichols did not say that Cable One’s case was the first time the Tax Commission had decided that costs of performance included capitalized costs; what she said was that capitalized costs were not involved in any other cases because capitalized costs were not a big issue in any other cases they had.” ISTC Br. at 11. In reality, Ms. Nichols stated that she didn’t “believe the capital costs were involved in any other cases,” subsequently (and separately) adding that “[i]t

was not a major issue in any of the other cases that we've had." When asked to clarify - "[s]o, the inclusion of capital costs in Cable One's case is unique?" - she responded, without further reference to other cases, "It is." *ISTC - Nichols Dep. Tr. 24:5-22 (J.A. 14)*. She also confirmed that a decision to use alternative apportionment is "always communicated to the taxpayer" by the *ISTC*. *ISTC - Nichols Dep. Tr. 94:2-14 (J.A. 14)*. Despite Ms. Nichols' attempt to "clarify" her words via affidavit, these two initial statements in her deposition testimony - "I don't believe the capital costs were involved in any other cases. It was not a major issue in any of the other cases that we've had." - were not conjoined by the word "because" or in any other manner. *ISTC - Nichols Dep. Tr. 24:10-16 (J.A. 14)*; *see also* *PSOF* ¶ 40. Ms. Nichols' subordinate, Ms. Inouye, claimed for the first time in her affidavit that "[t]here were other cases before Cable One's audit in which the Tax Commission had determined that costs of performance included capitalized costs, but the cost of performance issue for those cases was not significant so it didn't end up being addressed." *ISTC - Inouye Aff.* ¶ 3. This statement is nonsensical, given that no "determination" could be rendered if the issue of capitalized costs was never "addressed" in the first place.

17. The *ISTC* contests the second half of Cable One's statement that ITA "auditors had not considered using alternative apportionment and were unaware as to how it might be invoked" by alleging that "audit staff is aware of how alternative apportionment might be invoked." *ISTC Br.* at 11 (quoting *PSOF* ¶ 40). The purported familiarity of "audit staff" with alternative apportionment in employing it "from time to time" is immaterial to this matter. *ISTC - Nichols Aff.* ¶ 3. Ms. Nichols' statement contradicts her deposition testimony, wherein she stated that the "auditor [who] is working the case" was responsible for requesting the use of alternative apportionment. *ISTC - Nichols Dep. Tr. 93:14-20 (J.A. 14)*. Ms. Inouye testified that

she didn't know who at the ISTC would make a decision as to whether an alternative apportionment method should apply, and stated that she would not be involved in the decision-making process to use alternative apportionment. ISTC - Inouye Dep. Tr. 78:3-19 (J.A. 13). Consequently, Ms. Inouye was unaware as to the general mechanism for invoking, and her specific responsibility for requesting, alternative apportionment.

18. The ISTC contests Cable One's statement that "'audits focused on the sales factor typically begin and end with a cost of performance analysis,'" and attempts to put forth an assumption as to "what Cable One means to say by this." ISTC Br. at 11-12 (quoting PSOF ¶ 41). Cable One's words should not be recast by the ISTC, Cable One's Statement of Facts speaks for itself and is supported by record evidence. In her testimony, Ms. Nichols stated that an alternative allocation is not routinely prepared after a NODD is issued. ISTC - Nichols Dep. Tr. 94:15-18 (J.A. 14). Ms. Nichols answered "no" in response to Cable One's question, "Does the Income Tax Audit Bureau routinely prepare alternative allocation methods after a Notice of Deficiency Determination has been issued?" *Id.* Having failed to elaborate further on that one-word response during her deposition, Ms. Nichols now attempts to offer an explanation: "after a NODD is issued and the taxpayer protests the NODD, the case is then assigned to a tax policy specialist, the case is no longer assigned to an auditor and thus 'Income Tax Audit Bureau' would not prepare, propose, or apply an alternative apportionment method." ISTC - Nichols Aff. ¶ 4. This directly contradicts her own deposition testimony, wherein she stated that the "auditor [who] is working the case" is responsible for requesting alternative apportionment. ISTC - Nichols Dep. Tr. 93:14-20 (J.A. 14). In addition, Ms. Nichols' subsequently admitted that certain taxpayers audited by the ISTC "have been allowed to exclude income based on the cost of performance analysis that showed more of the direct costs were incurred outside of Idaho."

ISTC - Nichols Dep. Tr. 78:18-79:7 (J.A. 14). The claim that “there are numerous audits that have been focused on the sales factor that have nothing to do with the costs of performance provisions in Idaho code” is irrelevant. ISTC - Nichols Aff. ¶ 4.

19. The ISTC claims there are “disputed material facts regarding capitalized and depreciated costs of Cable One’s broadband network in Idaho.” ISTC Br. at 12. Whether certain capitalized and depreciated costs should be included in Cable One’s cost of performance analysis is a legal issue for this Court to decide. *See* Cable One Reply at 12-13. The ISTC’s allegation that Cable One “makes no mention of these issues” in its Statement of Facts is incorrect - Cable One’s network and the associated costs are discussed throughout Cable One’s Statement of Facts. *See, e.g.*, PSOF ¶¶ 4-6, 12-13, 35.

DATED: October 1, 2012

CAHILL GORDON & REINDEL LLP

By: 

Cherie R. Kiser, *pro hac vice*
Angela F. Collins, *pro hac vice*

PERKINS COIE LLP

Kelly A. Cameron, ISB No. 7226
Tonn K. Petersen, ISB No. 8385

Attorneys for Plaintiff Cable One, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on October 1, 2012, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Idaho Rules of Procedure, to the following person(s):

Erick M. Shaner
Phil Skinner
Deputy Attorneys General
State of Idaho
P.O. Box 36
Boise, ID 83722-0410
FAX: 208-334-7844
Erick.Shaner@tax.idaho.gov
Phil.Skinner@tax.idaho.gov
Attorneys for Defendant

Hand Delivery	<u> X </u>
U.S. Mail	<u> </u>
Facsimile	<u> </u>
Overnight Mail	<u> </u>
Electronic Mail	<u> </u>



JAN 23 2013

CHRISTOPHER D. RICH, Clerk
By ANNETTE CAMPBELL
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,)
)
) *Plaintiff,*)
)
 vs.)
)
 IDAHO STATE TAX COMMISSION,)
)
) *Defendant.*)

Case No. **CV OC 2011 03406**

**CORRECTED ORDER
DENYING SUMMARY
JUDGMENT**

Cable One's Motion for Summary Judgment of an I.C. § 63-3049 appeal of a tax year 2005 income tax deficiency determination by the Idaho State Tax Commission. **Denied**

Kelly A. Cameron and Tonn K. Peterson, PERKINS COIE LLP, Boise, and Cherie R. Kiser and Angela F. Collins, CAHILL GORDON & REINDEL LLP, Washington, D.C., Lawyers for Cable One, Inc., Plaintiff.

Erick M. Shaner and Phil N. Skinner, Deputy Attorneys General, Boise, Lawyers for Idaho State Tax Commission.

PROCEDURAL BACKGROUND

The Idaho State Tax Commission (Tax Commission) issued a Notice of Deficiency Determination (NODD) dated December 16, 2008, asserting a tax and interest deficiency on Cable One, Inc. (Cable One) for tax year 2005. On December 22, 2009 the Tax Commission modified the amount of its NODD.

Cable One timely filed a petition for redetermination of the alleged tax

year 2005 deficiency. The Tax Commission denied the petition for redetermination in a decision issued on November 18, 2010 as Docket No. 21735.

Cable One timely deposited the sum required by I.C. § 63-3049(b) and appealed the denial of its petition for redetermination by commencing this action on February 17, 2011.

SOURCE AND SCOPE OF JURISDICTION AND PROCEEDING

This Court has jurisdiction of this matter pursuant to I.C. § 63-3049. The scope of the jurisdiction of this court is to determine if

[A]ny tax is due, it shall enter judgment for such tax, including any interest or penalties that may also be due and owing, against the taxpayer. Any taxes, penalties or interest paid, found by the court to be in excess of that which can be legally assessed, shall be ordered refunded to the taxpayer with interest from the time of payment. I.C. § 63-3049(a).

The process for this appeal is "as a *de novo* bench trial." See *Parker v. Idaho State Tax Commission*, 148 Idaho 842, 845, 230 P.3d 734, 737 (2010). A *de novo* bench trial means "a trying of the matter anew—the same as if it had never been heard before." *Gilbert v. Moore*, 108 Idaho 165, 168, 697 P.2d 1179, 1182 (1985).

SUMMARY JUDGMENT STANDARD IN NON-JURY CASE

The standard for summary judgment in a non-jury case was set forth in *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 69, 205 P.3d 1203, 1205 (2009) as

Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Disputed facts should be construed in favor of the non-moving party, and all

reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.

I. Facts and Procedural History

In addition to the facts stated above in the section entitled "Procedural Background" the following facts can be taken as material and undisputed unless otherwise stated:

1. Cable One is a corporation organized under the laws of Delaware and headquartered in Phoenix, Arizona. In 2005 Cable One provided cable television and high speed internet services over its broadband network. Cable One's operations and personnel in Arizona support its service offerings throughout its 19-state territory. Those states are Arizona, Alabama, Arkansas, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas and Washington.
2. In order to provide cable television services, Cable One is required to obtain a franchise agreement with local governmental authorities for the relevant geographic area. These agreements contain obligations to build out a cable system to a particular capacity or to reach a specific number of customers in the authorized service territory.
3. In 2005 all of Cable One's broadband cable systems were capable of providing Internet access services to customers.
4. In 2005 Cable One's broadband cable network was used primarily to provide cable television service or video programming to Cable One's customers. It was also used to provide high speed Internet access services to Cable One's customers.
5. Cable One's broadband cable network can carry many different

channels, each of which is a unique signal carrying either video programming or high-speed data capabilities. Cable One's broadband cable network carries every signal to every house, with subscribers' set-top boxes and cable modems filtering out particular signals according to the customer's subscriptions and selections.

6. Cable One's broadband cable network has several discrete parts which may be simplified and summarized as:
 - a) Cable modem – the equipment located within the subscriber's home or office that allows the subscriber to connect to Cable One's broadband cable network.
 - b) Loop – the section from the subscribers' home or office through the "nodes" to Cable One's "head end". Cable One installs and owns the cables and equipment in this part of the broadband cable network.
 - c) Head End – the location where Cable One aggregates the signals and connects internet traffic to the "internet backbone". The head end is also where the television and video signals are received, processed and sent over the broadband cable network to a television or video services subscriber's home or office. The head end equipment includes the System Core Router and the Cisco UBR CMTS. Although used primarily to support the internet service it also has the capability to support video services. The allocation of the use of the System Core Router and the Cisco UBR CMTS between the provision of video service and internet service has not been determined and therefore disputed.
 - d) Internet Backbone – Cable One contracts access to the World Wide Web from Qwest and AT&T. The location, nature, ownership and

- operation of the internet backbone components are disputed.
7. Cable One maintains a Solution Center and a Network Operations Center in Arizona to support its provision of Internet access service to the customers in all of its cable systems in its 19 state operation.
 8. Once an internet signal has left a head end it proceeds via the internet backbone access point provided by either Qwest or AT&T.
 9. Cable One's provision of internet services to its Idaho customers has generated significant revenues, the amount of which is not in dispute.
 10. I.C. § 63-3027 is Idaho's formulation of the Uniform Act for the Division of Income for Tax Purposes Act (UDITPA).

II. Issues

The taxation of Cable One's Idaho internet income is controlled by I.C. § 63-3027 which requires that a corporation doing business in more than one state shall have its income allocated and apportioned using a three factor formula. The three factors are a property factor, a payroll factor and a double weighted sales factor. The formula is expressed as:

$$\frac{\frac{\text{Idaho Property}}{\text{Total Property}} + \frac{\text{Idaho Payroll}}{\text{Total Payroll}} + 2\left(\frac{\text{Idaho Sales}}{\text{Total Sales}}\right)}{4} = \text{Idaho Apportionment \%}$$

The determination of what items if any should be included in the Idaho Sales factor are matters in dispute and are to be determined in this action.

I.C. § 63-3027(r) and IDAPA Rule 35.01.01.550 Sales Factor

I.C. § 63-3027(r) and IDAPA Rule 35.01.01.550¹ provide that

¹ IDAPA references are to the 2005 Idaho Administrative Code.

revenue transactions are to be determined to be Idaho Sales if "the greater part of the income producing activity is performed in Idaho, based on costs of performance."

The term income producing activity applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit. The activity does not include transactions and activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor.

IDAPA Rule 35.01.01.550.02

Costs of performance are the direct costs determined according to generally accepted accounting principles and accepted conditions or practices of the taxpayer's trade or business.

IDAPA Rule 35.01.01.550.03

Although the term 'direct costs' is defined by neither Idaho law nor by any of the standard methods of accounting, the above regulations read together indicate that direct costs include the costs incurred by Cable One in providing internet services to its Idaho customers. What those costs are and where the activities they paid for were performed are the issues that must be determined in order to properly attribute Cable One's Idaho internet revenue.

I conclude that these are disputed issues of fact that prevent the granting of Cable One's motion on I.C. § 63-3027(r) and IDAPA Rule 35.01.01.550 Sales Factor.

I.C. § 63-3027(s) and IDAPA Rule 35.01.01.560 Special Rules

Cable One seeks summary judgment that the ISTC's proposed alternative allocation under I.C. § 63-3027(s) should be barred on the following grounds:

1. That the alternative allocation is a "new" issue and not addressed

in the proceedings from which this appeal is brought. This argument fails as the issue of alternative allocation was addressed in ISTC's November 18, 2010 Decision.

2. That the ISTC has not met the pre-condition to the application of the alternative allocation in I.C. § 63-3027(s), i.e. that the allocation provided in I.C. § 63-3027(r) does not fairly represent the extent of the taxpayer's internet business activity in Idaho. While this is an open question while the issue of the proper attribution of Cable One's Idaho internet revenue is still being litigated, there is at least a factual question as to whether or not such ultimate allocation fairly represents Cable One's internet business activity in Idaho. The Idaho Supreme Court in *Union Pacific Corp. v. Idaho State Tax Com'n*, 139 Idaho 572, 577, 83 P. 2d 116, 121 (2004) identified that the purpose of the relief clause of UDITPA (I.C. § 63-3027(s)) is reasonableness, stating:

"Reasonableness" has been defined as being made up of three elements:

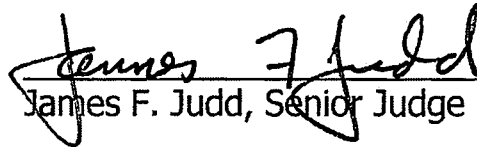
- (1) the division of income fairly represents business activity and if applied uniformly would result in taxation of no more or no less than 100 percent of the taxpayer's income;
- (2) the division of income does not create or foster lack of uniformity among UDITPA jurisdictions; and
- (3) the division of income reflects the economic reality of the business activity engaged in by the taxpayer in the taxing state.

I conclude that it would be premature to determine the use of the alternative relief provisions and that there are disputed issues of fact that prevent the granting of Cable One's motion on I.C. § 63-3027(s) and IDAPA Rule 35.01.01.560 Special Rules.

ORDER

1. Cable One's motion for summary judgment is denied.


ENTERED this 22nd day of January, 2013 *nunc pro tunc* to the 19th day of December, 2012.


James F. Judd, Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2013 a true and correct copy of the foregoing was mailed, postage prepaid or, if the Fax service block is checked, was sent via facsimile to:

Kelly A. Cameron
Tonn K. Peterson
Lawyers
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391

Fax Service

343-3232

Erick M. Shaner
Phil N. Skinner
Deputy Attorneys General
P.O. Box 36
Boise, Idaho 83722-0410

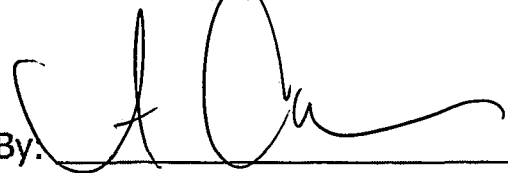
Fax Service

334-7844

Chérie R. Kiser
Angela F. Collins
Lawyers
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006


(866) 255-0185

Clerk of the District Court

By: 
Deputy Clerk

FEB 22 2013

CHRISTOPHER D. RICH, Clerk
By JOHN WEATHERBY
CLERK

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,

Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. **CV OC 2011 03406**

**ORDER CONTINUING THE
SEALING OF NUMERICAL
FIGURES**

ISTC has requested that the court make a determination pursuant to I.C.A.R. 32(i)(3) as to the propriety of continuing to have certain numerical figures redacted and filed under seal.

Absent the appropriate determination under I.C.A.R. 32(i) the public policy of the State of Idaho is stated in I.C. § 9-338 that "every person has a right to examine and take a copy of any public record of this state..." It is beyond dispute that court files in judicial proceedings are public records unless exempted from disclosure by statute, court rule or court order.

The determination of non-disclosure under I.C.A.R. 32(i) is committed to the exercise of discretion in the trial court. See *State v. Turpen*, 147 Idaho 869, 216 P.3d 627 (2009) and *Doe v. State*, 153 Idaho 685, 290 P.3d 1277 (Ct.App. 2012). It is in the exercise of that discretion that my

2

determination of this issue will be made.

I.C.A.R. 32(i)(3) provides the procedure and the basis for determining whether the numerical figures should continue to be sealed as follows:

(i) Other Prohibitions or Limitations on Disclosure and Motions Regarding the Sealing of Records. Physical and electronic records, may be disclosed, or temporarily or permanently sealed or redacted by order of the court on a case-by-case basis. Any person or the court on its own motion may move to disclose, redact, seal or unseal a part or all of the records in any judicial proceeding. The custodian judge shall hold a hearing on the motion after the moving party gives notice of the hearing to all parties to the judicial proceeding and any other interested person, guardian ad litem, court visitor, ward or protected person, personal representative, guardian, or conservator designated by the custodian judge. In ruling on whether specific records should be disclosed, redacted or sealed by order of the court, the court shall determine and make a finding of fact as to whether the interest in privacy or public disclosure predominates. If the court redacts or seals records to protect predominating privacy interests, it must fashion the least restrictive exception from disclosure consistent with privacy interests. Before a court may enter an order redacting or sealing records, it must also make one or more of the following determinations in writing:

(3) That the documents or materials contain facts or statements, the dissemination or publication of which may compromise the financial security of, or could reasonably result in economic or financial loss or harm to, a person having an interest in the documents or materials, or compromise the security of personnel, records or public property of or used by the judicial department, or

In applying these rules, the court is referred to the traditional legal concepts in the law of the right to a fair trial, invasion of

privacy, defamation, and invasion of proprietary business records as well as common sense respect for shielding highly intimate or financially sensitive material about persons. When a record is sealed under this rule, it shall not be subject to examination, inspection or copying by the public. When the court issues an order sealing or redacting records, the court shall also inform the Clerk of the District Court of which specific files, documents and ISTARs records are to be sealed or redacted. Sealed files shall be marked "sealed" on the outside of the file. Sealed or redacted records shall be placed in a manila envelope marked "sealed" with a general description of the records, their filing date and date they were sealed or redacted. When a file has been ordered sealed, or when records within a file have been ordered sealed or redacted, the electronic record shall reflect such action and shall be limited accordingly. When the court issues an order redacting records for purposes of public disclosure, the records in the court file or in the custody of the court shall not be altered in any fashion. The originals shall be placed in a manila envelope marked "sealed" with a general description of the records, and a redacted copy, so marked, shall be substituted for the originals in the court file. An order directing that records be redacted or sealed shall be subject to examination, inspection or copying by the public to the extent that such disclosure does not reveal the information that the court sought to protect in issuing the order. The decision on a motion to redact, seal or unseal records may be reconsidered, altered or amended by the court at any time. When the court issues an order disclosing otherwise exempt records, it shall place appropriate limitations on the dissemination of that information.

