IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31375

THE SOUTH DAKOTA DEPARTMENT OF REVENUE,

Petitioner and Appellant,

v.

MIDCONTINENT COMMUNICATIONS,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGO D. NORTHRUP
CIRCUIT COURT JUDGE

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellee, the South Dakota Department of Revenue is referenced as “the Department.” Appellant, Midcontinent Communications, LLC is referenced as “Midco.” Comcast Cable Communications, LLC is referenced as “Comcast.” The Programming Supply Agreement between Midco and Comcast, as amended (SR01 720-740, SR02 785-89; App. 1-26), is referenced as “the Agreement.” “The Fee” references the 3% administrative or management fee charged by Comcast to Midco as provided in the Agreement and Comcast’s invoices. The Honorable Judge Margo Northrup, Sixth Judicial Circuit Court, Hughes County, South Dakota, is referenced as “Circuit Court,” and its Memorandum Decision, dated December 12, 2025, (SR05 17-37; App. 88-95) is referenced as “CC” followed by the page number. The Office of Hearing Examiners is referenced as “OHE,” and the transcript of the parties’ hearing before OHE on February 9, 2024, (SR01 252-78; App. 35-48) is referenced as

"HT" followed by the page number. The settled record on appeal is referenced as "SR" followed by the part and page number (e.g. SR01 1234). The appendix will be referenced as "App" followed by the page number.

JURISDICTIONAL STATEMENT

This is an appeal from the final Order for Reversal and Judgments filed by the Circuit Court on January 16, 2026. SR05 39-42; App. 99-101. Midco's Notice of Entry was filed on January 23, 2026. SR01 1142-46. The Department's Notice of Appeal was filed on February 6, 2026. SR01 1147. Jurisdiction is proper pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER COMCAST'S MANAGEMENT SERVICES WERE TAXABLE?

The Circuit Court determined "The transaction at issue between Comcast and Midco is one for syndicated programming and not services. Accordingly, the Fee is exempt." SR05 24; App. 95.

SDCL 10-45-4

SDCL 10-45-4.1

II.

WHETHER MIDCO FAILED TO MEET ITS BURDEN TO ESTABLISH A TAX EXEMPTION?

The Circuit Court determined "The programming meets the exemptions found in SDCL 10-46-1(17) and ARSD 64:06:01:08.03." SR05 22; App. 94.

SDCL §§ 10-46-1(17); ARSD 64:06:01:08.03

Midcontinent Broad Co. v. S.D. Dep't of Revenue, 424 N.W.2d 153 (SD 1988)

III.

WHETHER MIDCO FAILED TO MEET ITS BURDEN TO ESTABLISH AN ATTORNEY FEES AWARD UNDER SDCL 10-59-34?

The Circuit Court determined "Midco is entitled to attorney fees but not interest." SR05 23; App. 96.

SDCL 10-59-34

Pourier v. S.D. Dep't of Revenue & Regulation, 2012 S.D. 11, 811 N.W.2d 327, 329

STATEMENT OF THE CASE

On October 10, 2018, the Department commenced an audit of Midco for the June 2015-July 2018 tax periods. SR01 328. During the audit, Midco requested a refund for use tax paid on an administrative fee pursuant to the Agreement between Midco and Comcast. SR01 835-36, 842, 847-88; SR02 791-93. Midco asserted the Fee was included in the cost of television programming resold to its customers and should be exempt tangible personal property purchased for resale. *Id.* The Department issued a Certificate of Assessment refunding Midco $162,318.23 and closed the audit. SR01 258. Midco's refund request regarding the Fee was denied via the Certificate of Assessment and the Department's Uniform Audit Report. SR01 344, 352. Midco requested a hearing before OHE pursuant to SDCL 10-59-9. SR01 1-2.

OHE considered the parties' cross motions for summary judgment and entered a proposed decision in Midco's favor. SR03 48-58. The Department retained final decision authority pursuant to SDCL §§ 10-59-9 and 1-26D. Due to a confiict, the Department's Secretary, Michael Houdyshell, appointed Rosa Yaeger, a division director with no prior involvement in the case, to act as final decision maker. SR03 42. An Order for Remand was then issued which explained an evidentiary hearing was necessary to determine the nature of the Fee as it was a disputed material fact. SR03 38-39; App. 33-34.

Midco sought attorney fees via a supplemental post-hearing brief after the February 9, 2024 evidentiary hearing. SR01 237-38. OHE issued a proposed decision in Midco's favor regarding the taxation matter but denied Midco's request for attorney fees and interest. SR03 48-57. The Department rejected OHE's proposed decision and issued a Final Decision finding that Midco failed to establish the Fee was subject to a tax exemption. SR02 117-42; App. 49-74. The Department issued a Notice of Entry on January 28, 2025. SR01 30.

Midco served its Notice of Appeal to the Circuit Court on February 25, 2025. SR01 1-2. The Circuit Court reversed the Department, found the Fee was exempt, awarded Midco attorney fees under SDCL 10-59-34, and denied Midco's request for interest under SDCL 10-59-24. SR05 5-12; App. 88-101. The Department now appeals.

STATEMENT OF FACTS

Midco and Comcast were conducting business pursuant to an initial agreement for Comcast's provision of television programming and other services dating back to 2001. SR02 721-22; App. 1-2. The Agreement provided Midco would reimburse Comcast for the cost of television programming[1] Comcast obtained on Midco's behalf and pay an additional fee of 3% of the cost of the television programming for certain additional services. SR01 720-740; App. 1-21. Midco had, at a minimum, been remitting use tax on the Fee through the entire audit period at issue. During the audit, Midco submitted invoices from Comcast that listed the 3% "Mgmt Fee" (the Fee) as a separately listed line item from the cost of the programming. SR01 473-78; App. 27-32. The invoice from Comcast also stated on the same line item: "Taxable in State of SD." *Id.*

A. The Agreement

In 2010, Midco and Comcast entered into the Agreement. The Agreement appointed Comcast to act as Midco's exclusive agent to obtain, manage, and account for cable and satellite programming Comcast obtained from television networks for Midco. SR02 720; App. 1. Under Section 7.3 of the Agreement, Midco agreed to pay Comcast the

[1] Under Section 7.2(a) of the Agreement, Midco was required to reimburse Comcast a "per Subscriber or Service Subscriber" fee for the cost of television programming at the rates Comcast negotiated for Midco. SR01 728; App. 9. Under Section 6.1 of the Agreement, Comcast disclaimed any title or copyright to the programming. SR02 727; App. 8. The taxation of programming, itself, is not at issue here as Midco did not pay use tax on or request a refund for the programming. SR01 352.

3% Fee in addition to the programming price, and, in exchange, Comcast agreed to act on Midco's behalf to negotiate, manage, select, bill, and collect for the programming (collectively referred to as the Management Services). SR02 728; App. 9. (Section 7.3 states the Fee is "In addition to the amounts described in Section 7.2"). (emphasis added).

Sections 2.2 and 2.3 of the Agreement delineated the specific management services Comcast agreed to provide to Midco in exchange for the Fee.

> 2.2. [Midco] hereby offers to [Comcast], and [Comcast] hereby accepts, the exclusive agency and authority to manage [Midco's] Programming Services in the Systems, with full and exclusive authority to make and execute decisions on behalf of [Midco] with respect to the management, selection, billing and collection of Programming Services . . . Further, [Comcast] is authorized to control and direct the promotion and marketing of the Programming Services, the sale of available commercial time in connection with the Programming Services, and all other matters associated therewith to the extent necessary to insure that such promotion, sales and marketing efforts do not violate any of the terms of the [Comcast] Affiliation Agreements[.]
>
> 2.3. [Midco] acknowledges and agrees that [Comcast] shall at all times have sole and complete discretion in negotiating and executing [Comcast] Affiliation Agreements . . . [Midco] acknowledges and agrees that [Comcast] shall have no liability whatsoever to [Midco] with respect to or arising out of any [Comcast] Affiliation Agreement or other contract or any term or condition of any such contract or agreement or for any failure of [Comcast] to obtain the most favorable rates or terms with respect to [Midco.]

SR02 722; App. 3. (emphasis added).[2]

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[2] Comcast replaced Satellite Services, Inc. (SSI) when the Agreement was amended in 2010, and the Fee was increased from 1% to 3%. SR02 785-89;

Additionally, under Section 4.2 of the Agreement, Comcast and Midco agreed to jointly establish a three-member committee to direct Comcast's selection, billing, management, and collection practices relating to the programming. SR02 724-25; App. 5-6. Further, under Section 4.4 of the Agreement, Comcast promised to transmit a pro rata share of all promotional, advertising, and marketing benefits it received from the affiliation agreements it negotiated for Midco. SR02 725; App. 6.

B. Office of Hearing Examiners

Midco appealed the Certificate of Assessment and the denial of its use tax refund request. SR01 448-66. The hearing examiner heard cross-motions for summary judgment and entered a proposed order on March 30, 2023. SR03 48-57. The parties' initial motions were dominated by an argument that Midco failed to timely provide a copy of the Agreement between Midco and Comcast to the Department pursuant to SDCL 10-59-7 (which provides that taxpayers have a burden to provide all relevant paperwork to the Department). SR03 348-68. The Agreement was eventually provided to the Department, and that issue was resolved. SR03 54. However, the parties continued to dispute the taxability of the Fee. SR03 49.

At the hearing on February 9, 2024, the Department's auditor testified to the following. SR03 48-57; App. 35-48. First, the auditor

App. 22-26. Accordingly, Midco, which was referred to as "Operator" in the Agreement, is referenced herein as "Midco" and "SSI" is referenced as "Comcast."

provided that use tax is routinely assessed on separately delineated management or administrative fees when they are set forth in separate line items, like the Fee here. SR01 268, 279-80; HT 68:23-69:3; 80:18-81:18; App. 45, 47. Comcast's invoices contained a line for the programming and its cost and then a separate line for the Fee. SR01 473-78; App. 27-32. Second, the auditor testified that simple markups are not typically listed as a separate line item in sale-for-resale transactions. SR01 272; HT 84:4-11; App. 48. She testified that in typical sale-for-resale transactions, the markup is instead included within the cost of the purchased item. SR01 269; HT 72:1-10; App. 46.

Midco provided testimony by its Vice President of Finance (VP) that the Fee was only a markup on the programming. SR01 254; HT 10:17-11:4; App. 36. But further testimony provided by the same VP and Comcast's Executive Director shows Comcast provided more than just the programming. SR01 257-65; App. 35-48. Midco's VP stated Midco used Comcast's Management Services for programming rate negotiation; channel packaging; and billing and accounting services. SR01 257-58; HT 21:8-25, 23:7-24:8; 25:18; App. 37-38. Comcast's Executive Director testified the Fee generally encompassed billing and other services to Midco, including negotiating agreements with television networks, timely billing networks, and collecting and distributing incentives from networks to Midco. SR01 263-65; HT 48:19-23, 50:9-51:2, 52:5-11, 52:20-53:2, 53:8-17, 55:6-8; App. 41-44. Midco's witnesses testified that the Fee was tied to these services. SR01 254, 360; HT 11:16-23, 34:20-35:12; App. 36, 41.

Specifically, the VP admitted Comcast provided negotiation services by "negotiat[ing] rates that then [Midco] ha[s] the option of participating in." SR01 258; HT 26:11-16. She testified Midco and Comcast also "package[d] channels together" indicating the two worked jointly to create specific channel offerings rather than Midco repurchasing programming directly from networks to create bundled channel offerings itself. SR01 258; HT 26:6-7; App. 38.

Midco's VP also admitted Midco used Comcast's billing services. SR01 257-58; HT 23:12-24:8, 25:18; App. 37-38. Comcast's Executive Director testified that Comcast managed Midco's billing to the networks and the billing and accounting services were included within the Fee. SR01 265; HT 55:3-8; App. 43. Every month Midco sent subscriber information to Comcast and Comcast calculated how much was owed for each of the channels being distributed to Midco's subscribers. SR01 257-58; HT 23:12-24:8, 25:18; App. 37-38. Comcast sent a bill to Midco to collect the appropriate amount, and then Comcast distributed the proper amounts to the various television networks. *Id.* Midco made payments to Comcast instead of managing separate subscriber reports and billing each network directly. SR01 257-58; HT 23:12-24:8, 25:18; App. 37-38. Comcast performed all of the accounting for these transactions, so Midco did not have to do any billing or accounting itself. SR01 257-58; HT

23:12-24:8, 25:18; App. 37-38 (noting Comcast is billed and does not bill out).

Comcast's Executive Director further testified that Comcast monitored Midco's networks to maintain compliance with upstream network contracts. SR01 265; HT 53:6-13; App. 43. In other words, Comcast provided legal compliance monitoring services. *Id.* Midco's VP admitted that if Comcast did not provide all of these services, Midco would have had to perform them. SR01 258; HT 26:11-16. And, importantly, Midco's VP testified these services were not passed along to Midco's subscribers. SR01 258; HT 32:18-33:7; App. 39.

