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State of Nevada
Department of Taxation

July 23, 2015

Deonne E. Contine
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937

RE: Senate Bill 483 Administration – Commerce Tax

Dear Director Contine:

Cox Enterprises, Inc. ("Cox") respectfully submits the following comments to the Nevada Department of Taxation ("Department") for clarification in relation to the Nevada Commerce Tax, which applies to tax years beginning on and after July 1, 2015.¹ Although the initial return is not due until on or about August 15, 2016, certain provisions of the Commerce Tax became effective on enactment for the "purpose of performing any preparatory administrative tasks necessary to carry out the provisions of this act."² In this context and of specific concern, Cox requests that the Department address the adoption of guidelines for business entities to recover Commerce Tax liability on customer bills/invoices.

Cox is a large, multi-state corporation with a variety of different operating businesses, across a variety of industries, in the State of Nevada. Cox employs over 1,500 and contracts with a significant number of Nevadans and makes substantial capital expenditures and other investments in the State. Accordingly, while we present the following for your consideration as a Commerce Tax implementation issue important to our business, also has wide application to other Nevada-based businesses. We appreciate this opportunity to present our view on this issue to the Department and will be active in pursuing joint resolution in a situation that is currently ambiguous.

¹ Laws Chapter 487, S.B. 483 (eff. July 1, 2015) (the "Act").

² S.B. 483, Section 104. The enumerated provisions that take immediate effect for administrative purposes include the following Sections: 4, defining "business entity"; 5, defining "commerce tax"; 13, defining "wages"; 14, defining "passive entity"; 15, business entities engaged in multiple business categories ("primarily engaged test"); 16, administration and enforcement by the Department; 17, record-keeping requirements; and 18, examination of a business entity's books and records by the Department. *Id.*

**Issue: Adoption of Guidelines for Business Entities to Recover
Commerce Tax Liability on Customer Bills/Invoices**

I. Background

Consistent with gross receipts-based taxes enacted by other states, most notably Texas, Cox respectfully requests confirmation in the Department's final regulations that it may recover an appropriate amount of the Commerce Tax as a separate line item on customer invoices.³ The Act does not prohibit, or address, the ability of a business entity to recover an appropriate amount of its Commerce Tax liability from customers in such a manner.

II. Other States' Approaches

Although Nevada may not constitutionally impose a complete prohibition on a service provider's ability to charge a Commerce Tax recovery line item on customer invoices, Nevada may regulate how those line items are presented to in-state customers. Because the Act does not address this issue, similar experiences in other states are instructive as to how Nevada may regulate cost recovery line items attributable to the Commerce Tax. For example, the Texas Comptroller recently issued guidance indicating that a telecommunications service provider may pass through the franchise (taxable margin) tax ("TMT") and set forth guidelines with respect to how the TMT pass through should appear on subscribers' invoices.⁴ In accordance with that Texas Letter Ruling, TMT taxpayers may include a separate line item charge on subscribers' invoices for recovery of the TMT, while remaining in compliance with state and federal consumer protection statutes, provided the line item and accompanying terms, conditions and other disclosures are not "false, misleading, or deceptive" such that it may lead to confusion among subscribers. In many respects, the Texas TMT served as a template for the Commerce Tax regime. Cox respectfully suggests that the Department should also consider the 2010 Texas Letter Ruling as a template for issuing guidance related to cost recovery of the Commerce Tax.

III. Line-Items as Protected "Commercial Speech"

It is worth noting that a business's ability to pass through government taxes and fees on its customer invoices is protected by the U.S. Constitution, as recognized by Texas and other states that have considered this issue. Specifically, the First Amendment prohibits state laws that restrict or impede "freedom of speech," except "false, inherently misleading speech."⁵ This constitutional prohibition applies not only "political speech," but also "commercial speech."⁶ Recently, the Sixth Circuit Court of Appeals held that a Kentucky statute prohibiting communications service providers and multichannel video programming service providers from recovering the

³ Businesses may also recover the cost of the Ohio commercial activity tax, which is similar in many respects to the Commerce Tax (compare, *e.g.*, the situs rules in Section 20(1)(g) of the Act and O.R.C. § 5751.033(I)), the Connecticut gross earnings tax, and Rhode Island utility gross earnings tax.

⁴ See attached, Texas Policy Letter Ruling No. 201008847L (Aug. 6, 2010) ("Exhibit B").

⁵ See, *e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

⁶ *Id.*; see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

state's gross revenues tax by stating the tax on customer bills violated the First Amendment of the U.S. Constitution.⁷

IV. Items Affecting the Amount of Cost Recovery Line Items

Correlative to the ability to pass through the Commerce Tax, Cox requests guidance on issues that may affect the *computation* of the amount that it (and other businesses) may reflect as line-items on their invoices. If a Nevada business decides to recover the increased costs of the Commerce Tax in this manner, the business will likely need to calculate an appropriate *pro rata* amount to be shown on each customer's invoice. Given the importance of this calculation, Cox respectfully asks that the Department clarify certain Commerce Tax provisions that are arguably unclear. For example, and of importance to Cox, we seek confirmation that the recovery of certain federal and state fees, such as federal and state universal service fund fees and franchise fees, are deductible from taxable gross revenues as "pass-through revenue." Indeed, such fee recoveries fall squarely within the plain meaning of the Commerce Tax' "pass-through revenue" definition. Specifically, the fee recoveries constitute "revenue received by a business entity that is required by law or fiduciary duty to be distributed to another person or governmental entity."⁸

V. Request for Cost Recovery Guidelines

For the reasons discussed above, Cox and other business entities subject to the Commerce Tax have a constitutional right to include truthful, non-misleading, and non-deceptive line items on its customer bills. Accordingly, Cox respectfully proposes that the Department include in its final regulations language that authorizes business entities to recover an appropriate amount of its Commerce Tax liability from Nevada customers. It is of utmost importance that the Department adopts such guidelines as soon as possible to protect business entities that elect to recover this incremental tax cost to businesses.

* * * * *

We hope the Department finds these comments helpful in clarifying the Commerce Tax issues presented herein. We are available to meet with the Department to discuss any of these comments at any time. Should you need additional information, please feel free to contact me at

Sincerely,

Cc: Michael Grover, Cox Communications, Inc.
George Markley, Cox Enterprises, Inc.

⁷ See *attached BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008) ("Exhibit A").

⁸ S.B. 483, Section 11(1)(a).