The numerical figures that ISTC seeks to have disclosed and that Cable One seeks to keep sealed relate to Cable One's income, expenses, and business activity in its 2005 tax year. ISTC asserts that these numerical figures are old information; that no one outside of the parties have expressed any interest in them; and that the use of the numbers will be necessary for the public to understand the reasoning and precedential basis of the court's ultimate opinion. Cable One asserts, supported by the

Affidavit of Patrick A. Dolohanty, that the numerical figures are confidential; that Cable One has exercised diligence in keeping these numerical figures from the public domain including encryption, password protection and a company-wide privacy policy; and that the disclosure of the numerical figures would provide Cable One's competitors with an advantageous insight into Cable One's efficiencies, vulnerabilities and negotiated costs.

The numerical figures are the type of information that ISTC is required to safeguard from disclosure, I.C. § 63-3076, and must redact the same from its final decisions, I.C. § 63-3045B(6).

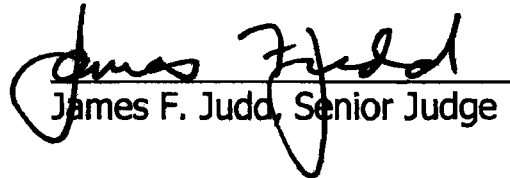
Based upon my review of the materials submitted on this issue and the materials reviewed for determination of the summary judgment motion, I make the following findings of fact:

1. That the numerical figures at issue are not in the public domain.
2. That the dissemination or publication of the numerical figures at issue may compromise the financial security of, or could reasonably result in economic or financial loss or harm to Cable One;
3. That the public policy of the state regarding the non-disclosure by the executive branch of these types of numerical figures has been expressed in I.C. 63-3076 and I.C. § 63-3045B(6);
4. That the knowledge that these types of numerical figures would disclosed in appeal pursuant to an I.C. § 63-3049 tax appeal would be a disincentive to a taxpayer's seeking of relief through judicial process;
5. That the ultimate decision in this case and its reasoning can be made intelligible to the public without the use of the actual numerical figures; and
6. That the interest of privacy out weighs that of public disclosure of the numerical figures.

Good cause appearing, **IT IS ORDERED** that:

1. ISTC's motion to unseal numerical figures is denied and
2. The terms of July 27, 2012 Order Re: Joint Motion for Leave to File Documents under Seal shall continue without modification.

ENTERED this 22nd day of February, 2013.


James F. Judd, Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of February, 2013 a true and correct copy of the foregoing was mailed, postage prepaid, or if the Fax service block is checked, sent a copy via facsimile, or if the PDF Email service block is checked, sent a PDF copy by email to:

Kelly A. Cameron
Tonn K. Peterson
Lawyers
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391

Fax Service
343-3232
 PDF Email Service
TKPetersen@perkinscoie.com

Erick M. Shaner
Phil N. Skinner
Deputy Attorneys General
P.O. Box 36
Boise, Idaho 83722-0410

Fax Service
334-7844
 PDF Email Service
Phil.Skinner@tax.idaho.gov
Erick.Shaner@tax.idaho.gov

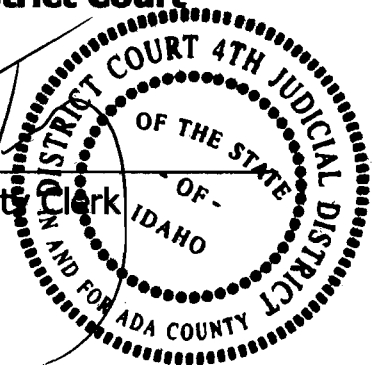
Chérie R. Kiser
Angela F. Collins
Lawyers
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006

Fax Service
(866) 255-0185
 PDF Email Service
CKiser@cahill.com
ACollins@cahill.com

Clerk of the District Court

By: 

Deputy Clerk



LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL

WILLIAM A. von TAGEN [ISB # 2671]
PHIL N SKINNER [ISB #8527]
ERICK M. SHANER [ISB #5214]
DEPUTY ATTORNEYS GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722-0410
(208) 334-7530
TELEPHONE NO.: (208) 334-7530
FACSIMILE: (208) 334-7844

NO. _____
A.M. _____ FILED P.M. 154

APR 15 2013

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

 ORIGINAL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CABLE ONE, INC.,)	
	)	Case No.: CV OC 1103406
Plaintiff,)	
	)	TAX COMMISSION'S POST TRIAL BRIEF
v.)	
)	
IDAHO STATE TAX COMMISSION,)	
)	
Defendant.)	
_____)	

COMES NOW Defendant, Idaho State Tax Commission, by and through its attorney of record, Phil N Skinner, and submits the Tax Commission's Post Trial Brief.

**I.
QUESTIONS BEFORE THE COURT**

To determine whether the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales receipts from Idaho Internet access customers in 2005 are "Idaho sales" that should be included in the Idaho sales numerator, the court must answer the following questions:

1. What was Cable One's income-producing activity?
2. What were the direct costs of performing the income-producing activity?
3. Where, geographically, were the activities giving rise to these costs performed?

Using cost as the measurement, if the greater proportion of the activities giving rise to the direct costs were performed in Idaho, than in any other state, then the sales receipts received by Cable One are considered by Idaho Code § 63-3027(r) to be "Idaho sales" that must be included in the Idaho sales numerator.

The secondary query before the court is whether an "alternative apportionment" should be applied. This analysis presents two questions:

1. Does Cable One's interpretation and application of Idaho Code § 63-3027, which treated none of the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales receipts from Idaho Internet service customers as Idaho sales, fairly represent Cable One's business activity in Idaho during taxable year 2005?

2. If Cable One's interpretation and application does not "fairly represent" its business activity in Idaho during taxable year 2005, then is the alternative being proposed by the Tax Commission reasonable?

II. THE PIVOTAL FACTUAL FINDING

The most pivotal factual question to be answered in this case is whether the activities giving rise to the Internet backbone costs (i.e. the dedicated internet access and local access services provided by Qwest and AT&T at Cable One's six Idaho headend facilities) were performed in Idaho or Arizona. If these activities were performed in Idaho, then, using Cable One's own cost of performance analysis, the Internet backbone costs would shift from the Arizona column to the Idaho column and the greater amount of costs of performance would be in Idaho. This one factual finding

will conclude the entire case, deeming the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales receipts received by Cable One to be “Idaho sales” that must be included in the Idaho sales numerator.

III. STANDARD OF REVIEW

The Idaho Supreme Court has set forth the standard of review for a district court review of a Tax Commission final decision. In Parker v. Idaho State Tax Comm’n, the Supreme Court stated:

A taxpayer may appeal a determination by the Commission by filing a complaint against the Commission in district court. I.C. § 63–3049. The case is to proceed as a *de novo* bench trial. I.C. § 63–3049; *cf.* I.C. § 63–3812(c). A deficiency determination issued by the Commission is presumed to be correct, and the burden is on the taxpayer to show that the Commission's decision is erroneous. *Albertson's Inc. v. State Dep't of Revenue*, 106 Idaho 810, 814, 683 P.2d 846, 850 (1984).

Parker v. Idaho State Tax Comm’n, 148 Idaho 842, 845, 230 P.3d 734, 737 (2010)

The burden of proof is on Cable One to show that it is erroneous to treat the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales revenue from Idaho Internet service customers as “Idaho sales” that should be included in the Idaho sales numerator.

IV. A GREATER PROPORTION OF THE ACTIVITIES ENGAGED IN TO PROVIDE INTERNET ACCESS SERVICE TO IDAHO CUSTOMERS WERE PERFORMED IN IDAHO THAN IN ANY OTHER STATE.

Applicable Law

Idaho Code § 63-3027(p) explains that “the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in [Idaho] during the tax period.” Idaho Code § 63-3027(r) instructs that sales, that are not sales of tangible personal property, are “in Idaho” if “the income-producing activity is performed both inside and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.”

IDAPA 35.01.01.550.02 instructs that “the term income producing activity applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit.”

The goal of the statute is to determine where, geographically, the income-producing activity was performed, if more of the income-producing activity was performed in Idaho than in any other state, the sales generated by that income-producing activity are considered to be Idaho sales which are included in the Idaho sales numerator. The “costs of performance” method is the tool for measuring and assigning weight to the various components of the income-producing activity.

IDAPA 35.01.01.550.03 states, “costs of performance are the direct costs determined according to generally accepted accounting principles and accepted conditions or practices of the taxpayer’s trade or business.”

Thus, the steps in the analysis are:

1. Identify the income-producing activity.
2. Identify the direct costs of performing the income-producing activity.
3. Identify where, geographically, the activities giving rise to these costs were performed.

Analysis

What is the income-producing activity in this case?

The “income-producing activity” in this case is the provision of Internet access to Idaho customers. This is the activity that produced the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales revenue which is at issue in this case.

IDAPA 35.01.01.550.02 says that “the term income producing activity applies to each separate item of income...” The separate items of income that add up to the total *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales revenue, are each of

the monthly payments received from each of the Idaho Internet access customers in 2005. Mr. Dolohanty testified that the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales revenue was received in the form of monthly payments from the Idaho customers. *See* Transcript of Proceedings, pgs. 116-117. The language of the rule could potentially require a costs of performance analysis to examine the activities and costs that were required to produce each monthly payment from each customer. However, the activities (and the costs of those activities) required to provide Internet access and produce the monthly payments from Idaho customers in 2005 appear to be consistent for all the monthly payments from all the customers throughout the year. So whether the costs of performance analysis is conducted looking at all the monthly payments taken as a whole, or looking at them individually, the result is the same in this case.

IDAPA 35.01.01.550.02 instructs that “the term income producing activity... means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit.” The activities Cable One engaged in to provide Internet access to Idaho customers include: (1) a portion of the activities of the Network Operations Center and Solutions Center at Cable One headquarters in Phoenix; (2) the activities of Cable One employees and local offices located in Idaho; (3) the activities with Qwest and AT&T for the ongoing provision of Internet backbone service at Cable One’s Idaho headend facilities, and (4) the activities of constructing and maintaining Cable One’s Idaho broadband network systems, which are required to deliver Internet access service to customer’s homes. *See* Joint Stipulation of Exhibits and Facts, paragraphs 6-9, 13, 14, 15; also *see* Transcript of Proceedings, pgs. 69-70, 76, 79, 80, 225, 238, 261-262, 311-318.

What are the direct costs of performing the income-producing activity?

Once the transactions and activities that constitute the income producing activity have been identified, the next step is to identify the direct costs arising from those activities during the taxable year at issue. Cable One calculated that *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of the 2005 Solution Center and Networks Operations costs were incurred to support and provide Internet access in Idaho. *See* Joint Stipulation of Exhibits and Facts, paragraph 14. In 2005, Cable One incurred *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of costs for the activities of Cable One employees and local offices located in Idaho. *See* Joint Stipulation of Exhibits and Facts, paragraph 13. The total cost for AT&T and Qwest to provide the Internet backbone service at all six of the Idaho system headends in 2005 was *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** *See* Joint Stipulation of Exhibits and Facts, paragraph 15. The Tax Commission does not dispute that these three amounts were direct costs of providing Internet access in Idaho during 2005.

Some portion of the costs of building and maintaining Cable One's Idaho network should also be included as direct costs of providing Internet to Idaho customers. Cable One only included the three cost amounts, identified in the preceding paragraph, as the total "direct costs" of providing Internet access in Idaho in 2005. *See* Affidavit of Patrick A. Dolohanty, page 4 (trial exhibit 12); also *see* Summary of Cable One's Direct Costs (trial exhibit 8). Cable One did not include any portion of the costs arising out of the activities of constructing and maintaining Cable One's Idaho broadband network systems, which are required to deliver Internet access service to customer's homes. Both Mr. Hannan and Mr. Ottley testified about how the Idaho networks are used to deliver Internet access to the homes of Idaho customers. *See* Transcript of Proceedings,

pgs. 185, 234-238. Mr. Starkey also identified all the portions of Cable One's network that were required to provide Internet access to Idaho customers. *See* Transcript of Proceedings, pgs. 438-440. Mr. Fischer testified, regarding the Idaho networks, that:

[T]here are costs that can be traced to the high speed internet service. You can trace some sort of capacity that's dedicated to providing that service. So that's the portion that should be considered a direct cost of the service.

See Transcript of Proceedings, pg. 396.

As seen in Mr. Starkey's Supplemental Expert Report, a reasonable amount of network costs to include in the costs of performance analysis would probably be somewhere in the range of *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** to *****START CONFIDENTIAL***** [Redacted]. *****END CONFIDENTIAL***** *See* Supplemental Expert Report of Michael Starkey, TC 004617-004620 (trial exhibit 11).

Where, geographically, were the activities giving rise to these costs performed?

The location of the activities giving rise to the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of 2005 Solution Center and Networks Operations Center costs were performed in Arizona; the parties do not dispute this. *See* Joint Stipulation of Exhibits and Facts, paragraph 14. Mr. Ottley testified extensively about all the functions performed in Phoenix that facilitate the provision of Internet access in Idaho; he addressed the provisioning system, the domain name server system, processing of Cable One assigned email, and all the other functions being performed in Phoenix that result in communications back and forth with the Idaho systems over the Internet by way of the AT&T and Qwest backbone service. *See* Transcript of Proceedings, pgs. 234-236, 239-244, 248, 255, 258, 260. Mr. Ottley explained that Idaho customers could not access the Internet only by using the Idaho CMTS, the Idaho router, and the Qwest or AT&T backbone; the applications in Phoenix are required elements for

Internet access. *See* Transcript of Proceedings, pgs. 266-267 (“these applications... complete the puzzle in terms of Internet access to our customers.) All these applications and functions that were performed in Phoenix are wrapped up in and represented by the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of 2005 Solution Center and Networks Operations Center costs, which the parties do not dispute were performed in Arizona.

The location of the activities giving rise to the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of costs for the activities of Cable One employees and local offices located in Idaho were performed in Idaho; the parties do not dispute this. *See* Joint Stipulation of Exhibits and Facts, paragraph 13.

Although the parties dispute whether or not some portion of the costs of constructing and maintaining the Idaho network systems should be considered to be direct costs, it is undisputed that these activities were performed in Idaho. From the headend facilities, down to Idaho customers’ homes, the six Idaho network systems are located entirely in Idaho. Mr. Hannan testified that the headends for the six Idaho network systems are all located in Idaho. *See* Transcript of Proceedings, pgs. 172-173, 221.

The activities giving rise to the *****START CONFIDENTIAL***** [Redacted]. *****END CONFIDENTIAL***** of Internet backbone service charges were performed in Idaho at the headend facilities where Qwest and AT&T provided the dedicated internet access and local access connections that Cable One was paying for. This is the pivotal disputed fact in this case. Cable One treated these costs as Arizona costs in its costs of performance analysis. *See* Affidavit of Patrick A. Dolohanty, page 4 (trial exhibit 12); *also see* Summary of Cable One’s Direct Costs (trial exhibit 8). Using Cable One’s own cost of performance analysis, if this cost is reassigned to the Idaho column because the activities giving rise to this cost were performed in Idaho at the

headend facilities, then more of the costs of performance are in Idaho than Arizona and thus the ***START CONFIDENTIAL*** [Redacted] ***END CONFIDENTIAL*** of sales receipts received by Cable One are “Idaho sales” that must be included in the Idaho sales numerator pursuant to Idaho Code § 63-3027(r). This one factual finding will conclude the entire case.

The ***START CONFIDENTIAL*** [Redacted]. ***END CONFIDENTIAL*** of Internet backbone service charges are comprised of individual charges specifically billed for the services provided at each of the Idaho system headend locations. Mr. Dolohanty discussed and explained the general ledger detail for the phone data line costs for the six Idaho systems. *See* General Ledger Detail, TC 003868-003871 (trial exhibit 13); *see also* Transcript of Proceedings, pgs. 120-121. The “grand total” on the last page of this general ledger excerpt is ***START CONFIDENTIAL*** [Redacted]; ***END CONFIDENTIAL*** Mr. Dolohanty confirmed that this is where the backbone cost amount seen on the profit and loss statement (and used in the costs of performance analysis) came from. *See* Transcript of Proceedings, pgs. 121-122. A few monthly bills from Qwest were shown to Mr. Dolohanty, he confirmed that the charges on each of these matched up with specific line entries in the general ledger. *See* Transcript of Proceedings, pgs. 122-126; *see also* Qwest Invoices, TC 003565, 003566, 003569, (trial exhibit 14). Two of the sample invoices show that the charges were for “Circuit Location, 2-261 Eastland Dr, Twin Falls;” the other sample invoice shows that the charge was for “Circuit Location, 2-205 W. Alameda Rd, Pocatello.” *See* Qwest Invoices, TC 003565, 003566, 003569, (trial exhibit 14). Another Qwest bill (trial exhibit 16) was presented to Mr. Dolohanty, he confirmed that the charges in this bill for Lewiston, Twin Falls, Pocatello, and Idaho Falls all matched up with specific line entries on the general ledger. *See* Transcript of Proceedings, pgs. 126-128; *see also* Qwest Invoice, TC 003592-003595 (trial exhibit 16). The general ledger (trial

exhibit 13) demonstrates that the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** cost amount is comprised of individual monthly bills for charges incurred at the specific Idaho headend locations. Each of these Idaho headends had a separate identifiable port; and there were different levels of bandwidth provided by Qwest or AT&T at each of these Internet access ports in the Idaho headends. *See* Transcript of Proceedings, pgs. 321-323, 327-329.

Cable One and its witnesses have inaccurately characterized the Idaho Internet backbone service cost as a cost that occurs in Arizona; they claim that it is only for “internal budget and accounting purposes” that they have allocated *****START CONFIDENTIAL***** [Redacted]. *****END CONFIDENTIAL***** to Idaho. *See* Affidavit of Patrick A. Dolohanty, paragraph 13 (trial exhibit 12). The general ledger, the sample Qwest invoices, along with the testimony of Mr. Dolohanty show that the total *****START CONFIDENTIAL***** [Redacted]. *****END CONFIDENTIAL***** of Internet backbone service costs is made up of the charges in the monthly bills, each of which identified the specific Idaho headend location where AT&T or Qwest had provided the services for which Cable One was being charged.