When Midco proposed its findings of fact and conclusions of law it admitted that no exemption certificate was provided to Comcast for the Management Services tied to the Fee as required to establish Midco's claimed exemption. SR01 163, ¶ 12. OHE nevertheless issued a proposed decision that Midco's refund request be granted, and Midco's request for attorney fees and interest should be denied. SR01 149-60. In doing so OHE noted, "The Department . . . took a position that was substantially justified at the time of the initial audit and the resulting certificate of assessment." SR01 156.

On January 28, 2025, the Department's Final Decision and Order was issued rejecting the proposed decision and denying Midco's refund request. SR01 75-100; App. 49-74. The Final Decision found the Agreement was unambiguous, the Fee was taxable, and Midco failed to prove it qualified for an exemption. *Id.* While the Final Decision noted the parol evidence rule would bar consideration of testimony that may vary the terms of the Agreement, it still considered testimony provided at the hearing which supported the finding that Midco provided services beyond just the programming to Comcast. SR01 27-28; App. 59-60. Based upon both the Agreement and the testimony at the hearing, the Final Decision's findings reflect: (1) no exemption certificate was in the record; (2) Midco used Comcast's Management Services; and (3) those services were not passed on to Midco's customers. SR01 141, ¶¶ 40-42; App. 72-73. Midco's request for interest and attorney fees was denied. SR01 141-142; App. 73-74.

C. Circuit Court

In presenting the merits of the matter to the Circuit Court, the Department again argued, both in brief and before the court, that Comcast provided services to Midco that were taxable without an exemption. SR04 994-1019; SR05 78-89. Midco argued the Fee was a markup on the programming, that no other services were provided, and sought attorney fees asserting the Department's review of invoices was inappropriate and the testimony taken before OHE was disregarded. SR04 968-91, 994-1030; SR05 52-89. When asked by the Circuit Court, the Department's counsel posited that if relying on the parol evidence rule was in error then such error was harmless as the record supported the Final Decision's determination that Comcast provided taxable services to Midco. SR05 86-88; App. 84-86. In its Memorandum Decision, the Circuit Court reversed the Final Decision, found the Fee exempt and awarded Midco attorney fees under SDCL 10-59-34, but denied interest under SDCL 10-59-24. SR04 1044-51; App. 88-95.

The Circuit Court's opinion addressed Midco's claimed exemptions under ARSD 64:06:01:08.03[3] and SDCL 10-46-1(17).[4] Regarding the ARSD 64:06:01:08.03 exemption, the Circuit Court acknowledged "Comcast is certainly performing a service to the industry by negotiating and bundling the [programming]." SR05 11; CC 7; App. 90. However, the Circuit Court determined the Fee was Comcast's "cost of doing business, and a way for Comcast to make a profit" and was, therefore, exempt. *Id.* The Circuit Court found an exemption certificate unnecessary to meet the requirements of ARSD 64:06:01:08.03 and opined: "[a]n exemption certificate is not dispositive of whether a transaction is a sale for resale." SR05 10; CC 6; App. 89.

The Circuit Court further found the programing was exempt tangible personal property purchased for resale under SDCL 10-46-1(17)

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[3] Under ARSD 64:06:01:08.03, "[s]ervices which are purchased by a service provider and delivered to a current customer in conjunction with the services contracted to be provided to the customer are considered to be for resale. Receipts from the sale of a service for resale by the purchaser are not subject to sales tax if the purchaser furnishes an exemption certificate."

[4] Under SDCL 10-46-1(17), tangible personal property purchased for resale in the regular course of business is not a taxable "use" and is, therefore, exempt from use tax.

"in accordance with the rationale in *Midco I* and *In Re Sioux Falls Newspapers*, 423 N.W.2d 806, 810 (SD 1988)." SR05 10; CC 6; App. 89. The Circuit Court did not address whether Midco met its burden to provide evidence that the programming or the Management Services were tangible personal property for resale under SDCL 10-46-1(17). SR05 5-12; CC 1-8; App. 88-91. The Circuit Court's analysis, instead, turned on whether Comcast was an "agent" of Midco under the Restatement (Third) of Agency. SR05 9; CC 4-5; App. 91-92. The Circuit Court determined that, because Midco "was not in control of the undertaking" and lacked "interim control" of Comcast's actions under the Agreement, Midco was not acting as an agent of Comcast. SR05 9; CC 5; App. 92. The Court implied that, because Midco was not an agent of Comcast, the Fee did not encompass taxable services Comcast provided to Midco apart from the programming. SR05 9; CC 5; App. 92.

STANDARD OF REVIEW

The South Dakota Supreme Court reviews administrative decisions "unaided by any presumption that the circuit court's decision was correct." *Peterson v. Evangelical Lutheran Good Samaritan Soc.*, 2012 S.D. 52, ¶ 13, 816 N.W.2d 843, 847 (quotations omitted). The Court must "examine agency findings" and "decide whether they were clearly erroneous in light of all the evidence." *Pirmantgen v. Roberts Cnty.*, 2021 S.D. 5, ¶ 20, 954 N.W.2d 718, 724 (quoting *Clarkson and Co. v. Harding Cnty.*, 1998 S.D. 74, ¶ 5, 581 N.W.2d 499, 501). However, "factual determinations based upon documentary evidence, such as depositions and medical records [are reviewed] de novo." *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 18, 984 N.W.2d 127, 133 (citations omitted). "When the issue is a question of law, the decisions of the administrative agency . . . are fully reviewable." *Pirmantgen*, 2021 S.D. 5, ¶ 20, 954 N.W.2d at 724 (citing *Butte Cnty. v. Vallery*, 1999 S.D. 142, ¶ 8, 602 N.W.2d 284, 287). Here, the Agreement and other documents are reviewed *de novo*, and the Department's factual findings are reviewed for clear error with due regard given to OHE's opportunity to observe witness testimony. SDCL 1-26D-8; *Williams v. S.D. Dep't of Agric.*, 2010 S.D. 19, ¶ 6, 779 N.W.2d 397, 400 (denoting the standards of review for documentary evidence and witness testimony).

ARGUMENT

I. The Management Services were taxable.

A. The structure of sales and use tax in South Dakota.

Under South Dakota law, sales tax applies to "[a]ny service . . . unless the service is specifically exempt[.]" SDCL 10-45-4. A "service" is defined as: "all activities engaged in for other persons for a fee, retainer, commission, or other monetary charge, which activities involve predominantly the performance of a service as distinguished from selling property." SDCL 10-45-4.1. "The purpose of a use tax is to 'serve[ ] as a sales tax substitute,' ensuring that all property either sold or used in South Dakota is subject to a state tax." *Ellingson Drainage, Inc. v. S.D.*

Dep't of Revenue, 2024 S.D. 8, ¶ 8, 3 N.W.3d 417, 421 (citations omitted). "If sales tax was not included in the price of a transaction involving taxable property [or services], the user of such property [or services] is then required to pay use tax." *Black Hills Truck & Trailer, Inc. v. S.D. Dep't of Revenue*, 2016 S.D. 47, ¶ 17, 881 N.W.2d 669, 674 (citations omitted). Under SDCL 10-46-2.1, a 4.2% use tax "[f]or the privilege of using services in South Dakota. . . is imposed on the person using the service[s.]" This use tax applies to any service unless the service is specifically exempt. SDCL §§ 10-45-4.1, 10-46-6. Additionally, "evidence that a service [was] used in this state [is] prima facie evidence that the service is subject to tax." SDCL 10-46-18.1.

Taxpayers requesting a refund of overpaid tax are required to establish the validity of the claim. SDCL 10-59-21. This is doubly true here, where the reason for the claimed overpayment is an exemption. The burden to establish a tax exemption lies with the taxpayer.

> Exemptions from tax are privileges accorded as a matter of legislative grace and not as a matter of tax payer right. Tax exemptions are never presumed. Additionally, statutes granting exemptions from a tax are to be construed in favor of the taxing power. Based upon these well-settled principles, the general rule has been established that the taxpayer has the burden of proving entitlement to a statutory exemption.

Matter of State Sales & Use Tax Liab. of Pam Oil, Inc., 459 N.W.2d 251, 255–56 (S.D. 1990) (citations omitted). Furthermore, taxpayers undergoing an audit are required to present, at a minimum, all documents or records evidencing the "reduction, deduction, or exemption from tax" before any administrative hearing. SDCL 10-59-7.

Midco's reasoning for the refund claimed two exemptions. First, Midco claimed the sale of service for resale exemption under ARSD 64:06:01:08.03, which provides:

> Services which are purchased by a service provider and delivered to a current customer in conjunction with the services contracted to be provided to the customer are considered to be for resale. Receipts from the sale of a service for resale by the purchaser are not subject to sales tax if the purchaser furnishes an exemption certificate.
>
> In order for the transaction to be a sale for resale, the following conditions must be present:
>
> (1) The service is purchased for or on behalf of a current customer;
> (2) The purchaser of the service does not use the service in any manner; and
> (3) The service is delivered or resold to the customer without any alteration or change.

Second, Midco claimed the Fee was exempt under SDCL 10-46-1(17), which, for purposes of use tax, excludes "the sale of . . . [tangible personal] property in the regular course of business" from definition of "Use:"

> "Use," the exercise of right or power over tangible personal property or any product transferred electronically incidental to the ownership of that property, except that it does not include the sale of that property in the regular course of business. Use also includes the use of the types of services, the gross receipts from the sale of which are to be included in the measure of the tax imposed by chapter 10-45, and the delivery or causing delivery into this state of tangible personal property or any product transferred electronically intended to advertise any product or service or promote or facilitate any sale to South Dakota residents.

See also Sioux Falls Newspapers, Inc. v. Sec'y of Revenue, 423 N.W.2d 806, 810 (S.D. 1988).

B. Comcast's Management Services were taxable.

Based on the law and record before this Court, Midco used Comcast's Management Services without providing evidence of an exemption certificate or that the Management Services were tangible personal property for resale. Given the presumption that use of a service makes it taxable, Midco did not meet its burden to provide evidence of an exemption as required. SDCL §§ 10-46-1(17), 10-46-18.1; ARSD 64:06:01:08.03. Midco's use of the Management Services alone is sufficient to find the Fee is taxable. SDCL §§ 10-45-4, 10-46-6, 10-46-18.1. Because the Fee covered taxable services not subject to any exemption, the law and record do not support the Circuit Court's finding that the Management Services were exempt.

Midco clearly used the Management Services provided by Comcast. The record shows Comcast did not solely accept the programming and pass it along to Midco but also performed other activities or services—as defined by SDCL 10-45-4.1—for Midco in exchange for the Fee. SR01 254-66; SR02 722; HT 11:16-23, 23:12-24:8, 25:18, 34:23-35:12, 48:19-23, 50:9-51:2, 52:5-11, 52:20-53:2, 53:6-13, 53:8-17, 55:6-8, 59:14-23. Midco and Comcast's employees admitted this and made it clear that Comcast's "activities involve predominantly the performance of a service as distinguished from selling property" as provided in SDCL 10-45-4.1.

SR1 260; HT 35:4-12; App. 40 (testifying "the 3 percent fee ties to Comcast's internal overhead costs associated with billing us, taking in our amounts that we pay them accounting for them, and then an allocation [for] their internal team that does negotiation of the contracts").

More specifically, the employees' testimony established Comcast provided contract negotiation services. SR01 257; HT 21:14-19; App. 37 (stating, "Q. And Midco makes use of Comcast services with respect to the management of programming services; correct? A. They're negotiating the rates for programming, yes. Q. Okay. So they use the services; correct? A. When it comes to the negotiation of programming rates, yes"). Comcast also assisted Midco in selecting programs and bundling them into packages. SR01 257; HT 22:19-23:11; App. 37 (testifying Comcast provides channel package options to Midco which Midco would otherwise have to do itself); SR01 264; HT 51:11-23; App. 42 (testifying Comcast selects and bundles tiers of channel packages with and for Midco).

The employees' testimony further evidenced Comcast's billing and accounting services. SR01 257; HT 23:16-25; App. 37 (stating Q. Can you describe what the billing and collection of programming services is? A. My understanding of that is them billing us for the programming that we buy from them so that every month we send them our subscribers, and then they run that through the math of how much we owe them for each of the channels that we're carrying based on their agreements, and then they send us a bill and we pay them, and then they take that money in and they do the accounting for that").

Their testimony also established that Comcast provides monitoring and analytics services to ensure Midco's compliance with upstream contracts. SR01 264; HT 50:9-51:1 (testifying Comcast performs analytics to ensure Midco's compliance with network agreements). Additionally, Comcast accounts for and transmits incentives from the networks to Midco. SR01 264-65; HT 52:7-53:17; App. 42 (testifying Comcast's provision of incentive collection and compliance services).

As illustrated above, the services provided go beyond just the programming itself. SR01 264-65; SR02 259-60; HT 32:18-33:7, 52:7-53:17, 55:3-8; App. 39-40, 43, 44. The Management Services were used by Midco and never reached the end consumer. SR01 259-60; HT 32:15-33-13; App. 39-40 (testifying Comcast provides negotiation services separate from what Midco's customers receive).