Understanding exactly what the Internet backbone services are solidifies that the activities giving rise to the *****START CONFIDENTIAL***** [Redacted]. *****END CONFIDENTIAL***** of Internet backbone service costs were performed in Idaho. In the profit and loss statement these costs are referred to as “phone data line” costs. *See* Idaho All – Profit and Loss Detail, CB 000124 (trial exhibit 7). Cable One has frequently used the term “Internet backbone services,” and in its costs of performance analysis also used the term “long distance communication services.” *See* Affidavit of Patrick A. Dolohanty, page 4 (trial exhibit 12); *also see* Summary of Cable One’s Direct Costs (trial exhibit 8). At one point when asked about the

services that Cable One purchases from Qwest and AT&T, Mr. Ottley stated, "We strictly want the backbone access to the World Wide Web. We take care of everything else." *See* Transcript of Proceedings, pgs. 318. Further testimony explained that the specific services that Cable One is paying AT&T and Qwest for are "direct internet access" (DIA) and "local access" services. Mr. Ottley was asked questions about one of the Qwest bills (trial exhibit 16) and explained that the "Qwest Total Advantage" service identified in the bill was "both local access as well as DIA for each of these locations." *See* Transcript of Proceedings, pg. 287. Mr. Ottley also explained that Qwest or AT&T installs equipment in the Cable One headend "in order for us to access their network;" explaining further, "they provide dedicated internet access into our headed, dedicated internet access as well as local access being the entire picture for internet access from Qwest or AT&T." *See* Transcript of Proceedings, pgs. 305-306. Cable One submitted a contract into evidence titled "Qwest Total Advantage Agreement." *See* Qwest Total Advantage Agreement (trial exhibit 28). The contract provides further insight about what the service is that Cable purchases from Qwest and AT&T.

The Qwest Total Advantage Agreement (trial exhibit 28) confirms that the Internet backbone service purchased from Qwest and AT&T consists of dedicated internet access and local access services provided at each of the Cable One headend facilities in Idaho. On the first page of the agreement Cable One is identified as the customer and the agreement states "customer shall purchase the services checked below..." *See* Qwest Total Advantage Agreement, pg 1 (trial exhibit 28). The two boxes "checked below" are "Domestic Standard DIA" and "Local Access." *Id.* On page seven of the agreement there is a section titled "Service Description;" in paragraph 2.1 it describes the DIA service as "a dedicated, high-speed network connection to the Internet." *Id.* at 7. Mr. Starkey confirmed that DIA service "is a basic service

that's purchased in the industry for purposes of accessing the World Wide Web." *See* Transcript of Proceedings, pg. 445. Mr. Starkey also explained how the DIA and local access services work. Referring to an "Internet Backbone Services" diagram that Cable One had prepared and provided during discovery (trial exhibit 27), Mr. Starkey explained that the local access channel picks up all the internet traffic that is coming out of the Cable One headend; from that point, Qwest transports the traffic a couple of miles away to its nearest central office where it then connects the traffic to its own backbone network and carries the traffic out to the Internet. *See* Transcript of Proceedings, pgs. 447-448. Along with explaining the function of the DIA and local access services, Mr. Starkey provided the reason for including the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of Internet backbone costs as costs that were in Idaho. Mr. Starkey explained:

So the service they were buying and paying for was this local channel, which is an actual physical facility that sits in Idaho, and then also for a port on the Qwest network that provides access to the World Wide Web.

So it became clear from this data response and then also from the bills that all of this [referring to trial exhibit 27] – and I'm circling all of these headends and all of these central offices and all of the lines right before the cloud, everything right up when you get to the cloud -- all of that equipment sits in Idaho...

So it became clear through all that analysis, including the bills, that all of these facilities actually sat in Idaho, and they were purchased for use in Idaho, specifically because they had to carry the traffic of those Idaho customers.

That was the basis for us saying, "We don't understand why Cable One would attribute those as Arizona costs, when clearly all the geographic nexus of those facilities and service sits in Idaho."

See Transcript of Proceedings, pgs. 448-450.

Cable One's counsel has erroneously asserted that when Cable One purchases the Backbone service from Qwest or AT&T, Cable One is not purchasing one end; but that Cable One is purchasing a service which goes from one end to the other end (the "other end" being

Phoenix). *See* Transcript of Proceedings, pg. 338. The general ledger (trial exhibit 13) demonstrates that the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** Internet backbone cost amount included in Cable One's costs of performance analysis is the total of all the monthly bills issued by Qwest and AT&T for providing DIA and local access services specifically at Cable One's Idaho headend facilities. Mr. Ottley testified that the Phoenix headquarters has its own dedicated Internet access port. *See* Transcript of Proceedings, pg. 322. If Cable One does pay Qwest for DIA and local access services at the Phoenix headquarters (as seems to be depicted on trial exhibit 27), then those Qwest bills specific to the services being provided at the Phoenix headquarters exist separate and apart from the Idaho specific bills that add up to *****START CONFIDENTIAL***** [Redacted]. *****END CONFIDENTIAL***** If the Qwest bills for DIA and local access services in Phoenix were analyzed and some traceable percentage of the Internet traffic going in and out of the Phoenix headquarters could be identified as being traffic that is specifically related to providing Internet access in Idaho, then it would probably be appropriate to include that amount in the "Arizona column" of the costs of performance analysis; however, no such evidence has been presented. The evidence that has been presented establishes that the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** Internet backbone cost amount included in Cable One's costs of performance analysis is the total amount that Cable One paid to AT&T and Qwest in 2005 for the provision of DIA and local access services at the six headend facilities in Idaho.

The activities giving rise to the Internet backbone service costs were performed in Idaho. Using Cable One's own cost of performance analysis (see page 4 of trial exhibit 12), the Internet

backbone costs must be shifted from the Arizona column to the Idaho column and the greater amount of the costs of performance are in Idaho. *****START CONFIDENTIAL*****

[Redacted]

*****END CONFIDENTIAL***** Affidavit of Patrick A. Dolohanty, page 4 (trial exhibit 12).

This one factual finding concludes the entire case; pursuant to Idaho Code § 63-3027(r) the

*****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales receipts

received by Cable One are “Idaho sales” that must be included in the Idaho sales numerator.

V.

CABLE ONE’S INTERPRETATION AND APPLICATION OF IDAHO CODE § 63-3027, WHICH TREATED ALL OF THE ***START CONFIDENTIAL***** \$30,019,045 *****END CONFIDENTIAL***** OF SALES RECEIPTS FROM IDAHO CUSTOMERS AS SALES THAT WERE IN ARIZONA, DOES NOT FAIRLY REPRESENT CABLE ONE’S BUSINESS ACTIVITY IN IDAHO IN 2005. THE TAX COMMISSION’S PROPOSED ALTERNATIVE IS REASONABLE.**

Applicable Law

Idaho Code section 63-3027(s) is known as the “alternative apportionment” provision (aka “section 18 relief”), this code section provides:

(s) If the allocation and apportionment provisions of this section do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the state tax commission may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) Separate accounting, provided that only that portion of general expenses clearly identifiable with Idaho business operations shall be allowed as a deduction;
- (2) The exclusion of any one (1) or more of the factors;
- (3) The inclusion of one (1) or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (4) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

The application of section 63-3027(s) was the central issue in Union Pacific Corp. v Idaho State Tax Commission case Idaho Supreme Court. Union Pacific Corp. v Idaho State Tax Commission, 139 Idaho 572, 83 P.3d 116 (2004). The court stated:

Idaho Code section 63-3027(s) provides that the Tax Commission may require alternative apportionment (a) if the allocation and apportionment provisions of the statute do not fairly represent the extent of the taxpayer's business and (b) if the alternative apportionment is reasonable. Before the statutory apportionment can be rejected in favor of an alternative apportionment, either the Commission or the taxpayer must show that the three-part formula does not accurately reflect the taxpayer's business in the State. The party asserting alternative apportionment bears the burden of showing that alternative apportionment is appropriate.

Id. at 575 (citations omitted).

The Idaho Supreme Court discussed the requirement that the proposed alternative be reasonable, stating:

In the words of the draftsman of the uniform act, William J. Pierce explaining the purpose of the relief clause:

[I]t gives both the tax collection agency and the taxpayer some latitude for showing that for the particular business activity, some more equitable method of allocation and apportionment could be achieved. Of course, departures from the basic formula should be avoided except where reasonableness requires.

“Reasonableness” has been defined as being made up of three elements:

(1) the division of income fairly represents business activity and if applied uniformly would result in taxation of no more or no less than 100 percent of the taxpayer's income; (2) the division of income does not create or foster lack of uniformity among UDITPA jurisdictions; and (3) the division of income reflects the economic reality of the business activity engaged in by the taxpayer in the taxing state.

Id. at 576-77 (citations omitted).

IDAPA 35.01.01.560.01 provides additional instruction for applying the alternative apportionment provision:

A departure from the allocation and apportionment provisions of Section 63-3027, Idaho Code, is permitted only in limited and specific cases. Section 63-3027(s), Idaho Code, may be invoked only when unusual fact situations that ordinarily are unique and nonrecurring produce incongruous results pursuant to the apportionment and allocation provisions contained in Section 63-3027, Idaho Code.

In the Idaho district court's decision in the Union Pacific case, it discussed the “unique and non-recurring” language of the rule:

The parenthetical phrase “(which ordinarily will be unique and non-recurring)” does not further limit what is an “unusual fact situation”, it simply explains that ordinarily an unusual fact situation will be unique and non-recurring. It does not require the unusual fact situation be unique and non-recurring.

Union Pacific Corp. v. Idaho State Tax Commission, Case No. CV OC 9704812D, pg. 10 (Idaho 4th Dist. June 03, 2002) (Partial Summary Judgment Decision). (A copy of this decision has been attached to this brief as "Exhibit A.")

California courts have expressed the same rationale regarding the “unique and non-recurring” language. A California court of appeals recently explained:

Finally, General Mills also argues that its hedging activity is not the sort of unusual, atypical fact situation for which section 25137 was designed. It cites California Code of Regulations, title 18, section 25137, which provides in part, “[Revenue and Taxation Code] [s]ection 25137 may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment and allocation provisions contained in these regulations.” The Supreme Court, however, specifically rejected a similar argument in *Microsoft*: “Systematic oversights and undersights are equally a matter of statutory concern. Nothing in the language of [California Code of Regulations, title 18,] section 25137 persuades us otherwise. While Revenue and Taxation Code section 25137 ‘ordinarily’ applies to nonrecurring situations, it does not apply only to such situations; the statutory touchstone remains an inquiry into whether the formula ‘fairly represent[s]’ a unitary business's activities in a given state, and when it does not, the relief provision may apply. [Citations.]” (*Microsoft, supra*, 39 Cal.4th at p. 770, 47 Cal.Rptr.3d 216, 139 P.3d 1169, fn. omitted.)

Gen. Mills, Inc. v. Franchise Tax Bd., 208 Cal. App. 4th 1290, 1307, 146 Cal. Rptr. 3d 475, 489 (2012)

The Idaho Supreme Court seemed to follow this logic in its Union Pacific opinion. The court actually cited the expected recurring nature of Union Pacific’s accounting method as a reason as to why it was appropriate to intervene with alternative apportionment. Stating:

What is clear, however, is that UPC's reporting system, which overstates sales, was to be used every year hence, the long-term consequence of which would be an inaccurate reflection of UPC's sales in Idaho and income from sales escaping taxation. The district court properly exercised its discretion in adopting the Commission's alternative apportionment.

Union Pacific, 83 P.3d at 122.

The steps in this analysis are:

1. Does the taxpayer's interpretation and application of the allocation and apportionment provisions of Idaho Code section 63-3027 fairly represent the taxpayer's business activity in Idaho (i.e. is it an unusual fact situation that produces an incongruous result)?
2. If it does not "fairly represent," then is the alternative being proposed by the Tax Commission is reasonable?

Analysis

Does it fairly represent Cable One's business activity in Idaho to treat all of the 2005 sales of Internet access to Idaho customers as sales that were in Arizona?

The purpose of the sales factor in the apportionment formula is to represent the market state's contribution to the taxpayer's production of income. Mr. Peters testified that during the creation of the three factor apportionment formula there was a desire to represent the market state, and this is where the sales factor came from. *See* Transcript of Proceedings, pgs. 513-514. Mr. Peters explained further:

[L]et me tell you that nobody that I know of -- and, you know, I have been in this field for 50-some years, and I have read everything and been involved in about everything that's been done.

I have never seen anybody say -- that's knowledgeable in the field -- say anything other than that the market state is the reason you have a sales factor in the three-factor formula, and I could cite 50 other references if I were asked to, where that is said by tax practitioners, by tax lawyers, by economists, by whatever.

See Transcript of Proceedings, pgs. 531-532.

Cable One operates in 19 states; it received 28 percent of its Internet access revenue from Idaho in 2005, yet included none of that amount in the Idaho sales numerator. *See* Transcript of Proceedings, pg. 93. Including none of those sales in the Idaho sales numerator does not fairly represent Cable One's business activity in Idaho, the state where it does more Internet access

business than any other. Mr. Peters also testified that failure to include the *****START CONFIDENTIAL [Redacted] END CONFIDENTIAL***** of sales to Idaho customers “produces what I would call an incongruous result... [b]ecause it does not reflect at all the market for the product... it totally ignores the market provided by Idaho for Internet access, which is... the only reason for the sales factor to exist at all in the formula.” *See* Transcript of Proceedings, pgs. 523-524.

If Cable One’s interpretation and application of Idaho Code § 63-3027 was correct, then this would be exactly the kind of case and scenario that the alternative apportionment provision of Idaho Code § 63-3027(r) was meant to apply to. Professor William J. Pierce, the “father” of UDITPA, noted the deficiency in this cost of performance area and the need for a variance under Section 18 (*see* Idaho code § 63-3027(s)) to deal with certain situations not covered by Section 17 (*see* Idaho Code § 63-3027(r)) as follows:

Another problem arises in conjunction with sales other than sales of tangible personal property. Section 17 of the uniform act attributes these sales to the state in which the income-producing activity is performed. If the activity is performed in more than one state, the sales are attributed to the state in which the greater proportion of the activity was performed, based upon costs of performance. In many types of service functions, this approach appears adequate. However, there are many unusual fact situations connected with this type of income and probably the general provisions of Section 18 should be utilized for these cases.

BellSouth Adver. & Pub. Corp. v. Chumley, 308 S.W.3d 350, 365 (Tenn. Ct. App. 2009).

The approach taken by Cable One to exclude its Idaho Internet service revenue from the Idaho sales factor was a new position they began taking in their 2005 tax return. *See* Transcript of Proceedings, pgs. 135-136. Just like in Union Pacific, Cable One’s approach is “to be used every year hence, the long-term consequence of which would be an inaccurate reflection of [Cable One's] sales in Idaho and income from sales escaping taxation.” Union Pacific, 83 P.3d at 122.

Is the Tax Commission's proposed alternative reasonable?

The Tax Commission's recommended alternative is reasonable; it is simply to include the Idaho Internet access sales as Idaho sales, just as Cable One had done in the years before 2005. *See* Transcript of Proceedings, pgs. 135-136. This method satisfies the three measures of reasonableness described in Union Pacific. Union Pacific, at 576-77.

First, the division of income fairly represents business activity and if applied uniformly would result in taxation of no more or no less than 100 percent of the taxpayer's income. Including the sales in the Idaho sales numerator fairly represents Cable One's business activity of selling Internet access service to customers in Idaho and receiving income from those customers. If this market approach were applied uniformly, it would result in taxation of no more or no less than 100 percent of the taxpayer's income; the sales would simply be included as sales in the state where each customer resided. Currently, Cable One inconsistently calls the Idaho customer sales "Arizona sales" in its Idaho tax returns, and calls these same Idaho customer sales "Idaho sales" in its Arizona return. *See* Transcript of Proceedings, pgs. 48, 133-135, 137-138, 143. In a self-serving fashion, the sales are currently not included in the calculation of income tax in either state, and are escaping taxation altogether. When asked why Cable One had not included the Idaho Internet access sales in their Arizona sales factor numerator, Mr. Dolohanty suggested that "we basically reviewed the Arizona laws and determined that it was not taxable." *See* Transcript of Proceedings, pg. 48. This position seems hard to justify; Arizona Code § 43-1147 and the related regulation, AZ ADC R15-2D-806(1), are virtually identical to Idaho Code § 63-3027(r) and its related tax rule, IDAPA 35.01.01.550.02. Both states have adopted the same UDITPA provisions.

Second, the division of income does not create or foster lack of uniformity among UDITPA jurisdictions. As has been discussed, the purpose of the sales factor is to represent the market state. Treating sales to customers residing in a state, as sales that “are in” that state, follows the goal of UDITPA and fosters uniformity among the states that have adopted its provisions. As pointed out above, both Arizona and Idaho have adopted the UDITPA provisions for “sales other than sales of tangible property.” Cable One currently treats the sales to Idaho customers as “Idaho sales” on their Arizona return and does not include them in the Arizona sales numerator; including these sales as “Idaho sales” in the Idaho numerator fosters uniformity between these two UDITPA jurisdictions.

Third, the division of income reflects the economic reality of the business activity engaged in by the taxpayer in the taxing state. In 2005, Cable One received *****START CONFIDENTIAL [Redacted] END CONFIDENTIAL***** of revenue from approximately *****START CONFIDENTIAL [Redacted] END CONFIDENTIAL***** customers in Idaho. In 2005, Cable One provided Internet access to customers in 19 states and received 28% of its total Internet access revenue from Idaho customers (significantly more Internet access income came from Idaho than any other state). *See* Internet Cost Analysis, pg. 5 (trial exhibit 9). It reflects the economic reality of Cable One’s business activity in Idaho for these sales to Idaho customers to be treated as Idaho sales.

Cable One’s application of the statute does not fairly represent its business activity in Idaho. This unusual approach produces an incongruous result where 28% of Cable One’s Internet access income is not included in the sales numerator of any state. During the deposition of Tax Commission expert witness, Jim Peters, he was asked about the period of time (1965 through 1984) during which he worked for AT&T as their attorney responsible for filing state

income tax returns, handling audits, handling appeals, and litigation. He was asked if he had ever looked at this cost of performance statute and considered zeroing out a line of income in a state based on more costs being performed out of state. Mr. Peters stated in his answer:

So my answer to you is that in my time, this sort of thing never occurred. We never went to any state with a zero sales factor. I would be embarrassed to go to a state with a zero sales factor, to tell you the truth. If you really want my opinion, I would have been ashamed to go to New York and say you have a zero sales factor or California, you have a zero sales -- I'd get nowhere. And any time that I dealt with a state, it was always recognized by the state and by me as a public utility large in every state, probably the largest state taxpayer in the country, that we had to come to some reasonable way, method of handling the situation...

See Deposition Transcript of James H. Peters, pgs. 95-97 (trial exhibit 41).

VI. CONCLUSION

More of the income producing activity was performed in Idaho than in Arizona

There are various activities that were required for Cable One to carry on its income-producing activity of providing Internet access to Idaho customers in 2005. These activities included: (1) a portion of the activities of the Network Operations Center and Solutions Center at Cable One headquarters in Phoenix; (2) the activities of Cable One employees and local offices located in Idaho; (3) the activities with Qwest and AT&T for the ongoing provision of Internet backbone service at Cable One's Idaho headend facilities, and (4) the activities of constructing and maintaining Cable One's Idaho broadband network systems, which are required to deliver Internet access service to customer's homes.

The parties have stipulated to the amount of the direct costs in 2005 for the first three of these four activities: (1) *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of Solution Center and Networks Operations Center costs; (2) *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of costs for the

activities of Cable One employees and local offices located in Idaho; and (3) *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of costs for AT&T and Qwest to provide Internet backbone (i.e. DIA and local access) services at the six Idaho headends.

Cable One disputes that any amount of the costs of the Idaho networks should be included as direct costs. The evidence suggests that an amount somewhere in the range of *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** to *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** should be included.

It is undisputed that the activities giving rise to the Solution Center and Network Operations Center costs were performed in Arizona. It is undisputed that the activities giving rise to the costs of Cable One employees and local offices in Idaho were performed in Idaho. It is also clear that the activities giving rise to the costs of building and maintaining the Idaho network systems were performed in Idaho.

The evidence in this case shows that the activities giving rise to the AT&T and Qwest Internet backbone service costs were performed in Idaho, at the six Cable One headend facilities, where AT&T or Qwest installed equipment and provided DIA and local access services so that Cable One would have a connection to the Internet. Each headend had a separately identifiable port, each headend had its own specified bandwidth capacity, and Qwest and AT&T provided separate bills for charges incurred at each headend facility. The *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of Internet backbone costs in Cable One's Idaho profit and loss statement (and included in Cable One's cost of performance analysis) is the total amount of all the monthly bills for services provided at each of the six Idaho Cable One headends.

Using costs as the measurement, more of the income producing activity was performed in Idaho than in Arizona. *****START CONFIDENTIAL*****

[Redacted]

*****END CONFIDENTIAL*****


Pursuant to Idaho Code § 63-3027(r), the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales receipts received by Cable One are “Idaho sales” that must be included in the Idaho sales numerator.

Treating all of the Internet access sales receipts from Idaho customers as sales that were “in Arizona” does not fairly represent Cable One’s business activity in Idaho in 2005

If the Court were to find that Cable One has correctly applied Idaho Code § 63-3027(r), then Cable One's interpretation and application of Idaho Code § 63-3027, which treated all of the *****START CONFIDENTIAL***** [Redacted] *****END CONFIDENTIAL***** of sales receipts from Idaho customers as sales that were “in Arizona,” does not fairly represent Cable One's business activity in Idaho in 2005. In 2005, Cable One received *****START CONFIDENTIAL** [Redacted] **END CONFIDENTIAL***** of revenue from approximately *****START CONFIDENTIAL** [Redacted] **END CONFIDENTIAL***** customers in Idaho. In 2005, Cable One provided Internet access to customers in 19 states and received 28 percent of its total Internet access revenue from Idaho customers (significantly more Internet access income came from Idaho than any other state). Cable One calls these sales “Arizona sales” in their Idaho return and does not include them; they then take the exact contradictory position and call these sales “Idaho sales” in their Arizona return and do not include them. Both states have enacted the same UDITPA provisions and have virtually identically worded statues and regulations/rules. Cable One’s interpretation and application of the law is an unusual approach, producing an incongruous result where 28% of Cable One’s Internet access income is not included in the sales numerator of any state. It is reasonable, and reflects the economic reality of Cable One’s

business activity in Idaho, for these sales to Idaho customers to be treated as Idaho sales that are included in the Idaho sales numerator.

DATED this 15th day of April 2013.




PHIL N SKINNER
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 2013, I have served a true and correct copy of the within and foregoing TAX COMMISSION'S POST TRIAL BRIEF upon counsel of record, and upon the Honorable James F. Judd, by depositing the same in the United States Mail in a properly addressed envelope with adequate postage thereon to insure delivery to the following:

KELLY A CAMERON
TONN K PETERSEN
PERKINS COIE LLP
1111 WEST JEFFERSON ST
SUITE 500
BOISE ID 83702-5391

CHÉRIE R KISER
ANGELA F COLLINS
CAHILL GORDON &
REINDEL LLP
1990 K STREET NW SUITE 950
WASHINGTON DC 20006



PHIL N SKINNER
DEPUTY ATTORNEY GENERAL

NO. _____ FILED
A.M. _____ P.M. 12:10

JUN 03 2002

J. DAVID NAVARRO, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

UNION PACIFIC CORPORATION,

Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV OC 9704812D

PARTIAL SUMMARY JUDGMENT
DECISION

On March 1, 2002, the Idaho State Tax Commission ("Tax Commission") moved this Court to grant it partial summary judgment allowing it to apply an alternative apportionment formula to the calculation of Union Pacific Corporation's instate revenue. In particular, it requests the Court delete the proceeds derived from Union Pacific's sales of it accounts receivables from the denominator of the sales factor. In response, on April 5, 2002, Union Pacific Corporation ("Union Pacific") requested partial summary judgment be granted to it and, on April 18, 2002, filed its opposition to the Tax Commission's Motion. The Tax Commission responded on April 17, 2002, and Union Pacific replied on April 25, 2002. Both parties submitted additional affidavits in support of their motions and had previously stipulated to other facts.

Argument was held May 2, 2002, and the Court took the matter under advisement.

Based on the record, the argument, briefs, law and for the reasons stated below, the Court grants partial summary judgment to the Tax Commission and denies partial summary judgment to Union Pacific.

1 **PROCEDURAL AND FACTUAL BACKGROUND**

2 Union Pacific is the parent company of a group of corporations (including the
3 Union Pacific Railroad and the Missouri Pacific Railroad) which are engaged in
4 transportation, natural resources, energy, environmental and computer technology, and
5 services. Both the Union Pacific Railroad and the Missouri Pacific Railroad (collectively
6 "railroads") ship goods for customers on credit, creating accounts receivable. The Idaho
7 Supreme Court specifically found the following facts are not in dispute.

8 In 1989, the railroads began selling their accounts receivable. As the Idaho
9 Supreme Court found, the railroads created a pool of accounts receivable and sold,
10 without recourse, an undivided interest in the receivables to several banks. They sold
11 the accounts for an amount that was less than the face value of the receivables. The
12 banks agreed to purchase interests in the accounts receivable until the banks had paid
13 an agreed-upon maximum sum (\$200 million in the first year).

14 The banks issued commercial paper to finance their investment in the receivables
15 and filed Uniform Commercial Code financing statements to protect their respective
16 interests in the receivables. The railroads, however, continued to collect the accounts
17 receivable, and as they were collected the railroads added new receivables to the pool
18 to maintain the face value of the receivables in the pool.

19 The face value of the pool of receivables was kept high enough so that if the
20 railroads discontinued operations, the banks' interests in the receivables would be
21 sufficient for them to recover the money they paid and to pay any liability they have for
22 the payment of interest on the commercial paper that they sold to finance their
23 purchases of the receivables. The railroads also had to pay a \$500,000 one-time
24 origination fee and a monthly commitment fee of 0.75% of the unused amount of the
25 banks' \$200 million commitment to purchase.

26 Because the Union Pacific Corporation and the railroads constitute a unitary
27 corporation transacting business in several states, their combined income for tax
28 purposes must be apportioned among those states.

29 In 1996, the Tax Commission assessed income tax deficiencies against the
30 Union Pacific Corporation for the years 1991, 1992, and 1993. At issue was Union
31

1 Pacific's apportionment of income to Idaho pursuant to *Idaho Code* § 63-3027. Under
2 that statute, corporations operating both in Idaho and in one or more other states are
3 required to apportion a part of their business income to Idaho. The Tax Commission
4 ruled Union Pacific was precluded from including revenues from the sale of its accounts
5 receivable within the sales factor.

6 Union Pacific appealed this decision to the District Court seeking *de novo* review
7 from this ruling.

8 Initially, the District Court affirmed the Tax Commission's decision based, in part,
9 on the Court's determination that Union Pacific's sale of its accounts receivables was
10 not a sale under the statute. However, because, pursuant to I.R.C.P. 36, the Tax
11 Commission had admitted that Union Pacific's sale of its accounts receivable were
12 "sales" as contemplated by *Idaho Code* § 63-3027(a)(5), on reconsideration, the District
13 Court reversed its decision and reversed the Tax Commission's assessment of tax
14 deficiencies against Union Pacific.

15 The Tax Commission appealed the District Court decision to the Idaho Supreme
16 Court. The Supreme Court remanded certain issues to this Court to consider, among
17 other things, whether an alternative apportionment formula regarding revenues from the
18 sale of Union Pacific's accounts receivable should be used. *See Union Pacific v. Idaho*
19 *State Tax Commission*, 136 Idaho 34, 28 P.3d 325, 380 (2001). The Supreme Court
20 further ordered the Court to determine whether dividends received by Union Pacific
21 from a limited partnership were business income. *Id.*

22 Because the Supreme Court opined in a footnote¹ that the Tax Commission could
23 move the District Court to allow it to withdraw its admission pursuant to I.R.C.P. 36(b),
24 the Tax Commission moved to withdraw its admission. The Court denied its motion.
25 Thus, for the purposes of this decision, it is assumed that the sales of accounts
26

27 ¹ "Our decision is based upon the Tax Commission's answers to the requests for admission, as is our
28 direction on remand that the district court must consider an alternative apportionment formula. That
29 direction is not intended to limit the district court's consideration in the event that the Tax Commission
30 moves to amend or withdraw its answers to the requests for admission and the district court grants such
31 motion. We likewise express no opinion upon whether the district court should grant such a motion if it is
32 made." *Union Pacific*, 28 P.3d at 378, fn.3.

1 receivable are properly included as sales. The issue, therefore, is limited to whether
2 inclusion of the sales of accounts in the apportionment formula as sales creates a result
3 that does not fairly represent the extent of Union Pacific's business activity in this State.

4 ANALYSIS

5 Summary judgment is proper only when there is no genuine issue of any material
6 fact, and the moving party is entitled to judgment as a matter of law. *G & M Farms v.*
7 *Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991); *Anderson v. Farm Bureau*
8 *Mutual Ins. Co. of Idaho*, 112 Idaho 461, 732 P.2d 699 (1987); I.R.C.P. 56(c). All
9 controverted facts are liberally construed in favor of the party opposing the summary
10 judgment. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v.*
11 *Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986). Here there are no controverted facts.
12 As both parties concede, the issue presented is a legal one. Both parties request partial
13 summary judgment.

14 *Idaho Code* §63-3027² establishes the procedure for determining what portion of
15 a company's income is apportioned to, and therefore taxable by, Idaho. The
16 apportionment is based upon a fraction. The numerator of the fraction is the total of
17 three factors called the "property factor," the "payroll factor" and the "sales factor."
18 *Idaho Code* §63-3027(i).

19 The property factor is the average value of the taxpayer's real and tangible
20 personal property owned or rented and used in Idaho during the tax period divided by
21 the average of all such property owned or rented and used by the taxpayer everywhere
22 during the tax period. *Idaho Code* §63-3027(j).

23 The payroll factor is the total amount that the taxpayer paid in Idaho for
24 compensation during the tax period divided by the total amount that the taxpayer paid
25 for compensation everywhere during the tax period. *Idaho Code* §63-3027(m).

26 The sales factor is calculated from the total sales in Idaho by the taxpayer during
27 the tax period divided by the taxpayer's total sales made everywhere during the same
28 tax period. *Idaho Code* §63-3027(o).

29
30 ² All references to *Idaho Code* §63-3027 are to the statute as it existed during the years at issue (1991-
31 1993).

1 The total of those three factors is then divided by three in order to apportion
2 business income to Idaho. *Idaho Code* §63-3027(i).

3 *Idaho Code* §63-3027(r) allows the Tax Commission to deviate from the
4 apportionment provisions of *Idaho Code* § 63-3027³ if application of those provisions
5 does not fairly represent the extent of the taxpayer's business activity in this State. This
6 is the issue presented in this case.

7 The parties concede that the annual totals of accounts receivables sold by the
8 railroads for the years in question were approximately \$2.5 billion in 1991, \$2 billion in
9 1992, and \$1.9 billion in 1993. The facts also establish that Union Pacific included the
10 railroads' freight revenues, as part of its total sales everywhere, in the sales factor. It
11 also included the monies received from the sale of the accounts receivable as part of its
12 total sales everywhere.

13 As the Idaho Supreme Court found "[b]ecause the sales of the accounts
14 receivable did not occur in Idaho, including such income as sales will increase the
15 denominator of the sales factor, thereby decreasing the value of the sales factor,
16 thereby decreasing the taxable business income apportioned to Idaho." *Union Pacific*,
17 28 P.3d at 377. The Idaho Supreme Court further found that "[b]y including accounts
18 receivable from freight sales under the accrual accounting method and by also including
19 the sales of those same accounts receivable under the cash accounting method, Union
20 Pacific has in essence double-counted the same income, adding approximately \$2
21 billion per year to the denominator of the sales factor." *Union Pacific*, 28 P.3d at 378.

22
23
24 ³ *Idaho Code* §63-3027(r) provides as follows:

25 If the allocation and apportionment provisions of this section do not fairly represent the extent of
26 the taxpayer's business activity in this state, the taxpayer may petition for or the state tax
27 commission may require, in respect to all or any part of the taxpayer's business activity, if
28 reasonable:

- 29 (1) Separate accounting, provided that only that portion of general expenses clearly identifiable
30 with Idaho business operations shall be allowed as a deduction;
31 (2) The exclusion of any one or more of the factors;
(3) The inclusion of one or more additional factors which will fairly represent the taxpayer's
business activity in this state; or
(4) The employment of any other method to effectuate an equitable allocation and apportionment
of the taxpayer's income.

1 Finally, the Idaho Supreme Court found that “[d]oing so artificially increases the
2 denominator of the sales factor, thereby reducing the income apportioned to Idaho.” *Id.*

3 While arguably⁴ finding that applying the statutory apportionment provisions for
4 multistate corporations to calculating Union Pacific’s Idaho taxable income did not fairly
5 represent the extent of Union Pacific’s business activity in Idaho, the Idaho Supreme
6 Court clearly held that a genuine issue of material fact existed as to whether an
7 alternative apportionment formula should be applied. The Idaho Supreme Court,
8 therefore, remanded the case to this Court to determine that issue. While the parties do
9 not contest the facts underlying the multistate statutory apportionment calculation, they
10 disagree whether those facts justify applying an alternative apportionment formula.

11 The State contends that including the revenues from sale of Union Pacific’s
12 accounts receivable within the sales factor in the denominator in apportioning income
13 understates Union Pacific’s Idaho income and that applying an alternative
14 apportionment formula is, therefore, appropriate. In fact, the Idaho Supreme Court
15 found that including the revenues from the sale of Union Pacific’s accounts receivable in
16 the denominator amounted to double-counting those revenues and artificially decreasing
17 its instate income.

18 By including accounts receivable from freight sales under the accrual
19 accounting method and by also including the sales of those same
20 accounts receivable under the cash accounting method, Union Pacific has
21 in essence double-counted the same income, adding approximately \$2
22 billion per year to the denominator of the sales factor.

22 *Id.*

23 While Union Pacific does not contest that including these revenues amounts to
24 double-counting the same income, thereby understating its instate revenues, it contends
25 that unconstitutional results only may be remedied under the State’s statutory and
26 regulatory scheme. It also suggests that there is a range within which its income could
27

28
29 ⁴ It is unclear whether the Supreme Court ruled the statutory apportionment of Union Pacific’s Idaho
30 taxable income fairly represented the extent of Union Pacific’s business activity in Idaho, because the trial
31 court clearly failed to address this apparently factual issue. *Union Pacific*, 28 P.3d at 378. Therefore, while
32 the Court could simply rely on the Idaho Supreme Court’s ruling, this Court will directly consider it.

1 be "understated"⁵ without invoking application of an alternative formula. It further argues
2 that in determining whether application of the statutory formula fairly represents its
3 income, the Court must first balance the three factors to determine whether one factor
4 mitigates the effects of the other factors.⁶ Finally, Union Pacific contends that Tax
5 Commission Rule 27, 4.18.a.⁷ (in effect in 1991) limits application of an alternative
6 apportionment formula to cases where the fact situations are "unusual", "unique", and
7 "non-recurring". This is not such a case, it concludes.

8 Union Pacific never addresses the propriety of applying the particular formula
9 proposed by the Tax Commission.

10 The Court rejects all Union Pacific's arguments.

11 **A. The Court finds that applying the statutory apportionment provisions for**
12 **multistate corporations to calculating Union Pacific's Idaho taxable income**
13 **does not fairly represent the extent of Union Pacific's business activity in**
14 **Idaho.**

15 Analysis of whether the statutory apportionment formula fairly represents the
16 extent of the taxpayer's business activity in Idaho begins with the statutory calculation
17 itself. There is no specific formula for determining whether a tax calculation fairly
18 represents a multistate taxpayer's instate income and such determination must be
19 analyzed case-by-case.

20 The Court finds, as did the Idaho Supreme Court, that by including accounts
21 receivable from freight sales under the accrual accounting method and by also including
22 the sales of those same accounts receivable under the cash accounting method, Union
23 Pacific double-counted the same income, adding approximately \$2 billion per year to the
24 denominator of the sales factor. Union Pacific does not contest that its accounting

25
26 ⁵ The Court assumes that if the formula overstated its intrastate income, Union Pacific would likewise apply
the same reasoning.

27 ⁶ While Union Pacific argues this, it does not apply its argument to the facts in this case.

28 ⁷ Tax Commission Rule 27, 4.18.a.: "Section 63-3027(r) and Article IV.18 permit a departure from the
29 allocation and apportionment for provisions of Section 63-3027 and Article IV only in limited and specific
30 cases. Section 63-3027 and Article IV.18 may be invoked only in specific cases where unusual fact
situations (which ordinarily will be unique and non-recurring) produce incongruous results under the
31 apportionment and allocations provisions contained in Section 63-3027 and Article IV. . . ."

1 methods amounted to double-counting the same income, thereby understating its
2 instate revenues.

3 Instead, Union Pacific argues that before the Court can find that the statutory
4 calculation does not fairly represent the extent of its business activity in Idaho, the Court
5 must examine the effect of the other factors (payroll and property) on the aggregate
6 calculation. The Court agrees. However, neither party introduced any evidence that the
7 other factors mitigated the sales factor's impact. Therefore, this argument does not
8 affect the Court's analysis. Because there is no evidence that the other factors used in
9 the statutory apportionment formula mitigate the distortive effects of this double-counting
10 or produce an aggregate calculation reflecting Union Pacific's actual instate activity, the
11 Court finds the result is *per se* an unfair representation of Union Pacific's Idaho income.

12 Union Pacific next suggests that even where application of the statutory formula
13 creates an anomaly, such as this one, this does not end the inquiry. It argues that
14 application of an alternative apportionment formula is limited to unconstitutional results
15 and, further, that to trigger application, the variance must be "significant" as measured
16 by the percentage of difference. The Court rejects this analysis.