The Agreement itself confirms and further establishes Comcast provided services to Midco. Specifically, Midco designated Comcast as Midco's agent[5] to: (1) negotiate with networks for programming rates; (2)

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[5] The Circuit Court applied a unique test from the Restatement (Third) of Agency to determine whether Comcast acted as an agent of Midco. The test is meant to define an agency relationship for purposes of assigning duties and liabilities between a principal and agent and determining whether an agent holds the authority to bind its principal. Restatement (Third) of Agency § 1.01 cmt. G (2006). The test is inapplicable here, as the presumption of taxability applies to all services performed for another for a fee without regard to agency affiliation, authority, fiduciary duty, or liability. SDCL 10-45-4.1. Further, if the test for taxability depended solely on whether the user of a service held the

bundle channel programming packages; (3) handle billing and accounting between Midco and the networks; and (4) provide compliance monitoring services. SR01 254-66; SR02 725-26; HT 11:16-23, 23:12-24:8, 25:18, 34:23-35:12, 48:19-23, 50:9-51:2, 52:5-11, 52:20-53:2, 53:6-13, 53:8-17, 55:6-8, 59:14-23; App. 1-21, 35-48. In exchange for these Management Services, Midco paid Comcast the Fee, which was separated from the provided programming on Comcast's invoice. SR01 766-71; App. 27-32.

All the Management Services were included within the Fee. SR01 265; HT 55:3-8; App. 43 (testifying "the services to negotiate and enter into the agreements as well as the billing mechanism to the networks would be inclusive on the 3 percent fee, yes"). Just because Midco called the Fee a mere "markup" for "internal overhead" is not controlling. SDCL 10-45-4.1 is clear that "[i]n determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling." Midco's use of more than one defined service, as "distinguished from selling property," is what controls. SDCL 10-45-4.1. Comcast charged the Fee for services provided to and used by Midco and, here, those services are taxable by law absent a specific statutory exemption. Neither Midco nor the Circuit Court established any exemption.

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contractual authority to provide "interim instructions" to the service provider, then every use of any independent contractor's services would be tax exempt.

II. The Management Services were not exempt.

A. Midco did not establish an exemption under ARSD 64:06:01:08.03.

To qualify for the services for resale exemption a taxpayer must meet the requirements of the following administrative rule:

> Services which are purchased by a service provider and delivered to a current customer in conjunction with the services contracted to be provided to the customer are considered to be for resale. Receipts from the sale of a service for resale by the purchaser are not subject to sales tax if the purchaser furnishes an exemption certificate.
>
> In order for the transaction to be a sale for resale, the following conditions must be present:
>
> (1) The service is purchased for or on behalf of a current customer;
> (2) The purchaser of the service does not use the service in any manner; and
> (3) The service is delivered or resold to the customer without any alteration or change.

ARSD 64:06:01:08.03. Administrative rules carry "the force of law and are presumed valid." *Krsnak v. S.D. Dep't of Env't & Nat. Res.*, 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (citations omitted). The only taxation issue presented is whether the Fee is taxable. The Fee is related to the services provided by Comcast and not the separate programming. To establish this exemption, Midco needed to meet the following: (1) furnish an exemption certificate; (2) establish Midco purchased the Management Services for an existing customer; (3) establish Midco did not use Comcast's Management Services; and (4) establish the Management Services were resold to Midco's subscribers without alteration or change.

ARSD 64:06:01:08.03. Analysis of each element applied to the facts is supplied below. Elements (2) and (4)—addressing what was received by Midco's subscribers—are addressed together in Section II. A. 3.

1. Midco did not furnish an exemption certificate.

The service for resale exemption applies only "if" the purchaser furnishes an exemption certificate. ARSD 64:06:01:08.03: ("[r]eceipts from the sale of a service for resale by the purchaser are not subject to sales tax if the purchaser furnishes an exemption certificate"). Midco admitted it did not furnish an exemption certificate. SR01 163, ¶ 13. The Circuit Court simply disregarded this express condition in determining Midco established an exemption under the rule. As the furnishing of an exemption certificate is an express condition for exemption, no further analysis was necessary to determine the exemption was inapplicable.

This Court has previously determined exemption certificates must be provided in order to meet similar exemptions. *Sioux Falls Shopping News, Inc. v. S.D. Dep't of Revenue & Regulation*, 2008 S.D. 34, ¶ 24, 749 N.W.2d 522, 527; *Matter of State Sales & Use Tax Liab. of Pam Oil, Inc.*, 459 N.W.2d 251, 256 (SD 1990). Similarly, here, receipts are exempt from tax only "if the purchaser furnishes an exemption certificate." ARSD 64:06:01:08.03. The plain text of the rule cannot be ignored. *Jensen v. Turner Cnty. Bd. of Adjustment*, 2007 S.D. 28, ¶ 12, 730 N.W.2d 411, 415 (finding "[w]hen we interpret a statute, no wordage should be found to be surplus. No provision can be left without meaning. If possible, effect should be given to every part and every word"). Furthermore, tax exemptions are construed strictly against the taxpayer and in favor of the Department. *Carsforsale.com, Inc. v. S.D. Dep't of Revenue,* 2019 S.D. 4, ¶ 11, 922 N.W.2d 276, 280 (citations omitted). In finding the exemption certificate was unnecessary, the Circuit Court disregarded the plain language of the exemption and construed the exemption broadly in favor of Midco and against the Department. The decision should be reversed.

2. Midco used Comcast's Management Services.

The second element of the service for resale exemption under ARSD 64:06:01:08.03—that the purchaser does not use the services in any manner—was also not met. As discussed above, the record shows Midco used the Management Services paid for by the Fee. Midco's testimony establishes the Fee was tied to Comcast's costs for the billing, accounting, and negotiation services provided to Midco. SR01 254, 260; HT 11:16-23, 34:23-35:12; App. 36, 40. Testimony also established that Comcast helped Midco comply with the carriage terms of the networks, timely billed the networks, and distributed incentives from the networks to Midco. SR01 263-65; HT 48:19-23, 50:9-51:2, 52:5-11, 52:20-53:2, 53:8-17, 55:6-8; App. 41-43. For the billing and accounting services specifically, Midco sent subscriber information, and Comcast calculated what was due to the networks for each of the channels being distributed to Midco's subscribers. SR01 257-58; HT 23:12-24:8, 25:18; App. 37-38.

Comcast also sent bills to Midco to collect the appropriate amounts and performed accounting to distribute the same to various networks. *Id.*

Regarding Comcast's billing services alone, similar types of billing services were found to be taxable in *Western Wireless Corp. v. S.D. Department of Revenue*, where Western contracted to pay for Computer Sciences Corp.'s (CSC) provision of "subscriber billing services." 2003 S.D. 68, ¶¶ 2-4, 665 N.W.2d 73, 74–75. Western sent CSC cellular records which CSC translated to generate electronic bills. *Id.* CSC then routed the electronic bills to a third party for printing and mailing to Western's customers. *Id.* This Court found: "Western uses the billing service 'in South Dakota to conduct its business and is therefore subject to use tax on these services.'" *Western Wireless Corp.*, 2003 S.D. 68, ¶14, 665 N.W.2d at 77 (quoting *In Matter of Thermoset Plastics, Inc.*, 437 N.W.2d 136, 139 (SD 1991)). Further, the Court found: "[u]nquestionably, if this billing service were provided by a South Dakota based company, it would be required to collect sales tax on its fees." 2003 S.D. 68, ¶ 14, 665 N.W.2d 73, 78 (citations omitted).

The billing and accounting services Comcast provided to Midco function in much the same manner as CSC's services to Western. *See Thermoset Plastics, Inc.* 437 N.W.2d at 139 (finding Thermoset liable for use tax on an accounting firm's services utilized to conduct its plastics business). Comcast calculates subscriber data provided by Midco and performs billing, accounting, and collection services to transmit the proper amounts to the respective networks. As in *Western Wireless Corp.*, these services are used by Midco separately and apart from the programming itself.

Further, Midco has not and could not have argued it did not use the services. Rather, Midco attempts to argue they were included with the programming. That argument is contrary to the facts and testimony provided. If Comcast had not conducted these services for Midco, the programming could have still been provided. These services did not combine with or change the programming but were separate and apart from it, as acknowledged by Comcast when testifying that had it not provided these services, Midco would have had to provide them.

3. The Management Services were not purchased for nor resold to Midco's subscribers.

Finally, regarding the second element—establishing Midco purchased the Management Services for an existing customer—and the fourth element—establishing the Management Services were resold to Midco's subscribers without alteration or change—the record also cannot support that these elements were met by Midco. In fact, Midco admitted its Management Services were not passed along to Midco's subscribers. SR01 259-60; HT 32:18-33:7; App. 39-40. Midco also admitted in briefing that "Comcast did not provide any services, for billing or otherwise, <u>to Midco's customers on behalf of Midco</u>." SR04 988 (emphasis retained). The Management Services were thus for Midco's use only and not intended for nor delivered or resold to Midco's customers.

Based on the facts contained in the record and the law, Midco failed to meet the elements of the service for resale exemption provided in ARSD 64:06:01:08.03. Therefore, the Circuit Court should be reversed and the Department's Final Decision reinstated.

B. Midco did not establish an exemption under SDCL 10-46-1(17).

The other exemption Midco attempted to claim was provided within SDCL 10-46-1(17). "Use" is defined as:

> [T]he exercise of right or power over tangible personal property or any product transferred electronically incidental to the ownership of that property, <u>except that it does not include the sale of that property in the regular course of business</u>. Use also includes the use of the types of services, the gross receipts from the sale of which are to be included in the measure of the tax imposed by chapter 10-45, and the delivery or causing delivery into this state of tangible personal property or any product transferred electronically intended to advertise any product or service or promote or facilitate any sale to South Dakota residents.

SDCL 10-46-1(17) (emphasis added). In essence, the definition of "Use" exempts the sale of tangible personal property for resale in the regular course of business (the sale-for-resale exemption to use tax). *Id.* However, Comcast's services are not tangible personal property; they are services. Accordingly, the exemption simply does not apply to the services at issue in this case.

Midco attempted to argue that the 40-year-old decision, *Midcontinent Broad Co. v. S.D. Dep't of Revenue*, 424 N.W.2d 153 (SD 1988) is controlling. However, *Midcontinent Broad Co.*, dealt with whether the "syndicated programming material," such as M*A*S*H reruns for television, were exempt under SDCL 10-46-1(17). [6] *Midcontinent Broad Co.,* 424 N.W.2d at 153-54. There, this Court dealt with tax assessed upon physical reels of film, printed newspapers, or physical samples that could be seen and felt and touched. *Id.* at 154.

Contrastingly, here, no tax was assessed on the programming itself. Additionally, Midco provided no evidence that Comcast's Management Services were tangible personal property. The Agreement and the limited testimony at hearing indicated the Fee covered the Management Services used by Midco to run its business without ever reaching the end consumer. This is because the syndicated programming was not at issue, the Management Services encompassed by the Fee were. Accordingly, SDCL 10-46-1(17) and *Midcontinent Broad. Co.* are wholly inapplicable to the issues presented. Midco failed to meet the requirements for an exemption, and the Management Services remained subject to use tax. The Circuit Court's decision should be reversed and the Department's Final Decision reinstated.

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[6] At the time the case was presented, the exemption was found at SDCL 10-46-1(2).

III. Midco was not entitled to attorney fees under SDCL 10-59-34.

The Circuit Court awarded Midco attorney fees under SDCL 10-59-34. SR05 10-11; CC 7-8. The Department asserts this award was in error. The Circuit Court's decision was incorrect as a matter of law in regard to taxation. If this court, after its *de novo* review, agrees and reverses the Circuit Court, then Midco no longer qualifies for attorney fees and that portion of the decision should also be reversed.

However, should this Court affirm the Circuit Court in regard to taxation, the record below still does not reflect that Midco met its burden to establish an award of attorney fees. SDCL 10-59-34 allows for attorney fees in tax matters under the following circumstances:

> If a court determines that the losing party has taken a position in an audit, hearing or appeal that was not substantially justified, the losing party shall reimburse the other party for all court costs and attorney fees associated with the hearing or appeal. The department's reimbursable costs are limited to nonemployee costs.

This Court said a position is substantially justified: "if (1) the position taken is based in truth; (2) the theory pronounced has a reasonable legal basis; and (3) the facts alleged and the legal theory advanced are reasonably connected." *Pourier v. S.D. Dep't of Revenue & Regulation*, 2012 S.D. 11, ¶ 8, 811 N.W.2d 327, 329 (quotations omitted and cleaned up).

"Neither losing the case nor advancing a novel but credible interpretation of the law constitutes grounds for finding a position lacking in substantial justification." *Pourier*, 2012 S.D. 11, ¶ 8. Whether a party's position is "substantially justified is a "question of law" that this Court reviews "de novo." *Pourier*, 2012 S.D. 11, ¶ 7. "The burden rests on the party seeking attorney fees to show a position was not substantially justified." *Pourier,* 2012 S.D. 11, ¶ 8. Midco did not meet this burden.