17 **B. Application of an alternative apportionment formula is not limited to**
18 **unconstitutional results.**

19 Union Pacific argues that application of an alternative apportionment formula is
20 limited to situations where use of the statutory provision creates an unconstitutional
21 result. The Court rejects this contention and finds there is nothing in either the statutory
22 provisions themselves or in due process principles that limits application of an
23 alternative apportionment formula to only unconstitutional results. *See, e.g., Twentieth*
24 *Century-Fox Film Corporation v. Department of Revenue*, 700 P.2d 1035, 1039-40 (Ore.
25 1985).

26 In reviewing the case law proffered by Union Pacific as supporting limiting
27 alternative apportionment to "unconstitutional" results, several things are significant.

28 For example, where the proponent taxpayer requests application of an alternative
29 apportionment formula, the courts do routinely require the taxpayer establish that
30 application of the statutory formula produces an unconstitutional result. However, those
31

1 facts are materially different from the case here. Clearly, there is a distinct difference
2 between a taxpayer asking the court to require application of an alternative
3 apportionment formula and the state taxing authority making the same application.
4 Because all agree that the statutory procedure is calculated to estimate instate activity,
5 the courts will not routinely step in, at the taxpayer's request, to impose an alternative
6 formula unless the taxpayer can establish that failure to do so produces an
7 unconstitutional result. Significantly, the question is normally whether the statutory
8 calculation improperly overstates instate activity which would allow the state to
9 improperly tax interstate commerce and subject the taxpayer to multiple taxation of the
10 same income.⁸ The issue presented in those cases concerns whether application of the
11 alternative apportionment formula leads to taxing interstate activities or double taxation.
12 In this case, however, the issue is not whether application of the alternative
13 apportionment formula taxes non-Idaho income; it is whether Idaho income is escaping
14 proper taxation.

15 Therefore, to the extent the cases proffered by Union Pacific imply that
16 application of an alternative apportionment formula is limited to unconstitutional results,
17 the Court finds these cases are not applicable here. There is nothing to suggest this is a
18 limitation inherent in the Uniform Division of Income for Tax Purposes Act ("Act"),
19 adopted by Idaho, or constitutionally required. In fact, the Act's language clearly
20 suggests that so long as the statutory apportionment does not fairly represent the extent
21 of the taxpayer's instate business, the "state tax commission may require, . . . if
22 reasonable. . ." an alternative apportionment formula be used.

23 Furthermore, there is no evidence that using an alternative apportionment
24 formula is limited to only those cases which produce a "gross distortion" between the
25 statutory calculation and the proposed alternative apportionment calculation. In
26 addition, gross distortion is not a limited definition, limited to some specific "objective
27 mathematical test".
28

29 ⁸ Where a tax burdens interstate commerce, it is void under section 8 of article 1 of the federal
30 Constitution. *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 119-120, 41 S.Ct. 45, 46-47
31 (1920).

1 Finally, the Court finds there is no showing that this proposed alternative
2 apportionment discriminates against interstate commerce or unfairly subjects Union
3 Pacific to double taxation. There is no showing, and Union Pacific does not suggest,
4 that more than 100 percent of its income is being taxed. Therefore, the Court rejects
5 Union Pacific's arguments.

6 **C. Tax Commission Rule 27, 4.18.a. (in effect in 1991) does not limit**
7 **application of an alternative apportionment formula to cases where the fact**
8 **situations are "unusual", "unique", and "non-recurring".**

9 Finally, Union Pacific argues that the Tax Commission proposal fails to satisfy the
10 tax commission rule in effect in 1991 because Union Pacific's sales of its accounts
11 receivables are not "unusual, unique or non-recurring". Tax Commission Rule 27,
12 4.18.a. in effect in 1991 read, in relevant part, as follows:

13 Section 63-3027(r) and Article IV.18 permit a departure from the allocation
14 and apportionment for provisions of Section 63-3027 and Article IV only in
15 limited and specific cases. Section 63-3027 and Article IV.18 may be
16 invoked only in specific cases where unusual fact situations (which
17 ordinarily will be unique and non-recurring) produce incongruous results
18 under the apportionment and allocations provisions contained in Section
19 63-3027 and Article IV. . . .

20 Union Pacific contends that this rule further interprets *Idaho Code* §63-3027(r)
21 and acts to limit the Tax Commission's authority. The Court disagrees. Union Pacific
22 reads more into this rule than is there.

23 The Court finds that the unusual fact situation in this case is that Union Pacific
24 double-counted the same income producing the incongruous result that its instate
25 income was understated for those tax years. The parenthetical phrase "(which ordinarily
26 will be unique and non-recurring)" does not further limit what is an "unusual fact
27 situation", it simply explains that ordinarily an unusual fact situation will be unique and
28 non-recurring. It does not require the unusual fact situation be unique and non-
29 recurring.

30 The fact that Union Pacific and other multistate companies may routinely "double-
31 count" income or that the situation recurs does not change the fact this practice
32 produces the anomalous result of understating Union Pacific's instate income – thus
33 escaping full taxation by Idaho. Therefore, the Court rejects Union Pacific's contention,

1 and finds that the facts clearly establish this is an unusual fact situation making it
2 appropriate for application of an alternative apportionment. Application of the existing
3 statutory formula did not fairly represent Union Pacific's Idaho activity.

4 **D. The Tax Commission has sustained its burden of establishing that an**
5 **alternative apportionment formula should be applied.**

6 The Tax Commission has the burden of showing that the statutory apportionment
7 provisions do not fairly represent the actual business activities of Union Pacific in Idaho.
8 *Burlington Northern, Inc. v. Idaho State Tax Com'n*, 126 Idaho 645, 647, 889 P.2d 79,
9 81 (1995). The Court finds that the Tax Commission has sustained its burden.

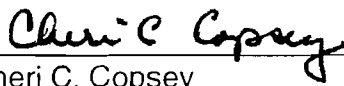
10 Moreover, the Court finds that deleting the proceeds of the receivables sales from
11 the sales factor denominator is a "reasonable" alternative apportionment method and
12 more accurately represents Union Pacific's Idaho business activity for those years.
13 *Idaho Code* §63-3027. The proposed apportionment method effectuates an equitable
14 apportionment of Union Pacific's income and more appropriately reflects the economic
15 reality of Union Pacific's business activity.

16 **CONCLUSION**

17 Therefore, the Court grants the Tax Commission partial summary judgment and
18 denies partial summary judgment to Union Pacific.

19 **IT IS SO ORDERED.**

20 Dated this 3rd day of June, 2002.

21
22
23 
24 Cheri C. Copsey
25 District Judge
26
27
28
29
30
31

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

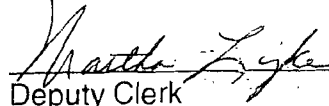
CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of June, 2002, I mailed (served) a true and correct copy of the within instrument to:

EUGENE A. RITTI
RICHARD G. SMITH
HAWLEY TROXELL ENNIS & HAWLEY, LLP
P.O. Box 1617
Boise, Idaho 83701-1617

GEOFFREY L. THORPE
DEPUTY ATTORNEY GENERAL
P.O. Box 36
Boise, Idaho 83722

J. DAVID NAVARRO
Clerk of the District Court


Deputy Clerk

RECEIVED

JUN 04 2002

LEGAL SECTION
STATE TAX COMMISSION
BOISE, IDAHO

NO. _____ FILED _____
A.M. 1050 P.M.

MAY 23 2013

CHRISTOPHER D. RICH, Clerk
By AMY LYCAN
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 IDAHO STATE TAX COMMISSION,)
)
 Defendant.)

Case No. **CV OC 2011 03406**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
ORDER**

Trial of Cable One's I.C. § 63-3049 appeal of a tax year 2005 income tax deficiency determination by the Idaho State Tax Commission.

Chérie R. Kiser and Angela F. Collins, CAHILL GORDON & REINDEL LLP, Washington, D.C., and Tonn K. Peterson and Kelly A. Cameron, PERKINS COIE LLP, Boise, Lawyers for Cable One, Inc., Plaintiff.

Phil N. Skinner, Erick M. Shaner, Deputy Attorneys General, Boise, Lawyers for Idaho State Tax Commission.

PROCEDURAL BACKGROUND

The Idaho State Tax Commission (Tax Commission) issued a Notice of Deficiency Determination (NODD) dated December 16, 2008, asserting a tax and interest deficiency on Cable One, Inc. (Cable One) for tax year 2005. On December 22, 2009 the Tax Commission modified the amount of its NODD.

Cable One timely filed a petition for redetermination of the alleged tax

year 2005 deficiency. The Tax Commission denied the petition for redetermination in a decision issued on November 18, 2010 as Docket No. 21735.

Cable One timely deposited the sum required by I.C. § 63-3049(b) and appealed the denial of its petition for redetermination by commencing this action on February 17, 2011.

During the pre-trial proceedings it was ordered that certain information be filed under seal and that redacted copies were to be available for public viewing. In the copy of this document filed under seal confidential information shall be displayed with shading. In the redacted copy the confidential information shall be shown as .

This matter was tried to the court over three (3) days, February 25, 2013 through February 27, 2013. After post-trial briefing this matter was taken under advisement on April 15, 2013.

SOURCE AND SCOPE OF JURISDICTION AND PROCEEDING

This Court has jurisdiction of this matter pursuant to I.C. § 63-3049. The scope of the jurisdiction of this court is to determine if

[A]ny tax is due, it shall enter judgment for such tax, including any interest or penalties that may be due and owing, against the taxpayer. Any taxes, penalties or interest paid, found by the court to be in excess of that which can be legally assessed, shall be ordered refunded to the taxpayer with interest from the time of payment. I.C. § 63-3049(a).

The process for this appeal is "as a *de novo* bench trial." See *Parker v. Idaho State Tax Commission*, 148 Idaho 842, 845, 230 P.3d 734, 737 (2010). A *de novo* bench trial means "a trying of the matter anew—the same as if it had never been heard before." *Gilbert v. Moore*, 108 Idaho 165, 168, 697 P.2d 1179, 1182 (1985).

FINDINGS OF FACT

After considering all of the stipulations and the evidence submitted by the parties and having weighed the credibility of the witnesses, I make the following findings of fact:

1. Cable One is a corporation organized under the laws of Delaware and headquartered in Phoenix, Arizona. Cable One is a private company wholly owned by The Washington Post.

2. Cable One is a cable company that operates in 19 states. Those states are Arizona, Alabama, Arkansas, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas and Washington. In 2005 Cable One operated 48 cable systems in its 19-state territory, six (6) of which were in Idaho.

3. Each Cable One cable system serves a distinct geographic area, which is typically named after a nearby municipality.

4. Cable One's 2005 Idaho cable systems were: Boise, Twin Falls, Idaho Falls, Lewiston, Pocatello, and West Valley. Collectively they will be referred to as Cable One Idaho.

5. Cable One's Phoenix, Arizona headquarters operates separately from its Arizona cable systems, none of which are located in Phoenix.

6. Located at Cable One's Phoenix, Arizona headquarters are the personnel, staff, servers, equipment and software that support the operations of its 48 cable systems. Within the headquarters is the "Arizona back office" that consists of the Solution Center and Network Operations Center personnel, the router, servers and related equipment and software that support the internet services provided by Cable One through its 48 cable systems.

7. In order to provide cable television services, Cable One is required to enter into a franchise agreement with local governmental authorities for the relevant geographic area. These agreements contain obligations to build out a cable system to a particular capacity or to reach a specific number of customers in the authorized service territory.

8. Cable One acquired its Idaho cable systems in 2001. At the time of acquisition, all of Cable One's Idaho cable systems were capable of providing Internet access services to customers, with the exception of Cable One's Twin Falls cable system which was upgraded in 2004.

9. Cable One's cable systems can carry many different channels. Each channel is unique, carrying either video programming or high-speed data. High-speed data typically occupies one (1) channel out of 80 to 100 channels available on a cable system. Cable One uses any high-speed data channel or channels to provide Internet access services.

10. Trial Exhibit 24 (based upon 2012 data) shows the channel allocation for Cable One Idaho cable systems. Excluding the numbers for the McCall system that did not exist in 2005, and avoiding the double counting of multi-plex channels it shows the 2012 channel allocation as follows:

Total Channel Capacity	Unused & Unavailable Channels	Total Channels Used Including HSD	High Speed Data (HSD) Channels Used	Percentage HSD ÷ Total
☒☒☒☒☒	☒☒☒☒☒☒	☒☒☒☒☒☒	☒☒☒☒☒☒	☒☒%

No evidence was offered on the 2005 channel allocation.

11. In 2005 about ☒☒☒% of Cable One Idaho's bandwidth was allocated to High Speed Data (HSD).

12. Every signal is carried to every house within Cable One's cable system, with subscribers' set-top boxes and cable modems filtering out particular signals according to the customer's subscriptions and selections.

13. Trial Exhibit 21 shows a graphic representation of an Idaho cable system and its connection to the Arizona Back Office.

14. Each of Cable One Idaho's broadband cable networks has several discrete parts which are used in the provision of Internet service and may be simplified and summarized as:

- a) Cable modem – the equipment located within the subscriber's home or office that allows the subscriber to connect to Cable One's broadband cable network and which controls the services available to the subscriber.
- b) Drop – the line from the subscriber's home to the local junction box.
- c) Loop – the section of Cable One's broadband cable network from the local junction box through the "nodes" to Cable One's "head end". Cable One installs and owns the cables and equipment in this part of the broadband cable network.
- d) Nodes – the equipment that changes the signal from or to one transmitted over a fiber optic line to or from one transmitted over a co-axial cable.
- e) Head End – the local cable system's location where the equipment for receiving and transmitting high speed data and the video signals is located. Television and video signals are received by antennas and satellite dishes and are processed for transmission over the broadband cable network. Through the "Combining Network" equipment Cable One combines the high speed data and the video signals for down stream transmission over the "loop" to the customer or separates the high speed data and the video signals received via the "loop" for up stream

transmission of the high speed data signal to the internet. The head end equipment includes the System Core Router and the Cisco UBR CMTS which are used primarily to support the internet service and incidentally to support video services. The head end is also the location of the connections provided by Qwest or AT&T for connection to the Internet Backbone.

- f) Internet Backbone – Cable One contracts high speed data access to the World Wide Web from Qwest and AT&T. The contracts involve two distinct services: 1) a local service connection which is a fiber optic connection from the head end to the local Qwest or AT&T facility; and 2) a DIA (Dedicated Internet Access) port at the local Qwest or AT&T facility that provides high speed data access to the World Wide Web.

15. Cable One's Arizona Back Office has several discrete parts which may be simplified and summarized as:

- a) Internet Backbone – Cable One contracts high speed data access to the World Wide Web from Qwest and AT&T. The contracts involve two distinct services: 1) a local service connection which is a fiber optic connection from the Arizona Back Office to the local Qwest or AT&T facility; and 2) a DIA (Dedicated Internet Access)port at the local Qwest or AT&T facility that provides high speed data access to the World Wide Web.
- b) Router – the device that receives and sends high speed data from and to the Internet Backbone and directs (routes) the high speed data to the various components of the Arizona Back Office.

- c) Solution Center – a call center that provides support for internet customers through out Cable One’s 48 cable systems.
- d) Network Operations Center – a higher level support group for internet customers through out Cable One’s 48 cable systems and monitors the performance of Cable One’s internet services over its 48 broadband cable systems.
- e) Provisioning Module – server and software that authorizes customers initial setup of their cable modem and internet access.
- f) LDAP Module – Lightweight Directing Access Protocol – server and software used to route e-mail and locate equipment on network.
- g) SNMP Module – Simple Network Management Protocol – server and software used to manage and configure network.
- h) DHCP Module – Dynamic Host Configuration Protocol – server and software used to assign (IP) addresses (i.e. 24.116.1.80).
- i) TFTP Module – Trivial File Transfer Protocol – server and software used automated transfer of configure or boot-up files and software between network devices.
- j) DNS Module – Domain Name System – server and software used to translate internet and domain names, i.e. Amazon, typed into customer’s browsers to the IP address of the Web server hosting those sites.
- k) Associate E-mail Module – server and software used to provide Cable One’s internal employee e-mail.
- l) Billing Module – server and software used for all Cable One billing.

m) DAC (Digital Video) Module – server and software used for digital video services – not used for Cable One internet services.

n) Customer E-mail Module – server and software used for Cable One customer e-mail accounts, i.e. customer@cableone.net.

16. Almost all customer internet traffic initially uses the DNS Module in the Arizona Back Office.

17. The elimination of the Idaho local service connections to the local Qwest or AT&T facility and the Idaho DIA (Dedicated Internet Access) ports at the local Qwest or AT&T facility would only terminate the Internet access of Idaho customers; it would have no effect on the Internet access or functionality for Cable One’s non-Idaho Internet access customers.

18. In the event Cable One’s Arizona “back office” lost power, existing Idaho Internet access customers would still have access to the World Wide Web provided that they used the actual IP address of a web site such as Amazon.com (i.e. 176.32.98.166) rather than relying on the Arizona “back office” DHCP Module to convert “Amazon.com” to its true IP address.

19. Cable One provided the Tax Commission its profit and loss statements to show its costs for providing Internet access services.

20. Cable One’s 2005 profit and loss statements for all of its cable systems are set forth in Trial Exhibit 6.

21. Cable One’s 2005 profit and loss statements for all of Cable One Idaho cable systems are set forth in Trial Exhibit 7.

22. Trial Exhibits 6 and 7 were both prepared and maintained by Cable One as part of its usual business practices.

23. Cable One incurred in Idaho employee and local office costs of \$[REDACTED] related to Internet access service during 2005. This number is the total of all the “Internet Costs” items on the “Idaho All” profit and loss

statement minus the "Allocated Solution Center Costs" and the "Phone-Data Line" entries. See Trial Exhibit 7.

24. The entry for "Allocated Solution Center Costs" on Cable One's Idaho profit and loss statement includes Cable One Idaho's proportionate share of all costs associated with the Arizona Back Office including and not limited to the Solution Center and Network Operations Center costs. The Arizona Back Office costs allocated to Cable One Idaho internet operations totaled \$[REDACTED] for 2005 as reflected on Trial Exhibit 7.

25. In 2005 Cable One contracted with Qwest and AT&T for them to provide the "Idaho backbone services" (local service fiber optic connection from the local Idaho head end to the local Qwest or AT&T facility and a DIA port at the local Qwest or AT&T facility) for the connection of the Cable One Idaho's internet customers to the internet. Qwest and AT&T performed their contracts by physically providing and maintaining in Idaho the "Idaho backbone services" for each Idaho Cable One system. Qwest and AT&T billed Cable One for each Idaho specific local service fiber optic connection and DIA port. Trial Exhibit 13. Cable One paid \$[REDACTED] for these services as reflected by the "Phone-Data Line" item on Trial Exhibit 7.