The Circuit Court failed to meaningfully examine the three-prong analysis in *Pourier*, *supra*. Instead, the Circuit Court awarded attorney fees solely because, according to the Circuit Court, the Department "fiip-fiopped" its position at hearing and on appeal. Yet, the Department's position was consistent and substantially justified given the novelty of the case, the terms of the Agreement, and the testimony presented—especially considering Midco held the burden to establish a tax exemption. As set forth below, pursuant to the *Pourier* factors, the Department's position was substantially justified.

A. The Department's position was based in truth.

When examining whether a position was based in truth, the Court inquires "into the truthfulness of the facts represented to the court." *Pourier*, 2012 S.D. 11, ¶ 11. In *Pourier*, the circuit court abused its discretion in finding the Department's position was not based in truth where there had "been no allegation that the facts underlying the Department's position in the . . . litigation were false." *Id.* Here, Midco did not assert any of the facts underlying the Department's position were false. *See* SR04 968-91, 1020-31 (Midco's circuit court briefs); SR05 72

(Midco's attorney admitting the Department's auditor and witness "was quite honest"). Likewise, neither OHE nor the Circuit Court made any finding that the facts underlying the Department's position were false. The Circuit Court's decision must be reversed for failure to meet the first prong of the analysis.

The only reasoning provided by the Circuit Court addressing this prong was: "the Department fiip-fiopped in its position which leads this Court to find that the Department's position was not based in truth." SR05 11; CC 7; App. 94. The Circuit Court did not elaborate on what "positions" the Department "fiip-fiopped" on. But, importantly, this is not the standard for the first prong analysis (which deals with the underlying facts), and the record does not support the Circuit Court's summary conclusion.

The Department consistently maintained Comcast provided Midco services under the Agreement; that those Management Services were taxable absent an exemption; and the exemptions at issue had not been established by Midco as required by law. SR03 352-66 (Department's Brief in Support of Summary Judgment); SR01 171-92 (Department's Proposed Findings of Fact & Conclusions of Law); SR01 4-26 (Department's Final Decision); SR04 994-1019 (Department's Circuit Court brief); SR05 78-89 (Department's oral argument); App. 49-74, 75-87. Further, if the Department changed its legal position, the Circuit Court provided no authority indicating the Department was prohibited from doing so. Just because the court ruled against the Department or disagreed with its position does not establish sufficient grounds to find the position not substantially justified.

B. The Department's theory had a reasonable legal basis.

The Department's position—that the Fee was taxable because Comcast provided services to Midco that were not exempt—was supported by the law as set forth above. The Department's reliance on these statutes and cases provided a reasonable legal basis. The Circuit Court did not appear to directly analyze this prong of the analysis, and the Findings of Fact reflect no flndings in this regard. *See* SR05 13-14. The Circuit Court did flnd, however, that "the legal issue in this case was an issue of flrst impression and tax law is a novel practice area." SR05 11-12, 14; CC 7-8; App. 94-95. This Finding supports the Department's position has a reasonable legal basis. The Court has previously found positions substantially justifled where novel cases of flrst impression are concerned, so long as there is "some plausible basis in fact and law." *Pourier*, 2012 S.D. 11, ¶ 14 (citation omitted) (finding the circuit court erred in flnding the theory pronounced by the Department lacked a reasonable legal basis "[w]hen a case presents a question of flrst impression").

Instead of remarking on the reasonableness of the Department's legal basis, the Circuit Court stated the Department's position "flip-flopped." SR05 11; CC 7; App. 94. The Circuit Court attempted to explain that the "flip-flop" was regarding whether the Agreement was ambiguous and whether testimony could be used to analyze the transaction. SR05 11; CC 7; App. 94. This "flip-flop" regarding the Agreement's ambiguity and the Final Decision's citation to the parol evidence rule appears to be the Circuit Court's sole reason for awarding attorney fees. Yet, the use of the parol evidence rule in the Final Decision was *sua sponte* and not a result of any argument presented by the Department's counsel or its witnesses.[7] The Department never argued for its application and never raised it in any pleadings. SR03 352-66 (Department's Brief in Support of Summary Judgment); SR01 171-92 (Department's Proposed Findings of Fact & Conclusions of Law); SR04 994-1019 (Department's Circuit Court brief); SR05 78-89 (Department's oral argument); App. 75-87. [8]

The Circuit Court continued by stating the Department "forced the parties to hold an evidentiary hearing then completely disregarded that hearing via its incorrect usage of the parol evidence rule." SR05 10; CC

[7] The Department did not raise the parol evidence rule at oral argument with the Circuit Court. SR05 50-94. However, when asked about it by the court, Department's counsel noted that, even if the parol evidence rule was improperly relied on, testimony at the hearing and the Agreement supported the determination that Comcast provided taxable services to Midco. SR05 86-87.

[8] The Department asserts the Final Decision was correct, even if not all of its legal theories were. *See Culhane v. Thovson*, ___ N.W.3d ___, ¶ 58, 2026 S.D. 23 n. 5 (finding we can "affirm the ruling of the [circuit] court if it is 'right for any reason'") (quoting *Gonzales v. Markland*, 2025 S.D. 14, ¶ 19, 18 N.W.3d 658, 667).

7; App. 94. This statement is not supported by the record. When the Order for Remand was issued, the Department could not have known what testimony or evidence would be presented or whether it would vary the terms of the Agreement. Department's counsel did not control the type of evidence allowed at the hearing nor which legal theory would be relied on to allow or deny that evidence in the Final Decision. Rather, the disinterested final decision maker used the rule to explain its reasoning for the Final Decision. The Order to Remand was not initiated with the intention of later disallowing the testimony provided (or for any other improper purpose), so it was not unreasonable given the record and facts in dispute.

Furthermore, the Final Decision did cite to and rely on testimony from the hearing when determining the Fee was taxable. SR01 123-24; App. 55-56. So, the Department's decision did not "flip-flop." It remained the same from administrative hearing to this briefing.

The record before this Court reflects the Department's legal basis was consistently reasonable. It appears the Circuit Court just disagreed with the Department's position. However, the Department's position may still be "justified even though it is not correct, and . . . can be substantially (i.e. for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *N. States Power Co. v. S.D. Dep't of Revenue*, 1998 S.D. 57, ¶ 11, 578

N.W.2d, 579 at 582 (quotation omitted). The Department's legal theory was and is based on a reasonable legal basis.

C. The facts and alleged legal theory advanced were reasonably connected.

The Department's position also included facts and a legal theory that were reasonably connected and justified at hearing and on appeal. Midco did not present any argument, and the Circuit Court made no finding that Midco met this element.

The Department's position was consistent and substantially justified given the novelty of the case, the terms of the Agreement, and the testimony presented—especially considering Midco held the burden to establish a tax exemption. Neither Midco's argument, nor the Circuit Court's findings support or meet the requirements of the *Pourier* factors. The Department's position was, therefore, substantially justified. Midco was not entitled to attorney fees. The Circuit Court's decision awarding Midco attorney's fees under SDCL 10-59-34 should be reversed or, at a minimum, remanded to require the Circuit Court to apply and analyze the *Pourier* factors.

CONCLUSION

Midco failed to meet its burden of establishing an exemption by substantial credible evidence. Specifically, Midco failed to prove an exemption certificate was provided to qualify the Fee as a service for resale or that its use of the Management Services qualified as a sale of tangible personal property in the regular course of business. The services Comcast provided Midco through the imposition of the Fee were taxable services. The Department respectfully requests this Court reverse the Circuit Court's decision or, in the alternative, remand with further instructions.

THE DEPARTMENT REQUESTS ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE

I certify Appellant's Brief complies with the type-volume limitations of SDCL 15-26A-66. Appellant's Brief was prepared with Microsoft Word, contains 8,505 words, and utilizes Bookman Old Style 12-point font.

Dated this 24th day of April, 2026.

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CERTIFICATE OF SERVICE

I, Nicholas M. Ramos, certify that on the 24th day of April, 2026, I served a true copy of the foregoing Appellee Brief upon the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

MIDCONTINENT COMMUNICATIONS Appellee,

v.

SOUTH DAKOTA DEPARTMENT OF REVENUE Appellant.

App. No. 31375
32CIV25-000057

Appeal from the Circuit Court, Sixth Judicial Circuit,
Hughes County, South Dakota

The Honorable Margo D. Northrup

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The Notice of Appeal was filed on February 6, 2026.

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JURISDICTIONAL STATEMENT

Appellee concurs with the Appellant's Jurisdiction Statement and incorporates the same here.

STATEMENT OF THE ISSUES

I. WHETHER THE FEE AT ISSUE WAS A MARKUP FOR WHOLESALER SERVICES IN SECURING THE PROGRAMMING THAT WERE INEXTRICABLE FROM SUCH PROGRAMMING?

The Circuit Court found in the affirmative.

Robinson & Muenster Associates, Inc. v. S. Dakota Dept. of Revenue, 1999 SD 132, ¶ 11-12601 N.W.2d 610, 613.

Black Hills Truck & Trailer, Inc. v. S. Dakota Dept. of Revenue, 2016 SD 47, ¶ 19-23, 881 N.W.2d 669, 675.

Watertown Co-op. Elevator Ass'n v. S. Dakota Dept. of Revenue, 2001 SD 56, 12-14627 N.W.2d 167, 172.

II. WHETHER THE EXEMPTIONS FOUND IN SDCL § 10-46-1(17) AND ARSD 64:06:01:08.03 APPLY TO THE TRANSACTION AT ISSUE?

The Circuit Court found in the affirmative.

SDCL § 10-46-1(17)

Administrative Rule 64:06:01:08.03

Midcontinent Broad Co. v. S.D. Dep't of Revenue, 424 N.W.2d 153 (SD 1988)

In re Sioux Falls Newspapers, 423 N.W.2d 806, 810 (S.D. 1988)

III. WHETHER MIDCO IS ENTITLED TO ATTORNEY FEES PURSUANT TO SDCL § 10-59-34?

The Circuit Court found in the affirmative.

SDCL § 10-59-34

Pourier v. S.D. Dep't of Revenue & Regulation, 2012 S.D. 11, ¶ 8, 811 N.W.2d 327, 329.

IV. <u>WHETHER MIDCO IS ENTITLED TO STATUTORY INTEREST PURSUANT TO SDCL § 10-59-24?</u>

The Circuit Court found in the negative.

SDCL §10-59-24

Northern States Power Co. v. South Dakota Dep't of Revenue, 1998 SD 57, ¶ 9-12, 578 N.W.2d 579, 582 (S.D. 1998).

<u>PRELIMINARY STATEMENT</u>

The Department's Appendix shall be cited to herein as "App." Midco's Appendix is referred to "Midco App." Other materials in the record referred to herein will cite to the "AR stamp on the bottom left of the page.

<u>STATEMENT OF THE CASE</u>

This matter is a dispute between a taxpayer, Midcontinent Communications ("Midco"), and the South Dakota Department of Revenue (the "Department") over certain tax payments made by Midco on a markup fee ("Fee") paid to Comcast Cable Communications, LLC ("Comcast"), a wholesaler, for television programming Midco resold to its cable subscribers. The Department mistakenly believes that the Fee was for separate services independent of and in addition to the programming purchased, and it refused to issue a refund on that basis. Midco initiated a contested case requesting a refund, and the matter was presented to South Dakota's Office of Hearing Examiners, with Hearing Examiner Catherine Williamson presiding.

The parties initially submitted the case to Hearing Examiner Williamson on stipulated facts and cross-motions for summary judgment as the Department agreed at that time that there were no issues of disputed facts in this case. Hearing Examiner Williamson found in Midco's favor and proposed that the Department issue the requested refund. The Department instead remanded the case for an evidentiary hearing to determine the nature of the Fee that was taxed. An evidentiary hearing was conducted, and Hearing Examiner Williamson, with the benefit of witness testimony, again found in Midco's favor, finding that the Fee was inextricable from the programing purchased and that the entire transaction was a tax-exempt sale for resale. Again, the hearing examiner found that the subject tax that had been paid by Midco should be refunded. The Department again rejected the hearing examiner's findings regarding the refund, finding that the testimony presented at the evidentiary hearing that the Department ordered should not have been considered by Hearing Examiner Williamson. The Department denied Midco's request for interest and fees based on the same in a February 25, 2025 Final Decision and Order ("Final Decision").

On February 26, 2025, Midco appealed the Final Decision to the Sixth Judicial Circuit of South Dakota, with the Honorable Margo D. Northrup presiding. The parties again briefed the issues, submitted the entire record to the Circuit Court, and argued their positions at an October 21, 2025 hearing. After review of the entire record and hearing argument, the Circuit Court reversed the Department's determination that the fee was taxable. The Circuit Court further found that Midco was entitled to attorneys' fees for the evidentiary hearing and appeal under SDCL § 10-59-34. She declined to award interest on the refund amount as set forth in SDCL § 10-59-24.

On February 6, 2026, the Department filed notice of this appeal. On February 25, 2026, Midco filed a notice of review regarding the denial of Midco's request for interest on the refund amount. Filed contemporaneously herewith is Midco's Motion for Appellee's Attorney Fees pursuant to SDCL § 15-26A-87.3.

STATEMENT OF THE FACTS

In 2000, Midco executed a "Satellite Services, Inc. Programming Supply Agreement" with Satellite Services, Inc., now Comcast. (App. at pp. 01-30.) In 2010, Midco executed an amendment to the agreement (collectively, the 2000 agreement and 2010 amendment are referred to herein as the "Agreement"). (*Id.*)

Through the Agreement, Comcast sold to Midco syndicated cable programming, referred to as the "Programming Service" in the Agreement ("Programming"). (*Id.* at p. 2.) Comcast invoiced Midco for the wholesale cost of obtaining the syndicated programming from affiliate suppliers, plus a 3% administrative fee on the cost of such programming. (*Id.* at p. 27.) The administrative fee payment was a markup to cover Comcast's overhead on the negotiation and procurement of programming and compensates Comcast for such overhead. (*Id.*) The syndicated programming was the sole object of the Agreement, which again was paid for at its wholesale costs plus a 3% fee or markup. (*Id.*)

The Department audited Midco for the period of August 2015 to July 2018. (AR 1262.) Midco hired Transaction Tax Consulting Group ("TTCG") to review Midco's records for any overpayments of tax. (Midco App. at pp. 1-6, AR 1519-1524.) Upon such review, TTCG discovered that Midco had improperly paid and the Department improperly collected taxes on the Fee. (*Id.*) Upon this discovery, a partner with TTCG, Diane Seidule, wrote two memos to the Department on behalf of Midco in which she opined that Midco is due a refund of the tax it paid on the syndicated programming it purchased from Comcast wholesale and resold to its cable subscribers. (*Id.*)

The amount of overpayment was determined to be $239,535.50. (AR 1979, ¶ 9.) Midco filed an amended return requesting reimbursement of this amount. (*Id.*) The Department has declined to issue a refund in this regard, and on March 19, 2021 Midco initiated this contested case. (AR 2189-2208.)

At the beginning of the contested case, the parties agreed to submit the case to Hearing Examiner Williamson on cross-motions for summary judgment, which were briefed in the spring of 2022. (AR 1696-1705.) On March 30, 2023, Hearing Examiner Williamson issued a proposed decision in Midco's favor, recommending the Department refund the requested amount. (*Id.*)

On April 19, 2023, the Secretary of the Department disqualified himself from issuing a final decision based on his knowledge of the case and appointed Director Yaeger from the Motor Vehicle Division of the Department. (AR 1690.) Director Yaeger, pursuant to an Order for Remand dated May 24, 2023, found that "it is not clear what, if anything, the 3% administrative fee charged by Comcast to Midco entails or involves" and remanded the matter to Hearing Examiner Williamson to conduct an evidentiary hearing on such issue. (AR 1686-1687.) On February 9, 2024, such hearing was held. (Midco App. at pp. 7-32, Transcript from February 9, 2024 hearing ("HT").) There, Hearing Examiner Williamson heard witness testimony and was presented with documentary evidence related to the issue set forth in the Order for Remand. (*Id.*)

A. The parties to the Agreement, Midco and Comcast, testified clearly and consistently that the Fee was a nontaxable markup inextricable from the Programming.

i. Markup

Lisa Gilbertson, vice president of finance with Midco's managing partner, Midcontinent Media Inc., testified that under the Agreement, Midco purchased programming from Comcast that it turned around and resold to Midco's subscribers. (HT at pp. 8:19-10:11.) The Programming was purchased exclusively for or on behalf of Midco's customers, and Midco does not use the Programming or receive benefit from it in any way other than reselling it to its customers. (*Id.*) The Programming was not altered in any way before being delivered to customers. (*Id.*)

Ms. Gilbertson testified that there two components to the Agreement as follows:

> Yes. The first – the first component is the wholesale cost of the programming to Comcast so it's what [Comcast is] paying. And then the second component is a markup to cover Comcast's internal costs associated with the sale and negotiation of the programming that [Midco] buys from [Comcast].

(HT at pp. 10:22-11:4.) When asked what the Fee covered, Ms. Gilbertson continued, "[s]o that's a markup to cover Comcast's internal overhead costs associated with the sale and negotiation of the programming…that we buy." (*Id.* at p. 11:16-23.) This negotiating and securing was inextricable from the programing itself as there would be no need for Comcast to negotiate and secure the programing for Midco if Midco was not going to buy it. (HT at p. 39:8-16.)

Ms. Gilbertson testified that the Fee is the same type of markup Midco pays to other wholesalers. (HT at pp. 40:17-41:11.) To her knowledge, the Department has never taxed or attempted to tax any of these other markup fees. (*Id.* at p. 41:12-15.)

Maureen Hines, the Executive Director of Comcast's Programming Accounting Group, also testified that the Fee was a markup. When asked to describe the Fee, with the Department's counsel at that time noting that it was described as "administrative fee" in the Agreement and a "management fee" on an invoice, she testified that "[i]t's really just a markup for the services that [Comcast is] providing for [Midco] acquiring the content via our agreements." (*Id.* at pp. 48:5-14, 57:1-15.)

Ms. Hines further testified, just as Ms. Gilbertson had done, that the Fee could not be separated out from the Programming itself, explaining that "[t]he 3 percent is completely dependent on the programming cost." (*Id.* at p. 57:6-17.) Midco would not have paid the Fee to Comcast if Midco was not also purchasing the Programming. (*Id.*)

ii. No Other Services or Benefits

The parties to the Agreement both testified consistently that the Fee is only a markup for Comcast's services in negotiating and securing the programming, and that the Fee was not for any other services or benefit to Midco. (*Id.* at p. 12:10-13.) Ms. Gilbertson testified that Midco did not receive any marketing services from Comcast under the Agreement. (*Id.* at p. 12:7-9.) When the Agreement discusses the marketing of the Programming, it is related to marketing restrictions Comcast is passing down from its agreements with the networks that make up the Programming. (*Id.* at pp. 41:16-42:18.)

Ms. Hines agreed that Comcast does not provide goods or services to Midco other than the Programming and Comcast's services are inextricably related to securing such programming. (*Id.* at p. 56:6-14.) Such Programming and related services have no independent value to Midco other than providing Midco an ability to resell the Programming to customers. (*Id.* at p. 56:18-21.)

Ms. Hines also testified that Comcast did not provide marketing services, explaining that the purchase agreement provides limitations on marketing programming to ensure compliance with network requirements and that there is no "actual marketing or promotions around it."(*Id.* at pp. 53:3-54:2.) To her knowledge, there were no promotional materials that flowed from Comcast to Midco. (*Id.*)

B. The Fee was only a nontaxable markup inextricable from the Programming.

i. Department Assumed "Management Fee"

Jennifer Aker, a tax auditor with the Department who was involved in the decision to tax the Fee, testified that the Department's initial decision was based solely on an invoice describing the fee as a "management fee" and the Department then making an assumption that this meant that the Fee was, at least in part, for taxable management services Comcast was providing for Midco under the Agreement. (*Id.* at pp. 77:9-13, 80:18-81:12.) At that time, the Department had not reviewed the Agreement. (*Id.* at p. 77:4-8.) When asked to explain how the Department came to its initial understanding that the Fee was a taxable management fee, she testified, "[b]ecause that's what the invoice indicated." (*Id.* at p. 81:5-12.) Based on this assumption, the Department taxed the Fee. (*See id.* at p. 82:11-24.)

During the audit process, Midco contested the taxability of the Fee and sought a refund in that regard. In response to the refund request, the Department began discussing the nature of the Fee internally. (*Id.* at p. 73.) There was considerable confusion and contradiction in such internal discussions (*See* Midco App. At pp. 32-87, AR 1445, 1413, 1400.)

At this time, Midco retained TTCG to, in part, provide an opinion as to whether the tax on the Fee was proper. (HT at pp. 12:15-15:15.) The Department still had not reviewed the Agreement at this time. (HT at p. 77:4-8.) On September 11, 2020, Ms. Seidule with TTCG responded to an email inquiry to her from the Department regarding the taxability of the fee, in which she informed the Department of her expert opinion that "[a]ll of these contracts are wholesale contracts to authorize Midcontinent to resell these services to its subscribers." (Midco App. at p. 33, AR 1385.) On September 23, 2020, Brian Hertel, Ms. Aker's supervisor at that time, sent an email to Ms. Aker agreeing with TTCG's opinion that the Fee "would all be for resale." (*Id.* at p. 32, AR 1380.)

The Department never attempted to contact Midco or Comcast to discuss the Fee, which Ms. Aker testified would have been helpful in making its taxability determination. (HT at pp. 91:13-92:16.) Despite the opinions to the contrary, including from Ms. Aker's supervisor, Brian Hertel, and without any real investigation into the essence of the

Agreement, the Department ultimately declined to issue a refund for the Fee because the "[invoice] said management fee." (*Id.* at pp. 80:18-81:12.)

ii. No Dispute the Fee was a Markup

Ms. Aker testified that the Department does not tax markups. (HT at p. 83:6-11.) She explained, "[t]ypically, markups are part of the cost so, no, they would not be taxed." (*Id.* at p. 94.)

Ms. Aker did not dispute that Ms. Gilbertson and Ms. Hines would know the nature of the Fee and the essence of the Agreement better than the Department. (*Id.* at p. 71:7-10.) Ms. Aker heard the testimony of Ms. Gilbertson and Ms. Hines explaining that the Fee is strictly a markup on the Syndicated Programming. (*Id.* at p. 81:20-24.) Ms. Aker conceded that the Department did not have any superior knowledge or evidence to contradict the testimony of Ms. Gilbertson and Ms. Hines. (*Id.* at p. 91:2-9.) When Ms. Aker was asked if she disagreed with their testimony "that the markup fee, the 3 percent markup fee is a markup upon the programming services provided pursuant to this agreement", she responded:

> A. I – I guess no.
>
> Q. Okay.
>
> A. I guess I don't know – I mean, based on what they said, it was a markup. I don't know what their – what they're actually doing. I mean, all I can base it on is what they said.
>
> Q. And you don't have any evidence to dispute what they said, do you?
>
> A. No, that that is in the contract, no.
>
> Q. And if it is, in fact, a markup on syndicated programming serviced, it would not be taxed. Is that fair?
>
> A. Typically, markups are part of the cost so, no, they would not be taxed.

(*Id.* at p. 93:23-94:18.)

Ms. Aker also could not dispute that there were no marketing, management, or other services that were in addition to or extricable from the services involved in securing the Programming. (*Id.* at pp. 101:16-102:17.) Based on the testimony she heard at the hearing, she wondered if the Department would have exempted the Fee initially. (*Id.* at p. 85:4-12.)

On October 30, 2024, Hearing Examiner Williamson, after having weighed the evidence presented at the hearing, ruled in Midco's favor and again issued a proposed decision recommending a refund to Midco. (AR 0033-43.) On January 28, 2025, Director Yaeger again rejected the proposed decision and recommendation from Hearing Examiner Williamson and issued the Final Decision denying Midco's refund request. (App. 3.) Director Yaeger found that 1) the Agreement was unambiguous and the parol evidence rule should be invoked to ignore or exclude the evidence presented at the hearing outside of the Agreement; and 2) that there were additional services in the Agreement that were taxable. (*Id.*)

In the Circuit Court's December 12, 2025 Memorandum Decision ("Decision"), it first addressed the Department's incorrect position that Midco failed to overcome statutory presumptions of taxability and that such presumptions should be considered in the Circuit Court's review. (App. 4 at p. 16.) It correctly found that, "to the extent either statute imposes a presumption, Midco has provided substantial and credible evidence to rebut the presumption." (*Id.*)

Next, the Circuit Court found that the Department erred in applying the parol evidence rule and that such application would be contrary to this Court's direction to the Department to examine the essence of the transaction. (*Id.* at pp. 16-19.) In framing the Department's position, the Circuit Court observed that the Department is essentially arguing that there are two agreements at issue; one for the purchase of the Programming and one for the purchase of "management services." (*Id.*) The Circuit Court further observed that for this to be the case, Comcast would have to be acting as Midco's agent in obtaining, managing, and accounting for the programming Comcast obtained from network providers. (*Id.*) In this context, the Court analyzed principles of agency under the Restatement (Third) of Agency. Under this analysis, the Circuit Court correctly found that Comcast was acting as a wholesaler in securing the Programming and not performing a separate service as an agent of Midco. (*Id.*)

The Circuit Court also agreed with Hearing Examiner Williamson in finding that the Programming meets the tax exemptions found in SDCL § 10-46-1(17) and ARSD 64:06:01:08:03. (*Id.* at pp. 18-20.) It held, "[i]n accordance with the rationale in *Midco I* and *In re Sioux Falls Newspapers*, 423 N.W.2d 806, 810 (SD 1988), Midco is purchasing tangible property in the regular course of business for resale." (*Id.*) On ARSD 64:06:01:08:03, the Circuit Court found that Midco met the three conditions for the transaction to be a sale for resale, and rejected the Department's attempt "to add a fourth condition, the issuance of an exemption certificate." (*Id.*)

In applying the "predominant activity test" and distinguishing the facts here from those in the cases on which the Department relies, the Circuit Court concluded:

> This case is distinguishable because the fee does not represent a separate and distinct service provided by Comcast to Midco. The fee in this case is a mark-up, the cost of doing business, and a way for Comcast to make a profit. As such, the fee is tax exempt. The testimony of Ms. Gilbertson and Ms. Hines and the language of the contract establish that what Midco received from Comcast was programming. While Comcast is certainly performing a service to the industry by negotiating and bundling the product, this service is simply being used to define what Midco is purchasing. Comcast, rightfully, should be paid for the product and whatever actions they took to secure the product for sale. If you take away the programming from the equation, there is nothing Comcast is providing to Midco above and beyond the programing. This makes the fee an inextricable part of the sale of programming.