26. Trial Exhibits 14 and 16 are copies of some of the Qwest invoices to Cable One for Idaho backbone services.

27. In 2005, Cable One received \$[REDACTED] of sales revenue from approximately [REDACTED] Internet access service customers located in Idaho. The \$[REDACTED] of sales revenue constituted [REDACTED] percent ([REDACTED]%) of Cable One's total 2005 Internet access service sales from all of its 48 cable systems.

28. On October 14, 2006, Cable One submitted its Idaho Corporation

Income Tax Return, Forms 41, 42 and 44, for taxable year 2005 as set forth in Trial Exhibit 2. Cable One did not include revenues from its sales of Internet access service to Idaho customers in the sales factor numerator on line 15 of Form 42.

29. In its 2005 Idaho income tax return, Cable One reported \$[REDACTED] for its Idaho property factor numerator, \$[REDACTED] for its Idaho payroll factor numerator, and \$[REDACTED] for its Idaho sales factor numerator. The I.C. § 63-3027(i)(1) formula yielded an Idaho Apportionment Factor of [REDACTED]%. Trial Exhibit 2.

30. The addition of Cable One's 2005 internet sales revenue of \$[REDACTED] from Idaho customers to the Idaho's Sales Factor of \$[REDACTED] shown on Trial Exhibit 2 would yield a new Idaho Sales Factor numerator of \$[REDACTED]. The I.C. § 63-3027(i)(1) formula would then yield a new Idaho Apportionment Factor of [REDACTED]%, a difference of [REDACTED]%.

31. Trial Exhibit 2 shows an Idaho taxable income of \$[REDACTED] and an Idaho Income Tax, before credits of \$[REDACTED]. Applying the new Idaho Apportionment Factor would yield an Idaho taxable income of \$[REDACTED] and an Idaho Income Tax, before credits of \$[REDACTED].

32. Cable One's Idaho Internet access sales constitute [REDACTED]% of its total Idaho gross receipts. (\$[REDACTED] divided by \$[REDACTED]).

33. Prior to 2005, Cable One included its Idaho Internet access sales as part of the Idaho Sales Factor on its Idaho Income Tax returns.

34. In 2005 Cable One installed extensions and upgrades to its High Speed Internet and Broadband Services network at a cost of \$[REDACTED]. The claimed equipment expenditures were limited to

those items "extending from the subscribers' side of the head end to the outside of the subscriber structure." Trial Exhibit 3.

35. Cable One applied for and received a 2005 tax credit for such extensions and upgrades pursuant to Idaho Code § 63-3029I. The amount of the 2005 tax credit was \$[REDACTED]. Trial Exhibits 2, 3 and 4.

36. If any of the statements in the introduction, Course of Proceedings, discussion, or the Conclusions of Law are determined to be Findings of Fact, they are so deemed and to that extent, they are incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I make the following conclusions of law:

1. Jurisdiction and venue are proper under Idaho Code § 63-3049.
2. Cable One is a multistate or unitary corporation.
3. In order to determine Cable One's Idaho taxable income, it is required to "allocate and apportion" its taxable income from business activity both within and without Idaho as provided in I.C. § 63-3027.
4. The computation of Cable One's Idaho internet income is controlled by I.C. § 63-30279 which requires that a corporation doing business in more than one state shall have its income allocated and apportioned using a three factor formula that yields an Idaho apportionment percentage to applied to Cable One's net business income subject to apportionment. The three factors are a property factor, Idaho Code § 63-3027(k), a payroll factor, Idaho Code § 63-3027(n), and a double weighted sales factor, Idaho Code § 63-3027(p). The formula can be expressed as:

$$\frac{\text{Idaho Property}}{\text{Total Property}} + \frac{\text{Idaho Payroll}}{\text{Total Payroll}} + 2\left(\frac{\text{Idaho Sales}}{\text{Total Sales}}\right) = \text{Idaho Apportionment \%}$$

4

5. The parties do not dispute the calculation of either the property factor or the payroll factor; they do dispute the calculation of the sales factor.

6. I.C. § 63-3027(r) and IDAPA Rule 35.01.01.550¹ provide that revenue transactions are to be determined to be Idaho Sales if “the greater part of the income producing activity is performed in Idaho, based on costs of performance.”

7. The term income producing activity applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit. The activity does not include transactions and activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor. IDAPA Rule 35.01.01.550.02.

8. Costs of performance are the direct costs determined according to generally accepted accounting principles and accepted conditions or practices of the taxpayer’s trade or business. IDAPA Rule 35.01.01.550.03.

9. Although the term ‘direct costs’ is defined by neither Idaho law nor by any of the standard methods of accounting, the above regulations read together indicate that direct costs include the costs incurred by Cable One in providing internet services to its Idaho customers.

10. A literal reading of the IDAPA Rule 35.01.01.550.02 definition of “income producing activity” would require a transactional analysis of the cost of performance for Cable One receiving each Idaho customer’s monthly payment for Internet access. Tax Commission concedes the burdensomeness of such an analysis and the appropriateness to conduct

¹ IDAPA references are to the 2005 Idaho Administrative Code.

the costs of performance analysis on Cable One's provision of Internet access to all Idaho customers in 2005 taken as a group.

11. Some portion of Cable One's costs of additional plant hardware and extension of its high speed cable network is attributable to Cable One's direct cost of its income producing activity of attracting and servicing Idaho Internet access customers. An example would be that the cost of upgrading or extending of high speed cable lines to new and existing developments should be apportioned to generating internet access business equal to the percentage of the capacity dedicated to High Speed Data (HSD). See Findings of Fact 11, 34 and 35. As these costs are depreciated over time, that portion of the yearly depreciation expense of 2005 costs attributable to HSD capacity should be applied each year to the direct costs calculation in determining the Idaho Sales Factor for internet sales. The amount of 2005 costs claimed as depreciation expense in 2005 was not established.

12. While the percentage of Cable One's 2005 channel allocation was not established, the 2005 bandwidth allocation (XX%) can be used to determine that \$XX of Cable One's 2005 Qualified Broadband tax credit of \$XXXX is attributable as a direct cost providing internet service.

13. Cable One's direct costs of the transactions and activities required to provide Internet access service to Idaho customers in 2005 were:

	Total Costs	Idaho Costs	Arizona Costs
Allocated Solution Center & Network Operation Center (NOC) costs (Arizona Back Office)	\$XXXX		\$XXXX
Allocated capitol improvement costs	\$XXXX	\$XXXX	
Idaho Employee and local office costs	\$XXXX	\$XXXX	
Idaho backbone costs for Idaho customers	\$XXXX	\$XXXX	
Total Direct Costs	\$XXXX	\$XXXX	\$XXXX

14. As it relates to the Idaho Internet access income and based upon cost of performance, the greater part of Cable One's 2005 Internet access services income producing activity was performed in Idaho.

15. Cable One's \$[REDACTED] of sales revenue from Idaho Internet access service customers should be included on line 15 of FORM 42 in calculating the Idaho Sales Factor numerator.

16. On its 2005 Idaho income tax return, Cable One properly reported \$[REDACTED] for its Idaho property factor numerator, \$[REDACTED] for its Idaho payroll factor numerator, and should have reported \$[REDACTED] for its Idaho sales factor numerator.

17. Using the correct numerators identified in Conclusions of Law 16, the I.C. § 63-3027(i)(1) formula yields an Idaho Apportionment Factor of [REDACTED] %.

18. Taking Cable One's Net business income subject to apportionment as shown on line 31 of Cable One's 2005 FORM 41 Idaho Corporation Tax Return (Trial Exhibit 2) in the amount of \$[REDACTED] and applying the new Idaho Apportionment Factor ([REDACTED] %) would yield an Idaho taxable income of \$[REDACTED] and an Idaho Income Tax, before credits, of \$[REDACTED].

19. The failure to include Cable One's 2005 sales revenue from Idaho Internet access service customers ([REDACTED] % of its total Idaho gross receipts) in calculating the Idaho Sales Factor would not fairly represent the extent of Cable One's 2005 business activity in Idaho.

20. The use of the correct numerators identified in Conclusions of Law 16 makes the allocation and apportionment provisions of I.C. § 63-3027 fairly represent the extent of Cable One's 2005 business activity in Idaho.

21. Based upon this Court's determination of the location of Cable One's income producing activity pursuant to I.C. § 63-3027(r)(2) it is unnecessary and improper to consider Tax Commission's request for an alternate allocation and apportionment under I.C. § 63-3027(s).

22. I.C. § 63-3049(a) mandates this court, following trial shall enter its judgment for

[A]ny tax is due . . . including any interest or penalties that may be due and owing, against the taxpayer. Any taxes, penalties or interest paid, found by the court to be in excess of that which can be legally assessed, shall be ordered refunded to the taxpayer with interest from the time of payment.

23. The calculations necessary to comply with the I.C. § 63-3049(a) mandate can best be done by the parties.

24. Tax Commission is determined to be the I.R.C.P. 54 prevailing party and shall be entitled to recover its costs.

25. If any of the statements in the introduction, Course of Proceedings, discussion, or the Findings of Fact are determined to be Conclusions of Law, they are so deemed and to that extent, they are incorporated into these Conclusions of Law.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,
IT IS ORDERED that:

1. Judgment should enter in favor of Tax Commission and against Cable One as set forth in the Conclusions of Law.

2. Counsel for Tax Commission shall prepare a form of proposed judgment, including the taxes due, accrued interest, any penalties and with any credits for deposits or taxes previously paid and circulate it, together with a summary of the calculations in support thereof, to all counsel for their signature that the same is approved as to form, and present such form of

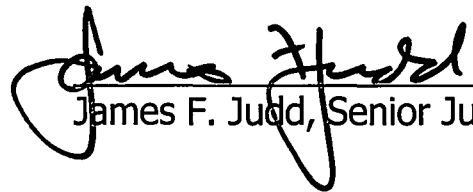
judgment to the court for entry on or before July 1, 2013.

3. Approval as to the form of the judgment shall only constitute agreement to the correctness of the calculations based upon these Findings of Fact and Conclusions and shall not be a bar to counsel challenging the correctness or sufficiency of these Findings of Fact and Conclusions of Law.

4. If counsel are unable to agree on the form of judgment, they may present their alternative forms of judgment, together with a summary of the calculations in support thereof.

5. Determination of costs and claims for attorney's fees shall follow the entry of judgment.

DATED this 22nd day of May, 2013


James F. Judd, Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of May, 2013 a true and correct copy of the foregoing was mailed, postage prepaid, or if the Fax service block is checked, sent a copy via facsimile, or if the PDF Email service block is checked, sent a PDF copy by email to:

Kelly A. Cameron
Tonn K. Peterson
Lawyers
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391

Fax Service
343-3232
 PDF Email Service
TKPetersen@perkinscoie.com

Erick M. Shaner
Phil N. Skinner
Deputy Attorneys General
P.O. Box 36
Boise, Idaho 83722-0410

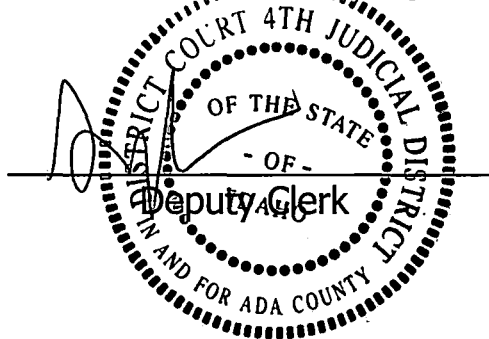
Fax Service
334-7844
 PDF Email Service
Phil.Skinner@tax.idaho.gov
Erick.Shaner@tax.idaho.gov

Chérie R. Kiser
Angela F. Collins
Lawyers
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006

Fax Service
(866) 255-0185
 PDF Email Service
CKiser@cahill.com
ACollins@cahill.com

Clerk of the District Court

By: _____



JUL 02 2013

CHRISTOPHER D. RICH, Clerk
By JOHN WEATHERBY
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,

Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. **CV OC 2011 03406**

JUDGMENT

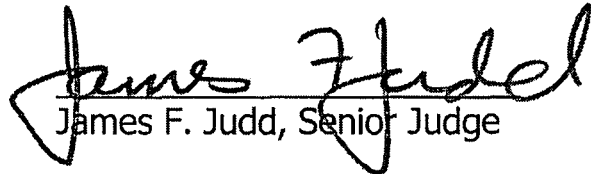
This matter came before the Court as a de novo bench trial, and was resolved by the entry of a "Findings of Fact, Conclusions of Law and Order," entered by the Court on May 22, 2013 ("Order"). Pursuant to the Order,

IT IS HEREBY ORDERED, DECREED AND ADJUDGED that, for taxable year 2005, Plaintiff, Cable One, Inc., owes income taxes and interest in the sum of two hundred and seven thousand, nine hundred thirty-one Dollars (\$207,931.00). This amount includes a credit of \$47,578 for the security Plaintiff deposited with the Tax Commission pursuant to Idaho Code § 63-3049 and includes interest computed through July 1, 2013. (Interest is currently accruing at a rate of \$25.41 per day. If the amount due is paid prior to or later than July 1, 2013, the total due should be adjusted accordingly.) Such payment shall represent complete payment and satisfaction of the taxes and interest owed by Plaintiff Cable One, Inc. for taxable year 2005.

W

Defendant, the Idaho State Tax Commission, is determined to be the I.R.C.P. 54 prevailing party and shall be entitled to recover its costs. Determination of costs and claims for attorney's fees shall follow the entry of judgment.

ENTERED this 28th day of June, 2013.


James F. Judd, Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of July, 2013 a true and correct copy of the foregoing was mailed, postage prepaid, or if the Fax service block is checked, sent a copy via facsimile, or if the PDF Email service block is checked, sent a copy by email to:

Kelly A. Cameron
Tonn K. Peterson
Lawyers
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391

Fax Service
343-3232
 PDF Email Service
TKPetersen@perkinscoie.com

Erick M. Shaner
Phil N. Skinner
Deputy Attorneys General
P.O. Box 36
Boise, Idaho 83722-0410

Fax Service
334-7844
 PDF Email Service
Phil.Skinner@tax.idaho.gov
Erick.Shaner@tax.idaho.gov

Chérie R. Kiser
Angela F. Collins
Lawyers
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006

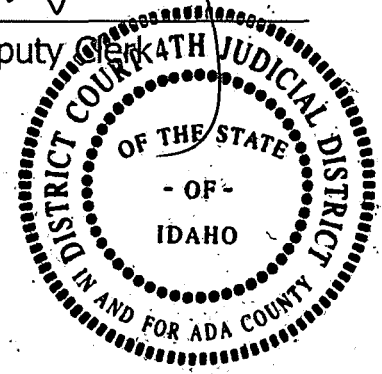
Fax Service
(866) 255-0185
 PDF Email Service
CKiser@cahill.com
ACollins@cahill.com

CHRISTOPHER D. RICH

Clerk of the District Court

By: 

Deputy Clerk



ORIGINAL

NO. _____ FILED _____
A.M. _____ P.M. _____

AUG 09 2013

CHRISTOPHER D. RICH, Clerk
By ELYSHIA HOLMES
DEPUTY

Kelly A. Cameron, Bar No. 7226
KCameron@perkinscoie.com
Tonn K. Petersen, Bar No. 8385
TKPetersen@perkinscoie.com
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391
Telephone: 208.343.3434
Facsimile: 208.343.3232

Chérie R. Kiser, DC Bar No. 415009, *pro hac vice*
ckiser@cahill.com
Angela F. Collins, DC Bar No. 473891, *pro hac vice*
acollins@cahill.com
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
Telephone: 202.862.8900
Facsimile: 866.255.0185

Attorneys for Plaintiff/Appellant Cable One, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,
Plaintiff/Appellant,
v.
IDAHO STATE TAX COMMISSION,
Defendant/Respondent.

Case No. CV OC 11-03406

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, IDAHO STATE TAX COMMISSION, AND ITS ATTORNEYS, ERICK M. SHANER AND PHIL SKINNER, DEPUTY ATTORNEYS GENERAL, STATE OF IDAHO, P.O. BOX 36, BOISE, ID 83722-0410, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant Cable One, Inc. ("Cable One"), by and through its counsel of record, appeals against the above named Respondent to the Idaho Supreme Court from the Findings of Fact, Conclusions of Law and Order, dated May 22, 2013, and the

Judgment, entered on June 28, 2013, in the above entitled action (the Honorable James F. Judd presiding).

2. Appellant has a right to appeal to the Idaho Supreme Court on the grounds that the judgment and order described in paragraph 1 are appealable orders under and pursuant to Idaho Appellate Rules 11(a)(1) and 17(e), as well as Idaho Code § 63-3049(c).

3. Following is a preliminary statement of the issues on appeal that Appellant intends to assert. This list of issues shall not prevent the Appellant from asserting other issues on appeal:

(A) Did the District Court err in its interpretation and application of Idaho Code § 63-3027 and IDAPA Rule 35.01.01.550?

(B) Did the District Court err in its legal conclusion that “direct costs include the costs incurred by Cable One in providing internet services to its Idaho customers?”

(C) Did the District Court err in its legal conclusion that a greater proportion of Cable One’s 2005 Internet access services income producing activity was performed in Idaho than in Arizona?

(D) Did the District Court err in its legal conclusion that Cable One’s Internet access service income for taxable year 2005 should be included when calculating Cable One’s Idaho income tax?

(E) Did the District Court err in its legal conclusion that Idaho Code § 63-3027(r)(2) and IDAPA Rule 35.01.01.550.02 require “a transactional analysis of the cost of performance” for an income producing activity?

(F) Did the District Court err in its legal conclusion that capital costs, depreciation, and Cable One’s 2005 qualified broadband tax credit are direct costs under the statutory analysis

required by Idaho Code § 63-3027 for allocation and apportionment of income of a multistate corporation transacting business both within and without the State of Idaho?

(G) Did the District Court err by basing its legal conclusions on considerations of what would “fairly represent the extent of Cable One’s 2005 business activity in Idaho” despite its ruling that it would be “unnecessary and improper” to consider alternative allocation and apportionment in this case?

(H) Did the District Court err by making findings of fact not supported by substantial evidence relevant to whether Cable One’s Internet access service income for taxable year 2005 was generated primarily by Cable One’s activities in Idaho?

(I) Did the District Court err by disregarding substantial evidence that Cable One’s Arizona operations are required to perform the income producing activity of providing Internet access service to Idaho customers?

(J) Did the District Court err by disregarding substantial evidence that Cable One’s direct costs for backbone services purchased from Qwest and AT&T were incurred in Arizona?

4. An order has been entered to seal a portion of the record. On July 30, 2012, an Order re: Joint Motion for Leave to File Documents under Seal was issued, which permitted the parties to file information designated as “Confidential” under seal. On February 22, 2013, an Order Continuing the Sealing of Numerical Figures was issued, which permitted the parties to continue to designate certain information as “Confidential.” Portions of the trial court record, including exhibits entered at trial and the transcripts of the trial, as well as portions of the parties’ summary judgment and post-trial briefs, have been designated as “Confidential” pursuant to the July 30, 2012 and February 22, 2013 orders.

5. A reporter's transcript of the bench trial held February 25-27, 2013 has been prepared. The cost of preparing the transcript was shared by the Appellant and the Appellee. Both the Appellant and the Appellee have a copy of the transcript.