(*Id.*)

I. STANDARD OF REVIEW

The standard of review set forth in that section of the Department's Appellate Brief is generally correct. In reviewing an appeal from an administrative hearing this Court "accord[s] great weight to the findings and inferences made by the hearing examiner on factual questions." *Pirmantgen v. Roberts Cnty.*, 2021 SD 5, ¶ 13, 954 N.W.2d 718, 724. These findings of fact are "reviewed under a clearly erroneous standard." *Peterson v. Evangelical Lutheran Good Samaritan Soc'y*, 2012 SD 52, ¶ 15, 816 N.W.2d 843, 846–49. The "deference underlying our clear error standard…recognizes the institutional advantage of a fact finder to hear and see the witnesses and weigh the relative merits of their testimony." *Pham v. Smithfield Foods*, 2025 SD 41, ¶ 45, 24 N.W.3d 735, 745. Such deference was acknowledged by this Court in a telling parenthetical in the analogous case *Sioux Falls Newspapers, Inc. v. Sec. of Revenue*, 423 N.W.2d 806 (S.D. 1988), which is discussed below. There, this Court noted, "[a]n administrative hearing was held on April 15th, 1986. Secretary (*who did not attend the hearing*) entered an order upholding the assessment." *Id.* at 807 (emphasis added) (finding the Secretary's assessment improper). De novo review of the facts is only appropriate when the review is of "factual determinations on the basis of documentary evidence, such as depositions or medical records." *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 18, 984 N.W.2d 127, 133 (citations omitted).

Here, however, in the argument section of the Appellate Brief, the Department argues as if the transcript from the administrative hearing is documentary evidence that this Court can review de novo. This is incorrect. Simply converting the live testimony of witnesses at a trial or hearing to a written transcript does not make such testimony documentary evidence to be reviewed de novo. If that were the case, jury verdicts could be reviewed de novo once the trial testimony is reduced to a written transcript.

Hearing Examiner Williamson made her findings of fact on the testimony she heard, not records or deposition transcripts. This Court is not in the same position as her to hear the confidence in which Midco's witnesses testified as to the fee simply being a markup or the hesitation and distress from the Department's witness attempting to justify the Department's position. As such, the Agreement and other documentary evidence in the record can be reviewed de novo, but the factual findings as to the essence of the transaction based on the testimony at the hearing must be reviewed under a clearly erroneous standard. The Department was and this Court is required to "accord great weight to the findings and inferences made by the hearing examiner on factual questions." *Clarkson and Co. v. Harding Cnty.*, 581 N.W.2d 499, 501-02 (S.D. 1998).

Finally on the standard of review, the Department continues to argue or imply that Midco still has a burden to rebut presumptions of taxability. As the Circuit Court clearly explained, Midco has already met that burden with the introduction of substantial, credible evidence.

II. ARGUMENT

In 1988, the Supreme Court of South Dakota determined that the syndicated programming that Midco resold to its subscribers was "tangible personal property." *Midcontinent Broad Co. v. S.D. Dep't of Revenue*, 424 N.W.2d 153, 155 (SD 1988) ("*Midco I*"). The Court further held that the entire transaction was exempt as a sale for resale under what is now codified at SDCL § 10-46-1(17). A few years later, South Dakota adopted an Administrative Rule, which made it clear that resold "services" were also exempt from taxation as a sale for resale, and used programming resold to cable subscribers as an example in the notes on the Rule. ARSD 64:06:01:08.03, Notes.

Here, the entire transaction at issue is for syndicated programming that was purchased and resold, and is therefore exempt under SDCL § 10-46-1(17). To the extent such transaction involved any services, the same are also exempt under the resold-services Rule. Therefore, the tax paid on the Fee should be refunded.

A. SDCL § 10-46-1(17)

Pursuant to SDCL §§ 10-45-2 and 10-45-4, State sales tax is due on the gross receipts from the sale of tangible personal property or the provision of a service. The tax is assessed on "tangible personal property purchased for use in this state." SDCL § 10-46-2. There is an exemption for this tax where the property is resold by the purchaser without "use" of the property. SDCL § 10-46-1(17) ("Use" does "not include the sale of [tangible personal] property in the regular course of business.").

This exemption was interpreted twice by this Court in 1988 in regard to syndicated materials purchased and resold. In both cases, the Court found that the transactions were exempt as resales of tangible personal property. *In re Sioux Falls Newspapers*, N.W.2d at 810; *Midco I*. As explained first in *Sioux Falls Newspapers*:

> We understand [SDCL § 10-46-1(17)] to mean that use tax, consistent with its complementary relationship to sales tax, generally applies to retail transactions and not to transactions where items are purchased for resale. This interpretation is supported by the fact that SDCL 10-46-2 makes direct reference to SDCL 10-45-2 - the complementary sales tax provision applicable to retail sales.

423 N.W.2d at 810. Applying the applicable statutes, the Court there found that "the purchase of syndicated materials by [the newspaper] was a nontaxable resale under SDCL § 10-46-1(2) [now SDCL § 10-46-1(17)]."

Later that year, the South Dakota Supreme Court again addressed the issue, this time in regard to a Midco syndicated programming agreement. *Midco I*. The Court there found that "[j]ust as the syndicated materials in *Sioux Falls Newspapers* were deemed to be tangible personal property, so are the syndicated materials presented in this case." *Midco*

I. at 155. Next, the Court addressed whether the payments were taxable. *Id.* As to this issue, the Court found:

> These same basic arguments were made in *Sioux Falls Newspapers, supra.* We noted there that the syndicated materials therein were purchased by the [Newspaper] with the intent to reproduce them in the newspaper to sell to readers. We held that the syndicated materials were purchased for resale in the ordinary course of the [Newspaper's] business, and that this was a nontaxable resale use under SDCL 10-46-1(2).
>
> Although there may be some dissimilarities between the newspaper and the broadcasting business, we believe that, in both cases, syndicated materials are an integral part of the final product (here, broadcast time). Broadcast time is made up of news, information, entertainment and advertising. Syndicated programming is an integral component of radio and television stations.
>
> We conclude that the purchase of the syndicated material by Midcontinent was a nontaxable resale use under SDCL 10-46-1(2). Such materials are an essential part of broadcasting and are purchased for resale in the ordinary course of business.

Id.

Importantly, the findings in *Sioux Falls Newspapers* and *Midco I* were not decided on how the payments were invoiced. Rather, the determination was based on the nature of product being purchased – syndicated materials.

The Department attempts to distinguish *Midco I* based on the physical form of the syndicated programming that Comcast delivered to Midco to resell. *Sioux Falls Newspapers* addressed this and makes it clear that the physical form of the syndicated material is irrelevant. *Sioux Falls Newspapers, Inc.* at 810. There, this Court held:

> It is not necessary for us to determine whether intangible *information* may be severed from the tangible medium of transmission. The items involved in this assessment are not raw information, but the tangible end product of an individual's skills. Columns, features, and editorials such as those written by Art Buchwald, Ann Landers, Erma Bombeck, Sylvia Porter, George Will, and Ellen Goodman, are not just rote reporting of current news events; they are the finished product of a writer's skills. Likewise, the comics are the finished product of an artist's or writer's skills. Therefore, we hold that these syndicated materials are tangible personal property.

Id.

Midco I adopted this finding in holding that syndicated programing is also tangible property without any discussion as to the medium on which such property is delivered to Midco. While it may be true that the *Midco I* programming was delivered in a medium that can be felt and touched such as physical reels of film, this was in no way part of this Court's analysis in determining that the syndicated programming was tangible property. Such analysis was not needed because earlier that year this Court determined that the finished product of an artist's skill was syndicated material, regardless of the medium of transmission. Whether a broadcast of an episode of SportsCenter on ESPN or an Ann Lander's column in the newspaper, it is syndicated material subject to the same sale-for-resale exemption for tangible property.

Here, the transaction at issue is for syndicated programming, bought by Midco from a wholesaler, Comcast, to resell to Midco's cable subscribers. This is substantively the same transaction that the Court in *Midco I* determined to be a nontaxable resale under then SDCL § 10-46-1(2), now 10-46-1(17). The fact that the markup paid to Comcast through an administrative fee was paid on a separate invoice from the cost of the programming does not change the substance of this transaction. For good reason, there is no legal authority suggesting otherwise. Therefore, the transaction at issue here is entirely a sale for resale exempt pursuant to SDCL § 10-46-1(17).

B. ARSD 64:06:01:08.03

For tax purposes:

> "Service" means all activities engaged in for other persons for a fee, retainer, commission, or other monetary charge, which **activities involve predominantly the performance of a service as distinguished from selling property**. In determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling. For the purposes of this chapter services rendered by an employee for his employer are not taxable.

SDCL § 10-45-4.1 (emphasis added).

In 1991, South Dakota promulgated ARSD 64:06:01:08.03, which states:

> Services which are purchased by a service provider and delivered to a current customer in conjunction with the services contracted to be provided to the customer are considered to be for resale. Receipts from the sale of a service for resale by the purchaser are not subject to sales tax if the purchaser furnishes an exemption certificate.
>
> In order for the transaction to be a sale for resale, the following conditions must be present:
>
> (1) The service is purchased for or on behalf of a current customer;
>
> (2) The purchaser of the service does not use the service in any manner; and
>
> (3) The service is delivered or resold to the customer without any alteration or change.

Importantly, the Notes to this provision of the code provide as an example:

> John Customer purchases a subscription to a movie channel from Fantastic Cable Company. Fantastic purchases the right to view the movie channel from Hollywood Movies, a cable movie channel subscription service. The services provided by Hollywood Movies are purchased for resale as Fantastic does not use the service in any way.

ARDS 64:06:01:08.03, Notes.

As the Circuit Court found, the Department attempts to add a fourth condition for a sale to be for resale, which would require the purchaser to furnish an exemption certificate. (AR 0017.) This is a misstatement of the Rule, however, as it expressly provides only the three conditions that need to be met in order for a service to be exempt as a sale for resale. The furnishing of an exemption certificate is only required to avoid the initial subjugation to tax and only relates to the *seller* of the resold product. Here, the seller would be Comcast, and its tax obligations are not at issue here. The issue here is whether the three resale conditions are met so that the exemption applies and a refund to Midco is warranted. As the Circuit Court and Hearing Examiner Williamson correctly found, such conditions are met here. Midco purchased the Programming for its customers. All of Comcasts efforts that were described as services in the Agreement were for the procurement of the programming and were not used by Midco. Midco did not alter the Programming.

Midco I holds clearly that syndicated programming is tangible personal property which is tax exempt as a sale for resale, and there are no ancillary taxable activities here that involve predominantly the performance of a service as distinguished from the purchase of such programming. The promulgation of ARSD 64:06:01:08.03 provides even more tax-exempt cover for this type of transaction even if it did involve "services." The Rule specifically notes a wholesale transaction for cable programming as meeting the criteria for an exempt service under this section.

Midco purchased the programming from Comcast on behalf of Midco's subscribers. Midco then, through its distribution facilities, delivered the programming, without using or changing it, to its subscribers. Therefore, this exemption would also apply to the extent the transaction at issue involved "services."

C. The Fee is for Comcast's efforts in securing the Programming for Midco to resell and are inextricable from the transaction for the purchase of the Programming.

The Fee is a markup to pay Comcast for its efforts in securing the Programming that Midco resells. To ensure compliance with Comcast's agreements with the affiliate suppliers that create the Programming, the Agreement sets forth certain services for Comcast, and not Midco, to perform in relation to securing the Programming. These were the typical efforts of a wholesaler in securing a product and certain limitations and restrictions on Midco related thereto were included in the Agreement to ensure that Comcast could control its contracts with network providers. As the Circuit Court found, this understanding of the "Management Services" in the Agreement is clear from its plain language and is reinforced by the testimony as to the essence of the Agreement. Only the Department fails to understand this.

In determining taxability, the Court must look at the essence of the contract. *Robinson & Muenster Associates, Inc. v. S. Dakota Dept. of Revenue,* 1999 SD 132, ¶ 11, 601 N.W.2d 610, 613. This Court, in *Robinson & Muenster,* in support of its affirmance of the Circuit Court's finding of non-taxability, found that the Department's auditor "made no investigation regarding the essence of the transaction, and merely examined bare invoices". *Id.* As a matter of settled law, the Department has a duty to conduct an investigation into the "essence of the transaction" in determining whether any part of such transaction is taxable. *Black Hills Truck & Trailer, Inc. v. S. Dakota Dept. of Revenue*, 2016 SD, 47 ¶ 21, 881 N.W.2d 669, 675; *Sioux Falls Newspapers,* 423 N.W.2d at 811; *Watertown Co-op. Elevator Ass'n v. S. Dakota Dept. of Revenue*, 2001 SD 56, ¶ 26, 627 N.W.2d 167, 172.

In examining the essence of the transaction, to determine whether a service included in a transaction with a tax-exempt product is separately taxable, the "predominant activity test," based on the definition of "service" set forth in SDCL § 10-45-4.1, applies. *Watertown Co-op. Elevator Ass'n v. S. Dakota Dept. of Revenue*, 2001 SD 56, ¶ 12, 627 N.W.2d 167, 172. Such test examines whether the transaction predominately involves the sale of tangible personal property rather than the performance of a service. *Nash Finch Co. v. S.D. Dep't of Revenue*, 312 N.W.2d 470, 472 (S.D. 1981) (finding the additional fee on the products purchased was not taxable).

Here, the analysis as to the predominant activity in the transaction at issue is not difficult. In looking at the contract and testimony regarding the essence of the transaction, it is absolutely clear that the predominant activity in the transaction was the purchase of tangible personal property, the Programming, to be resold to Midco's subscribers. The testimony is undisputed that the services described in the Agreement were either not provided or were simply restrictions on Midco relating to Comcast's wholesaler services necessary to secure the product. Midco received no benefit from the same other than the predominant object of the transaction, the Programming. As such, the Fee was a markup, and the Department concedes that markups on products resold by a retailer are not taxable.

The Department's witness, Jennifer Aker, was put in the difficult position of defending the Department's careless taxability determination based on a mere review of invoices. She confirmed that, contrary to the South Dakota Supreme Court's holding in the *Robinson & Muenster* case, the Department initially assessed the tax based solely on a review of the invoices. (AR 201, HT at p. 81:5-12.) Ms. Aker also testified that the Department later refused to refund the tax based solely on its reading of the Agreement and without ever attempting to talk to Midco or Comcast about the essence of the transaction at issue in the Agreement. (AR 201, HT at pp.91:13-92:16.) She was also asked if the Department had any evidence to show that the Fee was anything other than an exempt markup or whether there were any taxable services that could be separated from the services involved in securing the Programming. (AR 204, HT at p. 93:23-94:18.) After some uncomfortable pauses and visible consternation during cross-examination, which hearing examiner Williamson personally observed[1], Ms. Aker eventually conceded that the Department had no such evidence. (*Id.*)

Again, the Department ignores this testimony and attempts read separate services into the transaction based on Sections 2.2 and 2.3 of the Agreement. The Department also ignores the plain language of these sections, which are clearly services related to

[1] "[D]eference is given to... a hearings examiner when a witness personally appears before him and can thereby see and hear the witness and give that witness credibility based upon the intangibles of appearance, forthrightness, and demeanor on the stand." *Lawler v. Windmill Restaurant,* 435 N.W.2d 708, 713 n.3 (S.D. 1989).

Comcast's efforts in securing the Programming from its suppliers (ESPN, CNN, etc.). These sections provide that, like any wholesaler, Comcast makes decisions regarding how it obtains the Programming from its suppliers, which includes the management, selection, billing, and collection of the Programming. Once the Programming was secured by Comcast, that was the end of these services for the purposes of the Agreement with Midco and Midco received no benefit from these services. Comcast, like every wholesaler for any good, performs services to obtain the best products at the best prices suitable to its customers who are retailers like Midco. In exchange for performing these services, which are inextricable from the sale of the good itself, the wholesaler charges a markup. The Fee at issue in this case, according to the undisputed testimony, was nothing more than Comcast's markup. The undisputed evidence in this case further establishes that wholesaler markups are not taxable. As such, the entire transaction, including the mark-up Fee, is a sale for resale and is exempt. Therefore, the Court should order that Midco be refunded.

D. Attorneys' Fees

SDCL § 10-59-34 provides that "[i]f a court determines that the losing party has taken a position in an audit, hearing or appeal that was not substantially justified, the losing party shall reimburse the other party for all court costs and attorney fees associated with the hearing or appeal." This Court said a position is substantially justified: "if (1) the position taken is based in truth; (2) the theory pronounced has a reasonable legal basis; and (3) the facts alleged and the legal theory advanced are reasonably connected." *Pourier v. S.D. Dep't of Revenue & Regulation*, 2012 S.D. 11, ¶ 8, 811 N.W.2d 327, 329 (quotations omitted).

The Circuit Court properly recognized that, from the outset, the Department "flip flopped" between substantially unjustified positions in an effort to rationalize its initial cursory determination that the Fee was taxable. The Department acknowledged that it based its initial determination of taxability merely upon an examination of invoices from Comcast. Prior to making this determination, the evidence established that the Department had not:

1. Spoken to anyone at Midco or Comcast about the nature or essence of the Fee;
2. Reviewed the Programming Agreement which established the Fee;
3. Reviewed the South Dakota Supreme Court opinion in *Midco I* setting forth that syndicated programming services are not subject to sales or use tax; or
4. Consulted with the Department legal staff or any other legal counsel about the taxability of the Fee.

Moreover, once Audit Supervisor Hertel reviewed the Agreement, he determined that the Fee was not subject to tax and that a refund should be issued. The Department ignored his determination. The Department furthermore ignored the expert opinion of TTCG that the Fee was not taxable. The Department first agreed to have the taxability issue decided on briefs with no facts in dispute. When that decision came back against it, the Department refused to accept it. Instead, the Department remanded the matter back to Hearing Examiner Williamson for an evidentiary hearing about the nature of the Fee. Following that evidentiary hearing, Hearing Examiner Williamson again found in favor of Midco and the Department again refused to accept such decision arguing, in part, that the evidence **<u>that it ordered to be taken</u>** should be ignored under the parol evidence rule. The Department has now abandoned its parol evidence rule arguments, and rightfully so because there is no reasonable basis to reject Hearing Examiner Williamson's proposed decision under this theory.

This Court directed the Department to treat the Programming under the Agreement as a sale for resale in *Midco I.* The Department ignored this instruction here.

This Court directed the Department to look at the essence of the Agreement. The Department ignored this direction and based its taxability determination on a glance at an invoice. After testimony at the evidentiary hearing was overwhelmingly in Midco's favor, the Department improperly relied on the parol evidence rule to exclude it in making its final taxability determination. Now on appeal, the Department is taking a third bite at the apple in arguing that this Court should apply presumptions of taxability that Midco has already rebutted and review the testimony de novo without considering the great weight of Hearing Examiner Williamson's ability to hear the same. This conduct demonstrates the Department's positions here were based on an extreme bias toward taxability and not based on truth. The Circuit Court recognized this in awarding attorneys' fees. This Court should affirm the same.

E. Statutory Interest

Midco's entitlement to interest on the refund is purely a legal question as to the interpretation of SDCL §10-59-24. As such, this Court can review the Circuit Court's incorrect interpretation of the statute de novo.

"A recovery credit or a recovery refund <u>shall</u> include interest at the same rate the taxpayer would be charged, except a recovery of an overpayment, resulting from a taxpayer's error, may not include interest." SDCL §10-59-24 (emphasis added). The rate a "taxpayer would be charged" is addressed at SDCL §10-59-6 which states that the applicable interest rate would be 1% per month or 12% per year.

The South Dakota Supreme Court addressed the mandatory nature of a taxpayer's right to interest on an overpayment in *Northern States Power Co. v. South Dakota Dep't of Revenue*, finding:

> "When 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning." *Fritz v. Howard Twp.*, 1997 SD 122, P15, 570 N.W.2d 240, 242 (citations omitted). Statutory "words and phrases ... must

> be given their plain meaning and effect." *In re AT&T Information Systems*, 405 N.W.2d 24, 27 (SD 1987). "When the language of a statute is clear, certain, and unambiguous, there is no reason for construction, and [this Court's] only function is to declare the meaning of the statute as clearly expressed." *Petition of Famous Brands, Inc.*, 347 N.W.2d at 885.
>
> ***
>
> From the broad terms the Legislature used in enacting SDCL 10-59-24, **it is evident that interest must be paid on these tax refunds**. Any other interpretation would contradict the plain language of the statute.

578 N.W.2d 579, 582 (S.D. 1998) (emphasis added).

On November 12, 2018, Midco submitted to the Department a Request for Refund seeking, in part, a refund of the use tax that it paid on the Fee. The Department has, since that date, refused to issue the requested refund. Accordingly, interest should run from that date.

Midco is not requesting interest from the date the tax was erroneously paid and improperly collected. Midco is requesting interest from the date it notified the Department of such payments and requested a refund of the same. After that date, the Department's refusal to refund the overpayment is not based on any taxpayer error but is instead based on the Department's own erroneous and unfounded belief that the Fee is for separate taxable services.

As is evident from the briefing herein, this Court has spilled considerable ink clarifying and resolving conflicts in the State's taxation statutes and regulations. SDCL §10-59-24 is among those statutes requiring such clarification. The inherent problem with its language is that all refunds, by their very nature, arise from erroneous overpayment of taxes. While the law is clear that interest is due on the refund of taxes improperly collected by the Department (*Standing Rock Sioux Tribe v. Janklow*, 103 F. Supp. 2d 1146 (D.S.D. 2000), there is no distinguishable difference between such improper collection by the Department and an erroneous overpayment by a taxpayer. Both arise from an initial payment from the taxpayer.

Here, the Department improperly collected taxes on the Fee. During the audit, Midco became aware of such improper collection and demanded a refund. If this was deemed an erroneous overpayment under SDCL §10-59-24, it would defeat the entire purpose of the statute along with this Court's findings in *Northern States Power Co.* requiring interest to be paid on refunds. It would also allow the Department to delay making refund payments, which again could all be considered erroneous overpayments, without penalty.

SDCL §10-59-24 should be clearer on what it means as to an erroneous overpayment, but as this Court noted in *Midco I*, that is a problem for the State and the Department. There, this Court instructed:

> This is the second case in recent months in which Department, through their audit and legal departments, has attempted to stretch and strain the tax statutes in order to attempt to tax various media entities. At oral argument, their counsel agreed that these statutes are neither sufficiently clear nor specific as to their specific intent to tax these entities in the requested manner. Would it not be more appropriate for Department to seek their remedy in the legislature, which creates the tax and its exemptions, rather than attempt to obtain their revenue through resort to judicial fiat? We believe so.

Midco I at 155.

If the Department and State do not want to pay interest on certain refunds, the Legislature needs to rewrite the statute to make clear what is an "erroneous overpayment" as opposed to an improperly collected tax payment. The ambiguity in the statute should not be used against Midco, the taxpayer here. After all these years, statutory interest should be paid to remedy the Department's improper collection of taxes on the Fee and its erroneous initial determination that the Fee was taxable. That is the purpose of SDCL §10-59-24, and it should be enforced here.

III. CONCLUSION

For all the foregoing reasons, Midco respectfully request that this Court affirm the Circuit Court's decision as to Midco's entitlement to its requested refund and attorneys' fees and reverse the Circuit Court's denial of interest on the refund.

Dated this 8th day of June, 2026

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CERTIFICATE PURSUANT TO SDCL 15-26A-66 and 15-26A-14

I, Daniel R. Fritz, hereby certify that the *Appellee's Brief* in the above-entitled matter complies with the typeface specifications of SDCL § 15-26A-66 and the length specifications in SDCL § 15-26A-14. The *Appellee's Brief* contains 39,116 characters not including spaces or 7,520 words and that said *Appellee's Brief* does not exceed thirty-two (32) pages and was typed in Times New Roman font, 12 point.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of June, 2026, two (2) true and correct copies of the foregoing *Appellee's Brief* were served via South Dakota Unified Judicial System's Odyssey File & Serve upon the following:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31375

THE SOUTH DAKOTA DEPARTMENT OF REVENUE,

Petitioner and Appellant,

v.

MIDCONTINENT COMMUNICATIONS,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGO D. NORTHRUP
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed February 6, 2026

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31375

THE SOUTH DAKOTA DEPARTMENT OF REVENUE,

Petitioner and Appellant,

v.

MIDCONTINENT COMMUNICATIONS,

Respondent and Appellee.

PRELIMINARY STATEMENT

The South Dakota Department of Revenue (the Department) submits the following Reply Brief and uses the same references as in its initial brief. Midcontinent Communications' (Midco) brief will be referenced as "Midco Br." followed by the appropriate page numbers. The Department relies on the Statement of the Case, Statement of the Facts, and Standard of Review as set forth in its initial brief.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER COMCAST'S MANAGEMENT SERVICES WERE TAXABLE?