6. Appellant requests the following documents be included in the clerk's record, and includes a notation of those documents that have been filed as confidential:

- (A) The original Plaintiff's Motion for Summary Judgment, filed August 10, 2012;
- (B) The original Final Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed October 1, 2012 (confidential);
- (C) The original Final Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment, filed October 1, 2012 (confidential);
- (D) The original Affidavit of Bradley D. Ottley in Support of Plaintiff's Motion for Summary Judgment, filed August 10, 2012 (confidential);
- (E) The original Affidavit of Patrick A. Dolohanty in Support of Plaintiff's Motion for Summary Judgment, filed August 10, 2012 (confidential);
- (F) The original Affidavit of James J. Hannan in Support of Plaintiff's Motion for Summary Judgment, filed August 10, 2012;
- (G) The original Final Reply in Support of Plaintiff's Motion for Summary Judgment, filed October 1, 2012 (confidential);
- (H) The original Final Reply Statement of Facts in Support of Plaintiff's Motion for Summary Judgment, filed October 1, 2012;
- (I) The original Reply Affidavit of Patrick A. Dolohanty in Support of Plaintiff's Motion for Summary Judgment, filed September 24, 2012 (confidential);
- (J) The original Reply Affidavit of Bradley D. Ottley in Support of Plaintiff's Motion for Summary Judgment, filed September 24, 2012 (confidential);
- (K) The original Reply Affidavit of Steven F. Arluna in Support of Plaintiff's Motion for Summary Judgment, filed September 24, 2012;
- (L) The original Corrected Order Denying Summary Judgment, filed January 23, 2013;
- (M) The original Plaintiff's Post-Trial Brief, filed April 15, 2013 (confidential);

- (N) The original Transcript of Proceedings, Volume I (February 25 and 26, 2013) (confidential);
- (O) The original Transcript of Proceedings, Volume II (February 27) (confidential);
- (P) The original Findings of Fact, Conclusions of Law, and Order, filed May 23, 2013 (confidential) (automatically included per Idaho Appellate Rule 28); and
- (Q) The original Judgment, filed July 2, 2013 (automatically included per Idaho Appellate Rule 28).

7. Appellant requests the following documents, charts, or pictures offered or admitted as trial exhibits be copied and sent to the Supreme Court, and includes a notation of those exhibits that have been marked as confidential:

- (A) Trial Exhibit 2, Cable One 2005 Idaho Income Tax Return, CB 002602-2606 (confidential)
- (B) Trial Exhibit 3, Cable One Broadband Tax Credit Application, TC 003406-3434
- (C) Trial Exhibit 4, Cable One Broadband Tax Credit Approval Order, TC 003402-3405
- (D) Trial Exhibit 5, Excerpts from Cable One franchise agreement, CB 002006-2009
- (E) Trial Exhibit 6, New All Cable profit and loss statement, TC 000617-638 (confidential)
- (F) Trial Exhibit 7, Idaho All profit and loss statement, TC 000112-126 (confidential)
- (G) Trial Exhibit 8, Cable One Summary of Direct Costs (confidential)
- (H) Trial Exhibit 9, Cable One Internet Cost Analysis, CB 002002-2003 (confidential)
- (I) Trial Exhibit 10, Cable One Chart of Accounts, CB 001954-1988 (confidential)
- (J) Trial Exhibit 11, Starkey Supplemental Report, TC 004604-4620 (confidential)
- (K) Trial Exhibit 12, Dolohanty MSJ Affidavit (confidential)
- (L) Trial Exhibit 13, Cable One General Ledger for Phone-Data Lines, TC 003868-3871 (confidential)

- (M) Trial Exhibit 14, Qwest bill portions, TC 003565-3569 (confidential)
- (N) Trial Exhibit 15, Cable One invoice summary sheet from Qwest bill package, TC 003590 (confidential)
- (O) Trial Exhibit 16, Qwest bill portions, TC 003592-3595 (confidential)
- (P) Trial Exhibit 17, Joy Presa email with Deloitte, CB 002067 (confidential)
- (Q) Trial Exhibit 21, Diagram - Cable Television Broadband Network in 2005 (confidential)
- (R) Trial Exhibit 22, Diagram - How Bandwidth Is Managed
- (S) Trial Exhibit 23, Diagram - Cable One Network Usage Chart, CB 002011 (confidential)
- (T) Trial Exhibit 24, Cable One Internal Channel Lineup, CB 002102-2065 (confidential)
- (U) Trial Exhibit 25, Diagram - Typical Broadband System Design (2005), CB 002010 (confidential)
- (V) Trial Exhibit 26, Hannan Deposition Transcript (confidential)
- (W) Trial Exhibit 27, Diagram - Internet Backbone Services, CB 002066 (confidential)
- (X) Trial Exhibit 28, Qwest Agreement (confidential)
- (Y) Exhibit 29, AT&T Agreement (confidential)
- (Z) Trial Exhibit 30, Ottley Deposition Transcript (confidential)
- (AA) Trial Exhibit 31, Ottley MSJ Affidavit (confidential)
- (BB) Trial Exhibit 32, Fischer Report, TC 000055-86 (confidential)
- (CC) Trial Exhibit 33, Fischer Deposition Transcript (confidential)
- (DD) Trial Exhibit 34, Starkey First Report, 000010-54 (confidential)
- (EE) Trial Exhibit 35, Cable One Discovery Responses (confidential)
- (FF) Trial Exhibit 36, Starkey First Deposition Transcript (confidential)
- (GG) Trial Exhibit 37, Starkey Second Deposition Transcript (confidential)

(HH) Trial Exhibit 38, Starkey MSJ Reply Affidavit (confidential)

(II) Trial Exhibit 39, Peters Report, 000001-09 (confidential)

(JJ) Trial Exhibit 41, Peters Deposition Transcript (confidential)

8. The undersigned hereby certifies:

(A) That a copy of this Notice of Appeal has been served on each reporter who

prepared a transcript as named below at the address set out below:

Susan G. Gambee
Certified Shorthand Reporter to Judge Deborah Bail
Ada County Courthouse
200 West Front Street, Room 5150
Boise, Idaho 83702

Kim I. Madsen
Certified Shorthand Reporter to Judge Cheri C. Copsey
Ada County Courthouse
200 West Front Street, Room 5123
Boise, Idaho 83702

(B) That the reporters have been paid the fee for preparation of the reporter's
transcript;

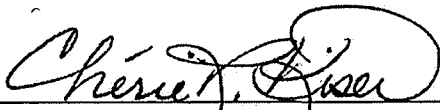
(C) That the estimated fee for preparation of the clerk's record has been paid:

(D) That the appellate filing fee has been paid; and

(E) That service has been made upon all parties required to be served pursuant to
Idaho Appellate Rule 20.

DATED: August 9, 2013

CAHILL GORDON & REINDEL LLP

By: 
Cherie R. Kiser, *pro hac vice*
Angela F. Collins, *pro hac vice*

PERKINS COIE LLP

Kelly A. Cameron, ISB No. 7226
Tonn K. Petersen, ISB No. 8385

Attorneys for Plaintiff Cable One, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on August 9, 2013, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Idaho Rules of Procedure, to the following person(s):

Judge James F. Judd
851 W. Front Street
Apt. 1202
Boise, ID 83702

Hand Delivery
U.S. Mail _____
Facsimile _____
Overnight Mail _____
Electronic Mail _____

Erick M. Shaner
Phil Skinner
Deputy Attorneys General
State of Idaho
P.O. Box 36
Boise, ID 83722-0410
FAX: 208-334-7844
Erick.Shaner@tax.idaho.gov
Phil.Skinner@tax.idaho.gov
*Attorneys for Defendant Idaho State Tax
Commission*

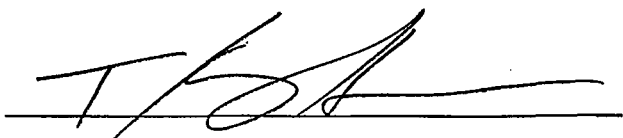
Hand Delivery _____
U.S. Mail
Facsimile _____
Overnight Mail _____
Electronic Mail _____

Susan G. Gambie
Certified Shorthand Reporter to
Judge Deborah Bail
Ada County Courthouse
200 West Front Street, Room 5150
Boise, Idaho 83702

Hand Delivery _____
U.S. Mail
Facsimile _____
Overnight Mail _____
Electronic Mail _____

Kim I. Madsen
Certified Shorthand Reporter to
Judge Cheri C. Copsey
Ada County Courthouse
200 West Front Street, Room 5123
Boise, Idaho 83702

Hand Delivery _____
U.S. Mail
Facsimile _____
Overnight Mail _____
Electronic Mail _____



AUG 12 2013

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,

Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. **CV OC 2011 03406**

AMENDED JUDGMENT

NUNC PRO TUNC

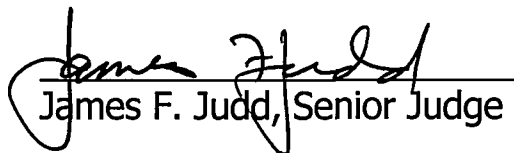
June 28, 2013

The court entered its original judgment on June 28, 2013 for the sum of \$207,931.00.

The Court having entered its Order Fixing Costs and having directed that an Amended Judgment reflecting the awarding of costs be entered *nunc pro tunc* to June 28, 2013,

IT IS HEREBY ORDERED, DECREED AND ADJUDGED that, the Idaho State Tax Commission have judgment against Cable One, Inc. for the principal sum of \$207,931.00 plus costs in the sum of \$8,392.42 for a **total judgment in the sum of \$216,323.42** together with statutory interest from the date of the original judgment, June 28, 2013, until paid.

ENTERED this 12th day of August, 2013 *nunc pro tunc* to the 28th day of June, 2013.


James F. Judd, Senior Judge

SMY

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2013 a true and correct copy of the foregoing was mailed, postage prepaid, or if the Fax service block is checked, sent a copy via facsimile, or if the PDF Email service block is checked, sent a copy by email to:

Kelly A. Cameron
Tonn K. Peterson
Lawyers
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391

Fax Service
343-3232
 PDF Email Service
TKPetersen@perkinscoie.com

Erick M. Shaner
Phil N. Skinner
Deputy Attorneys General
P.O. Box 36
Boise, Idaho 83722-0410

Fax Service
334-7844
 PDF Email Service
Phil.Skinner@tax.idaho.gov
Erick.Shaner@tax.idaho.gov

Chérie R. Kiser
Angela F. Collins
Lawyers
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006

Fax Service
(866) 255-0185
 PDF Email Service
CKiser@cahill.com
ACollins@cahill.com

Clerk of the District Court

By: _____

Matthew Lyke
Deputy Clerk

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720

NO. _____
A.M. _____ FILED P.M. 3:31

OCT 11 2013
CHRISTOPHER D. RICH, Clerk
By KELLE WEGENER
DEPUTY

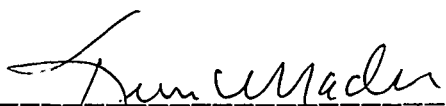
(
(SC No. 41305
(
(
(CABLE ONE, INC.
(
(Vs.
(
(IDAHO STATE TAX COMMISSION

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on October 10, 2013, I lodged a appeal transcript of 405 pages in length in the above-referenced appeal with the District Court Clerk of the County of Ada in the 4th Judicial District.

This transcript contains hearings held on

-February 25, 2013, trial
-February 26, 2013, trial


KIM I. MADSEN
Ada County Courthouse
200 West Front Street
Boise, Idaho 83702
(208) 287-7583

KW

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720
(208) 334-2616

NO. _____
A.M. _____ FILED P.M. 3:31

OCT 11 2013
CHRISTOPHER D. RICH, Clerk
By KELLE WEGENER
DEPUTY

IN THE SUPREME COURT OF THE STATE OF IDAHO


----- x Docket No. 41305
CABLE ONE, INC., :
Plaintiff-Appellant, :
vs. :
IDAHO STATE TAX COMMISSION, :
Defendant-Respondent. :
----- x

NOTICE OF TRANSCRIPT OF 147 PAGES LODGED

Appealed from the District Court of the
Fourth Judicial District of the State of
Idaho, in and for the County of Ada,
James F. Judd, District Court Judge.

This transcript contains hearing held on:
February 27, 2013

DATE: September 13, 2013



Susan G. Gambee, Official Court Reporter
Official Court Reporter,
Judge Deborah Bail
Ada County Courthouse
Idaho Certified Shorthand Reporter No. 18
Registered Merit Reporter

KW

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CABLE ONE, INC.,

Plaintiff-Appellant,
vs.

IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

Supreme Court Case No. 41305

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

That the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court on Appeal.

I FURTHER CERTIFY, that the following documents will be submitted as CONFIDENTIAL EXHIBITS to the Record:


1. Affidavit of Bradley D. Ottley in Support of Cable One, Inc. Motion for Summary Judgment, FILED UNDER SEAL, filed August 10, 2012.
2. Affidavit of Patrick A. Dolohanty in Support of Cable One, Inc. Motion for Summary Judgment, FILED UNDER SEAL, filed August 10, 2012.
3. Reply Affidavit of Patrick A. Dolohanty in Support of Cable One, Inc. Motion for Summary Judgment, FILED UNDER SEAL, filed September 24, 2012.
4. Reply Affidavit of Bradley D. Ottley in Support of Cable One, Inc. Motion for Summary Judgment, FILED UNDER SEAL, filed September 24, 2012.
5. Final Version Statement of Undisputed Material Facts in Support of Plaintiff Cable One, Inc.'s Motion for Summary Judgment, FILED UNDER SEAL, filed October 1, 2012.
6. Final Version Plaintiff Cable One, Inc.'s Reply in Support of Motion for Summary Judgment, FILED UNDER SEAL, filed October 1, 2012.
7. Final Version Plaintiff Cable One, Inc.'s Memorandum in Support of Motion for Summary Judgment, FILED UNDER SEAL, filed October 1, 2012.
8. Joint Stipulation of Exhibits and Facts, FILED UNDER SEAL, filed January 29, 2013.

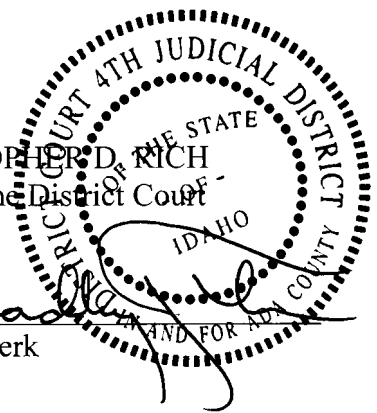
9. Plaintiff Cable One, Inc.'s Post-Trial Brief, FILED UNDER SEAL, filed April 15, 2013.

10. Findings of Fact, Conclusions of Law and Order, FILED UNDER SEAL, filed May 23, 2013.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 9th day of December, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Clerk



**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

Judge James Judd
Deputy Clerk: A. Lycan

February 25th - February 27th , 2013

Type of Hearing: Civil Trial

CABLE ONE INC,
Plaintiff,
vs.
IDAHO STATE TAX COMMISSION,
Defendant.

Case No. CV-OC-2011-03406

EXHIBIT LIST

Appearances:

Cherie Kiser
Phil Skinner

Counsel for Plaintiff
Counsel for Defendant

BY	NO.	DESCRIPTION	STATUS	DATE
Plaintiff	1.	TC-003110-3142, Letter with attachments CONFIDENTIAL	Not Admitted	2-25-13
Plaintiff	2.	Cable One 2005 Income Tax Return CONFIDENTIAL	Admitted	2-25-13
Plaintiff	3.	Application for Order Confirming Qualified Broadband Equipment	Admitted	2-25-13
Plaintiff	4.	Order No 30506	Admitted	2-25-13
Plaintiff	5.	Portions of an ordinance 5868	Admitted	2-25-13
Plaintiff	6.	Cable One Profit and Loss Detail 12-31- 05 CONFIDENTIAL	Stipulated Admission	2-25-13
Plaintiff	7.	Cable One Profit and Loss, Idaho All CONFIDENTIAL	Stipulated Admission	2-25-13
Plaintiff	8.	Summary of Cable One's Direct Costs CONFIDENTIAL	Admitted	2-25-13
Plaintiff	9.	Internet Cost Analysis CONFIDENTIAL	Stipulated Admission	2-25-13
Plaintiff	10.	Cable One Inc. Chart of Accounts CONFIDENTIAL	Stipulated Admission	2-25-13
Plaintiff	11.	Supplemental Expert Report of Michael Starkey. CONFIDENTIAL	Admitted	2-25-13

Defendant	12.	Affidavit of Patrick Dolohanty CONFIDENTIAL	Admitted	2-25-13
Defendant	13.	General Ledger Detail CONFIDENTIAL	Admitted	2-25-13
Defendant	14.	Samples of Quest Invoices CONFIDENTIAL	Admitted	2-25-13
Defendant	15.	Sample of Invoice CONFIDENTIAL	Admitted	2-25-13
Defendant	16.	Quest Invoice CONFIDENTIAL	Admitted	2-25-13
Defendant	17.	Email CONFIDENTIAL	Stipulated Admission	2-25-13
Defendant	18.	Arizona Code	Returned	2-27-13
Defendant	19.	Copy of Arizona State income tax for 2005 CONFIDENTIAL	Returned	2-27-13
Plaintiff	20.	Deposition of Ms. Inouye CONFIDENTIAL	Returned	2-27-13
Plaintiff	21.	Cable One's Television Broadband Network 2005 Diagram CONFIDENTIAL	Admitted	2-25-13
Plaintiff	22.	How bandwidth is measured in a broadband network	Admitted	2-25-13
Plaintiff	23.	Cable Television Broadband Network Used For High Speed Data in Idaho CONFIDENTIAL	Stipulated Admission	2-25-13
Plaintiff	24.	CV 201-2065, channel number reference CONFIDENTIAL	Admitted	2-25-13
Defendant	25.	Diagram of Typical Broadband System Design 2005 CONFIDENTIAL	Admitted	2-26-13
Defendant	26.	James Hannon Deposition CONFIDENTIAL	Admitted	2-27-13
Defendant	27.	Internet Broadband Services Utilized By Cable One Idaho Cable Systems- Circa 2005 CONFIDENTIAL	Admitted	2-26-13
Plaintiff	28.	Copy of the Quest Total Advantage Agreement CONFIDENTIAL	Admitted	2-26-13
Plaintiff	29.	Copy of the AT&T Master Agreement between Washington Post and AT&T Corp. CONFIDENTIAL	Admitted	2-26-13
Defendant	30.	Deposition of Bradley Ottley CONFIDENTIAL	Stipulated Admission	2-26-13
Defendant	31.	Affidavit provided by Bradley Ottley CONFIDENTIAL	Admitted	2-26-13
Defendant	32.	Expert Report and C.V. of Warren Fischer CONFIDENTIAL	Admitted	2-26-13

Plaintiff	33.	Deposition Transcript of Warren Fischer CONFIDENTIAL	Admitted	2-26-13
Defendant	34.	Michael Starkey's Expert Report CONFIDENTIAL	Admitted	2-27-13
Defendant	35.	Supplemental Data CONFIDENTIAL	Admitted	2-27-13
Plaintiff	36.	Deposition of Michael T. Starkey CONFIDENTIAL	Admitted	2-27-13
Plaintiff	37.	Deposition Transcript of Michael T. Starkey- Volume II, March 28 th 2012 CONFIDENTIAL	Admitted	2-27-13
Plaintiff	38.	Affidavit of Michael Starkey Opposing Cable One Inc's Motion For Summary Judgment CONFIDENTIAL	Admitted	2-27-13
Defendant	39.	Expert Report and C.V. of James Peters CONFIDENTIAL	Admitted	2-27-13
Defendant	40.	Fax-Legal Section State Tex Commission CONFIDENTIAL	Returned	2-27-13
Plaintiff	41.	Deposition of James Peters CONFIDENTIAL	Admitted	2-27-13

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CABLE ONE, INC.,

Plaintiff-Appellant,
vs.

IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

Supreme Court Case No. 41305

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

KELLY A. CAMERON

ATTORNEY FOR APPELLANT

BOISE, IDAHO

ERICK M. SHANER

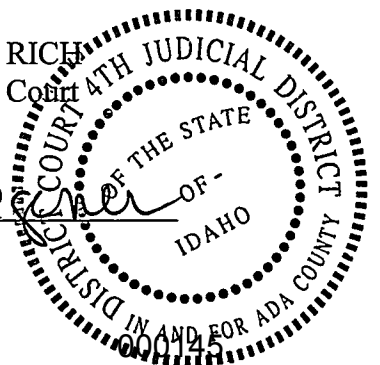
ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Date of Service: OCT 15 2013

CHRISTOPHER D. RICH
Clerk of the District Court

By *Christopher D. Rich*
Deputy Clerk



CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CABLE ONE, INC.,

Plaintiff-Appellant,
vs.

IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

Supreme Court Case No. 41305

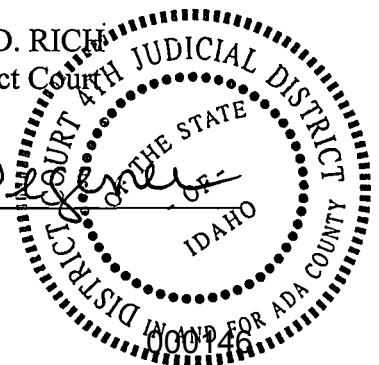
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 9th day of August 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By *[Signature]*
Deputy Clerk



CERTIFICATE TO RECORD

Bred

NOV 12 2013

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL

WILLIAM A. von TAGEN [ISB # 2671]
PHIL N SKINNER [ISB #8527]
ERICK M. SHANER [ISB #5214]
DEPUTY ATTORNEYS GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722-0410
(208) 334-7530
TELEPHONE NO.: (208) 334-7530
FACSIMILE: (208) 334-7844

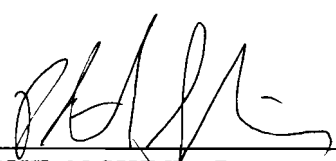
 ORIGINAL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CABLE ONE, INC.,)	
	)	Case No.: CV OC 1103406
Plaintiff,)	
	)	REQUEST FOR ADDITIONS TO THE
v.	)	RECORD
)	
IDAHO STATE TAX COMMISSION,)	
)	
Defendant.)	

COMES NOW Defendant, Idaho State Tax Commission, by and through its attorney of record, Phil N Skinner, and pursuant to Idaho Appellate Rule 28(c), requests two additions to the record. The Commission requests that the "Original Unredacted Joint Stipulation of Exhibits and Facts" (filed on 01/29/2013) be added to the record. The Commission also requests that the "Tax Commission's Post Trial Brief" (filed on 04/15/2013) be added to the record.

DATED this 12th day of November 2013.



PHIL N SKINNER
DEPUTY ATTORNEY GENERAL

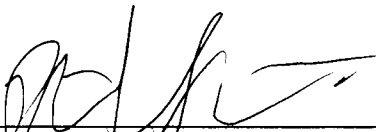
9/14

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2013, I have served a true and correct copy of the within and foregoing REQUEST FOR ADDITIONS TO THE RECORD upon counsel of record, and upon the Honorable James F. Judd, by depositing the same in the United States Mail in a properly addressed envelope with adequate postage thereon to insure delivery to the following:

**KELLY A CAMERON
TONN K PETERSEN
PERKINS COIE LLP
1111 WEST JEFFERSON ST
SUITE 500
BOISE ID 83702-5391**

**CHÉRIE R KISER
ANGELA F COLLINS
CAHILL GORDON &
REINDEL LLP
1990 K STREET NW SUITE 950
WASHINGTON DC 20006**



**PHIL N SKINNER
DEPUTY ATTORNEY GENERAL**

ORIGINAL

NO. _____ FILED 3:28
A.M. _____ P.M.

NOV 12 2013

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

Kelly A. Cameron, Bar No. 7226
KCameron@perkinscoie.com
Tonn K. Petersen, Bar No. 8385
TKPetersen@perkinscoie.com
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391
Telephone: 208.343.3434
Facsimile: 208.343.3232

Chérie R. Kiser, DC Bar No. 415009, *pro hac vice*
ckiser@cahill.com
Angela F. Collins, DC Bar No. 473891, *pro hac vice*
acollins@cahill.com
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
Telephone: 202.862.8900
Facsimile: 866.255.0185

Attorneys for Plaintiff/Appellant Cable One, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,
Plaintiff/Appellant,

v.

IDAHO STATE TAX COMMISSION,
Defendant/Respondent.

Case No. CV OC 11-03406

**OBJECTION TO CLERK'S RECORD ON
APPEAL FOR SUPREME COURT CASE
NO. 41305 PURSUANT TO I.A.R. 29(a)**

**TO: CHRISTOPHER D. RICH, CLERK OF THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO**

AND TO: THE HONORABLE JAMES F. JUDD

Plaintiff/Appellant Cable One, Inc. ("Cable One"), by and through its counsel of record and pursuant to I.A.R. 29(a), respectfully requests a modification of the Clerk's Record on Appeal, which was served on October 15, 2013.

OBJECTION TO CLERK'S RECORD ON APPEAL FOR SUPREME COURT CASE NO. 41305 PURSUANT TO I.A.R. 29(a) - 1
12910291v1

000149

5

First, Cable One requests that the compilation of documents labeled as “CABLE ONE cr sealed” in the Clerk’s Record on Appeal be consecutively paginated starting with page number 000106. These documents represent those items in the Clerk’s Record on Appeal that have been designated as confidential by the parties and have been filed under seal pursuant to the July 30, 2012 Order re: Joint Motion for Leave to File Documents under Seal and the February 22, 2013 Order Continuing the Sealing of Numerical Figures. The non-confidential documents contained in the Clerk’s Record on Appeal have been consecutively paginated as 000001-000105 (“labeled as CABLE ONE cr”). Continuing the same pagination for the remainder of the Clerk’s Record on Appeal will assist the parties as well as the Court when citing to record documents. Defendant Idaho State Tax Commission has indicated it does not oppose Cable One’s request to consecutively paginate the sealed portion of the Clerk’s Record on Appeal as requested herein.

Second, Cable One requests that certain portions of the transcripts contained in the Clerk’s Record on Appeal be designated as confidential pursuant to the July 30, 2012 Order re: Joint Motion for Leave to File Documents under Seal and the February 22, 2013 Order Continuing the Sealing of Numerical Figures. Specifically, Cable One requests that the following portions of the transcripts be designated as confidential:

- Tr. Feb. 25/26, p. 22, line 1
- Tr. Feb. 25/26, p. 93, lines 3, 15
- Tr. Feb. 25/26, p. 95, line 6
- Tr. Feb. 25/26, p. 117, line 11
- Tr. Feb. 25/26, p. 159, lines 12-13
- Tr. Feb. 25/26, p. 204, lines 10, 13-14, 19
- Tr. Feb. 25/26, p. 205, lines 5, 14-15, 24
- Tr. Feb. 25/26, p. 206, lines 4, 13-14, 16
- Tr. Feb. 25/26, p. 207, lines 2-6
- Tr. Feb. 25/26, p. 208, lines 1, 3
- Tr. Feb. 25/26, p. 289, line 6
- Tr. Feb. 27, p. 110, line 7
- Tr. Feb. 27, p. 122, line 16
- Tr. Feb. 27, p. 123, line 17

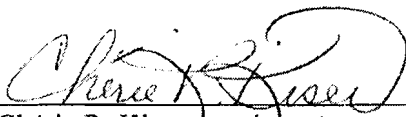
These portions of the transcripts refer to numerical figures or trial exhibits that have been designated as confidential, and therefore also should be designated as confidential.

A proposed order modifying the Clerk's Record on Appeal as requested above is attached.

Cable One does not request a hearing on this matter, but will issue a notice for hearing immediately if requested by the Court.

DATED: November 12, 2013

CAHILL GORDON & REINDEL LLP

By: 
Cherie R. Kiser, *pro hac vice*
Angela F. Collins, *pro hac vice*

PERKINS COIE LLP

Kelly A. Cameron, ISB No. 7226
Tonn K. Petersen, ISB No. 8385

Attorneys for Plaintiff/Appellant Cable One, Inc.

CERTIFICATE OF SERVICE

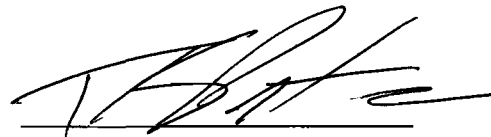
I, the undersigned, certify that on November 12, 2013, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Idaho Rules of Procedure, to the following person(s):

Judge James F. Judd
851 W. Front Street
Apt. 1202
Boise, ID 83702

Hand Delivery	<u> X </u>
U.S. Mail	<u> </u>
Facsimile	<u> </u>
Overnight Mail	<u> </u>
Electronic Mail	<u> </u>

Erick M. Shaner
Phil Skinner
Deputy Attorneys General
State of Idaho
P.O. Box 36
Boise, ID 83722-0410
FAX: 208-334-7844
Erick.Shaner@tax.idaho.gov
Phil.Skinner@tax.idaho.gov
*Attorneys for Defendant Idaho State Tax
Commission*

Hand Delivery	<u> </u>
U.S. Mail	<u> X </u>
Facsimile	<u> </u>
Overnight Mail	<u> </u>
Electronic Mail	<u> </u>



NOV 15 2013

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,)	Case No. CV OC 2011 03406
<i>Plaintiff/Appellant,</i>)	ORDER ON OBJECTION TO CLERK'S RECORD ON APPEAL FOR SUPREME COURT CASE NO. 41305 PURSUANT TO I.A.R. 29(a)
vs.)	
IDAHO STATE TAX COMMISSION,)	
<i>Defendant/Respondent.</i>)	

Plaintiff/Appellant Cable One, Inc. has objected to the Clerk's Record on Appeal. Defendant/Respondent Idaho State Tax Commission has indicated that it has no objection to Cable One's suggested correction regarding pagination but, as indicated by its November 14, 2013 email, it does object to Cable One's suggested corrections regarding the confidentiality of specified portions of the Reporter's Transcripts. The Idaho State Tax Commission in the same email indicated that it no objection to the Court's determination of Cable One's Objection to Clerk's Record on Appeal without a hearing.

I have reviewed the portions of the Reporter's Transcripts containing Cable One's objections, I.A.R. 29(a), I.C.A.R. 32(i) and have again reviewed the parties February 2013 filings regarding the sealing or unsealing of numerical figures. Based upon the findings stated in my order of February 22, 2013 and good cause appearing,

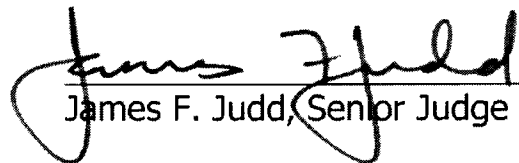
MLK

IT IS HEREBY ORDERED THAT:

1. The Clerk shall consecutively paginate the compilation of documents labeled as "CABLE ONE cr sealed" in the Clerk's Record on Appeal starting with page number 000106. and
2. The Clerk shall mark as confidential the portions of the Reporters' transcripts identified as follows:

Tr. Feb. 25/26, p. 22, line 1
Tr. Feb. 25/26, p. 93, lines 3, 15
Tr. Feb. 25/26, p. 95, line 6
Tr. Feb. 25/26, p. 117, line 11
Tr. Feb. 25/26, p. 159, lines 12-13
Tr. Feb. 25/26, p. 204, lines 10, 13-14, 19
Tr. Feb. 25/26, p. 205, lines 5, 14-15, 24
Tr. Feb. 25/26, p. 206, lines 4, 13-14, 16
Tr. Feb. 25/26, p. 207, lines 2-6
Tr. Feb. 25/26, p. 208, lines 1, 3
Tr. Feb. 25/26, p. 289, line 6
Tr. Feb. 27, p. 110, line 7
Tr. Feb. 27, p. 122, line 16
Tr. Feb. 27, p. 123, line 17

ENTERED this 18th day of November, 2013.


James F. Judd, Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2013 a true and correct copy of the foregoing was mailed, postage prepaid, or if the Fax service block is checked, sent a copy via facsimile, or if the PDF Email service block is checked, sent a copy by email to:

Kelly A. Cameron
Tonn K. Peterson
Lawyers
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-S391

Fax Service
343-3232
 PDF Email Service
TKPeterson@perkinscoie.com

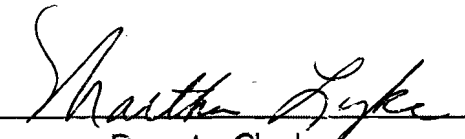
Erick M. Shaner
Phil N. Skinner
Deputy Attorneys General
P.O. Box 36
Boise, Idaho 83722-0410

Fax Service
334-7844
 PDF Email Service
Phil.Skinner@tax.idaho.gov
Erick.Shaner@tax.idaho.gov

Chérie R. Kiser
Angela F. Collins
Lawyers
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006

Fax Service
(866) 255-0185
 PDF Email Service
CKiser@cahill.com
ACollins@cahill.com

Clerk of the District Court

By: 
Deputy Clerk

NOV 22 2013

CHRISTOPHER D. RICH, Clerk
By BRIAN D. CHESS
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA**

CABLE ONE, INC.,	)	Case No. CV OC 2011 03406
<i>Plaintiff/Appellant,</i>)	
vs.	)	AMENDED
IDAHO STATE TAX COMMISSION,	)	ORDER ON OBJECTION TO
<i>Defendant/Respondent.</i>	)	CLERK'S RECORD ON
	)	APPEAL FOR SUPREME
	)	COURT CASE NO. 41305
	)	PURSUANT TO I.A.R. 29(a)

On October 15, 2013 the Ada County Clerk served the Clerk’s Record and Reporter’s Transcript in this matter on the parties. On November 12, 2013, within the 28 days provided by I.A.R. 29(a), Plaintiff/Appellant Cable One, Inc. timely objected to the Clerk’s Record on Appeal and to the Reporters’ Transcripts.

The entry of the court’s November 19, 2013 order raised questions between the clerk and reporters on how or if to comply with its terms. Upon further review of the matter I conclude that the order entered by the court on November 19, 2013 was insufficiently specific in dealing with the issues raised as relates to the settling of the Reporters’ Transcripts. I therefore enter this AMENDED ORDER ON OBJECTION TO CLERK’S RECORD ON APPEAL FOR SUPREME COURT CASE NO. 41305 PURSUANT TO I.A.R. 29(a).

Defendant/Respondent Idaho State Tax Commission has indicated that it has no objection to Cable One’s suggested correction regarding

pagination but, as indicated by its November 14, 2013 email, it does object to Cable One's suggested corrections regarding the confidentiality of specified portions of the Reporter's Transcripts. The Idaho State Tax Commission in the same email indicated that it had no objection to the Court's determination of Cable One's Objection to Clerk's Record on Appeal without a hearing.

I have reviewed the portions of the Reporter's Transcripts containing Cable One's objections, I.A.R. 29(a), I.C.A.R. 32(i) and have again reviewed the parties February 2013 filings regarding the sealing or unsealing of numerical figures. Based upon the findings stated in my order of February 22, 2013 and good cause appearing,

IT IS HEREBY ORDERED THAT:

1. The Clerk shall consecutively paginate the compilation of documents labeled as "CABLE ONE cr sealed" in the Clerk's Record on Appeal starting with page number 000106. and
2. The reporters' transcripts in this matter contain confidential numbers on the following lines:

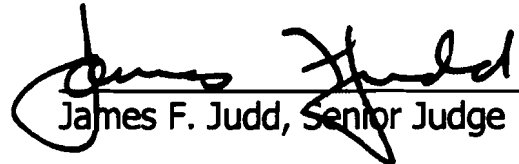
Tr. Feb. 25/26, p. 22, line 1	Tr. Feb. 25/26, p. 206, lines 4, 13-14, 16
Tr. Feb. 25/26, p. 93, lines 3, 15	Tr. Feb. 25/26, p. 207, lines 2-6
Tr. Feb. 25/26, p. 95, line 6	Tr. Feb. 25/26, p. 208, lines 1, 3
Tr. Feb. 25/26, p. 117, line 11	Tr. Feb. 25/26, p. 289, line 6
Tr. Feb. 25/26, p. 159, lines 12-13	Tr. Feb. 27, p. 110, line 7
Tr. Feb. 25/26, p. 204, lines 10, 13-14, 19	Tr. Feb. 27, p. 122, line 16
Tr. Feb. 25/26, p. 205, lines 5, 14-15, 24	Tr. Feb. 27, p. 123, line 17

3. The original reporters' transcripts shall be filed under seal with a copy of this order and marked as "**CONFIDENTIAL SEALED BY COURT ORDER**".
4. Copies of the reporters' transcripts may be made available to the public when the confidential numbers are redacted and the

copies are marked "REDACTED COPY FOR PUBLIC RECORD".

5. The Transcripts filed under seal are settled.

ENTERED this 22nd day of November, 2013.


James F. Judd, Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 2013 a true and correct copy of the foregoing was mailed, postage prepaid, or if the Fax service block is checked, sent a copy via facsimile, or if the PDF Email service block is checked, sent a copy by email to:

Kelly A. Cameron
Tonn K. Peterson
Lawyers
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702-5391

Fax Service
343-3232
 PDF Email Service
TKPetersen@perkinscoie.com

Erick M. Shaner
Phil N. Skinner
Deputy Attorneys General
P.O. Box 36
Boise, Idaho 83722-0410

Fax Service
334-7844
 PDF Email Service
Phil.Skinner@tax.idaho.gov
Erick.Shaner@tax.idaho.gov

Cherie R. Kiser
Angela F. Collins
Lawyers
CAHILL GORDON & REINDEL LLP
1990 K Street, NW, Suite 950
Washington, DC 20006

Fax Service
(866) 255-0185
 PDF Email Service
CKiser@cahill.com
ACollins@cahill.com

Clerk of the District Court

By: Brian Chen
Deputy Clerk