The Circuit Court determined "The transaction at issue between Comcast and Midco is one for syndicated programming and not services. Accordingly, the Fee is exempt." SR05 24; App. 95.

SDCL 10-45-4

SDCL 10-45-4.1

II.

WHETHER MIDCO FAILED TO MEET ITS BURDEN TO ESTABLISH A TAX EXEMPTION?

The Circuit Court determined "The programming meets the exemptions found in SDCL 10-46-1(17) and ARSD 64:06:01:08.03." SR05 22; App. 94.

SDCL 10-46-1(17); ARSD 64:06:01:08.03

Midcontinent Broad Co. v. State, Dep't of Revenue, 424 N.W.2d 153 (SD 1988)

III.

WHETHER MIDCO FAILED TO MEET ITS BURDEN TO ESTABLISH AN ATTORNEY FEES AWARD UNDER SDCL 10-59-34?

The Circuit Court determined "Midco is entitled to attorney fees but not interest." SR05 23; App. 94.

SDCL 10-59-34

Pourier v. S. Dakota Dep't of Revenue & Regulation, 2012 S.D. 11, 811 N.W.2d 327, 329

IV.

WHETHER STATUTORY INTEREST WAS UNAVAILABLE UNDER SDCL 10-59-24?

The Circuit Court determined "Midco is not entitled to interest." App. 95.

SDCL 10-59-24

ARGUMENT

The Department incorporates and relies on its arguments presented in its initial brief and makes the following additional argument in response to Midco's Brief.

The key question in this matter is whether Comcast provided taxable services to Midco separate from the television programming. The record shows Comcast did. Midco's employees repeatedly testified that Midco paid Comcast the Fee in exchange for Comcast's Management Services (negotiation, accounting, billing, and compliance monitoring services). App. 37-43; HT 21:8-24:5, 32:15-33:13, 35:4-12, 50:9-52:17 (testimony indicating the Fee covers Comcast's negotiation, management, billing, accounting, and compliance services). The Agreement between Midco and Comcast also indicates Midco purchased the right to use these Management Services from Comcast. App. 1-10.

Presumably conflating the Management Services with the television programming, Midco[1] has continuously argued the television programming should be exempt from tax, relying on *Midcontinent Broad. Co. v. State, Dep't of Revenue*, 424 N.W.2d 153 (S.D. 1988). However, the Department is not and has not sought to tax the television programming. After years of Midco paying use tax on the Fee Comcast charged for performing services provided separate from the television programming, Midco requested a refund claiming this Fee is exempt from tax. At no time relevant to this appeal has Midco paid tax on the television programming; and at no time relevant to this appeal has the Department assessed tax against Midco for the television programming. As Midco now

[1] Midco's Brief makes arguments but rarely cites to caselaw or the record to support its arguments. Midco Br. 17; *Shevling v. Major,* 2026 S.D. 27, ¶ 51, 35 N.W.3d 833, 850.

claims an exemption from tax for the Fee, Midco must establish an exemption. The record reflects Midco failed to do so, and, therefore, the Circuit Court's decision should be reversed.

I. The Management Services were taxable.

The law for determining whether a service is taxable is simple: "'Service' means <u>all activities engaged in for other persons for a fee</u>, retainer, commission, or other monetary charge[.]" SDCL 10-45-4.1 (emphasis added). Here, both the Agreement and the testimony at hearing establish that Midco paid Comcast a separate 3% Fee in exchange for Comcast's provision of contract negotiation, management, billing, accounting, and compliance monitoring activities for Midco. Because Midco paid Comcast separately for these and other (e.g. television program selection and bundling) activities, they are taxable services under South Dakota law.

Midco asserts "[t]he parties to the Agreement both testified consistently that the Fee is only a markup <u>for Comcast's services</u> in negotiating and securing the programming, and that the Fee was not for any other services or benefit to Midco." Midco Br. 7 (emphasis added). However, Gilbertson testified that Comcast also provided billing and accounting services in addition to negotiation services. App. 37, 40; HT 21:8-24:9, 35:4-9.[2] Hines testified Comcast also provided compliance

[2] These services are provided to Midco as part of Comcast's ongoing commitments under the terms of the Agreement. App. 2-4.

monitoring, incentive distribution, and channel packaging services in addition to the negotiation, billing, and accounting services. App. 42-43; HT 50:9-55:8. Whether Midco called the Fee for these services a "markup" or an "administrative fee," the services Midco paid for and used in exchange for the Fee (negotiation, management, bundling, billing, accounting, and compliance services) are not the same as the end-consumer's purchase of the limited ability to simply watch and consume programming like ESPN. Additionally, South Dakota law does not recognize a "markup" or "overhead" exemption, rather the definition of a taxable service broadly encompasses "all activities engaged in for other persons for a fee[.]" SDCL 10-45-4.1. The services themselves were paid for and used by Midco and are, therefore, taxable.

Midco attempts to argue that the "predominant activity test" should be used to determine whether the Management Services are separately taxable. Midco Br. 10-11. This argument was not raised by Midco prior to its appeal and should be deemed waived.[3] SR01 72-251. Whether the activities covered by the Fee "involve predominantly the performance of a service as distinguished from selling property" under SDCL 10-45-4.1 was never truly at issue.

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[3] "It is a general rule of procedure that an appellate court does not address issues parties raise for the first time on appeal[.]" *Shevling*, 2026 S.D. 27, ¶ 48, 35 N.W.3d at 849 (citations omitted).

There has been no need to determine whether the Management Services should be classified as a service or as property because it has been clear since the hearing that Midco paid Comcast the Fee in exchange for Comcast's provision of services, as distinguished from the sale of tangible personal property. Midco Br. 7 (claiming the Fee was "a markup on Comcast's services" (emphasis added)). These services Midco purchased from Comcast were separately delineated and not included within the cost of the programming, so there was no need to determine whether they were predominantly tangible personal property. App. 27-28.

Even under the predominant activity test, it is clear the Fee Midco paid Comcast was predominantly for services rather than the sale of property. Comcast disclaimed any right or title to the programming, which is supplied by upstream networks at cost to Midco. App. 8-9. Of course, Midco could, itself, purchase the programming from upstream providers. However, as explicitly stated in the Agreement, Midco instead sought to have Comcast perform those activities on Midco's behalf. App. 1. Midco authorizing Comcast to perform these activities in exchange for the Fee is the predominant purpose of the Agreement and the transaction.

Furthermore, under SDCL 10-45-4.1, the "principal objective or ultimate objective of the contracting parties shall not be controlling." Thus, despite all of Midco's arguments, it does not matter whether the cost of Comcast's services is labeled as "overhead" or as "markup" by

Comcast or Midco's employees. It does not matter whether the cost of these services is later passed down to Midco's customers. It does not matter if other wholesalers provide similar services that are not paid for when selling their products wholesale. The simple fact remains that—in this transaction—Midco did pay Comcast to perform the Management Services for Midco, and those services are, therefore, taxable without an exemption. The Circuit Court's decision finding otherwise is contrary to the law, the Agreement, and the testimony at hearing.

II. The Management Services were not exempt.

A. Midco did not establish an exemption under ARSD 64:06:01:08.03.

The Circuit Court also erred in determining Midco established an exemption under ARSD 64:06:01:08.03. The plain terms of the rule are to be construed strictly in the Department's favor. *Matter of State Sales & Use Tax Liab. of Pam Oil, Inc.*, 459 N.W.2d 251, 255 (S.D. 1990). The rule plainly states "[r]eceipts from the sale of a service for resale by the purchaser are not subject to sales tax if the purchaser furnishes an exemption certificate." ARSD 64:06:01:08.03 (emphasis added). Under the rule, two categories of conditions must be met for a transaction to be tax exempt.

First, if the conditions for a sale for resale have been met then the receipts for the transaction may be exempt "if" (and only if) a purchaser furnishes an exemption certificate. ARSD 64:05:01:08.03. This requirement for Midco to furnish an exemption certificate for a sale-for-resale transaction is separate and apart from the three conditions necessary for a transaction to be considered a sale for resale. ARSD 64:06:01:08.03. The requirement is substantive and is intended to protect the seller or service provider (i.e. Comcast).

For context, under ARSD 64:06:01:08.02 and 64:06:01:08.04, exemption certificates are also required to purchase ingredients or component parts exempt from tax. The examples indicate an exemption certificate is a substantive prerequisite to qualify for these exemptions:

> (1) ABC Manufacturing builds garden tractors. It does not have the capacity to paint the finished product, and hires Rainbow Paint Company to do so. The services of Rainbow are an integral part of the manufacturing process, and may be purchased by ABC for resale <u>provided ABC furnishes an exemption certificate to Rainbow</u>.
>
> (2) Ace Mechanic contracts to repair a wrecked automobile. Ace repairs the damage except for the radiator which is taken to Sam's Radiator Service. Sam fixes the radiator and is paid by Ace. Ace then bills the owner of the vehicle for the repair work, which charge includes the sum paid to Sam. <u>The amount paid by Ace to Sam would not bear tax if Ace gave Sam an exemption certificate</u>. The entire amount paid by the owner to Ace is subject to tax.

ARSD 64:06:01:08.02, Examples (1)-(2) (emphasis added).

> (1) Al's Used Cars, Inc., hires Ace Mechanic to install a rebuilt carburetor in one of its cars which is to be sold. Ace's fees are not subject to tax <u>if Al gives Ace an exemption certificate</u>.

ARSD 64:06:01:08.04, Example (1) (emphasis added).[4]

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[4] Notably, the paint and repaired parts in these examples are physically integrated into and become a component of the vehicles, whereas Comcast's services are not integrated into the television programming.

Similarly, here, the plain terms of ARSD 64:06:01:08.03 allow a transaction to be exempt from tax only "if the purchaser furnishes an exemption certificate." Midco and the Circuit Court erroneously ignore this second substantive exemption certificate requirement, rendering it superfluous. *Jensen v. Turner Cnty. Bd. of Adjustment*, 2007 S.D. 28, ¶ 12, 730 N.W.2d 411, 415 (finding "[w]hen we interpret a statute, no wordage should be found to be surplus. No provision can be left without meaning. If possible, effect should be given to every part and every word" (citations omitted)); *Carsforsale.com, Inc. v. S. Dakota Dep't of Revenue,* 2019 S.D. 4, ¶ 11, 922 N.W.2d 276, 280 (finding exemptions should be construed strictly in favor of the taxing power); Midco Br. 17. The plain language of the rule should control.

Under the second category of conditions necessary to meet the exemption, a transaction must meet three conditions to be considered a sale for resale

(1) The service is purchased for or on behalf of a current customer;
(2) The purchaser of the service does not use the service in any manner; and
(3) The service is delivered or resold to the customer without any alteration or change.

ARSD 64:06:01:08.03. Here, the plain terms of the Agreement and the testimony at hearing indicate Midco paid Comcast the Fee in exchange for Comcast's agreement to negotiate contracts at favorable rates for Midco; bundle programming; and perform billing, accounting, and compliance monitoring for Midco. App. 2-3, 37-43; HT 21:8-24:5, 32:15-

33:13, 35:4-12, 50:9-52:17. These services were not passed down unchanged to Midco's customers but instead used by Midco to run its business. App. 36-37, 39-40, 42-43; HT 21:8-24:5, 30:20-24, 32:15-33:7, 50:9-51:1, 55:3-8.

Importantly, Midco's subscribers do not pay for or receive the same Management Services that Midco pays for and receives from Comcast in exchange for the Fee. *Id.* Under the Agreement, Comcast disclaimed any right, title, or interest in the programming it purchases for Midco, and Midco reimburses Comcast for the television programming at cost. App. 8-9. Midco's subscribers then purchase the right to view the television programming from Midco through a separate end-user agreement and acceptable use policy. SR01 258-59, SR02 754-59; HT 28:2-36:18, Exhibits 18-19. Testimony at hearing indicates Midco's subscribers pay for and obtain only a limited right, subscription, or license (subject to certain conditions) to view television programming hosted through Midco's cable network under Midco's subscriber agreements. App. 39-40; HT 29:19-33:7. Midco's employee agreed these rights were not the same as the rights Midco obtains from Comcast pursuant to the Agreement. App. 39; HT 30:20-24.

Midco did not meet the requirements for an exemption under ARSD 64:06:01:08.03. The rights Midco receives to the programming are not passed down to the customer unchanged. The Circuit Court disregarded this evidence in finding that Midco resold the Management

Services to its subscribers without alteration or change and should be reversed.

B. Midco did not establish an exemption under SDCL 10-46-1(17).

The exemption under SDCL 10-46-1(17) applies to tangible personal property purchased for resale in the regular course of business. Despite Midco's arguments to the contrary, this claimed exemption simply does not apply under these facts. Again, the taxability of the television programming is not at issue, only the services Comcast provided to Midco. This distinction is important given Midco's reliance on *Midco I* and *Sioux Falls Newspapers.* Midco Br. 14-15.[5]

This Court stated in *Midco I* and in *Sioux Falls Newspapers* that the syndicated materials (physical, tangible film reels and physical papers) were the finished product of an artist's skills. *Midcontinent Broad. Co. v. State, Dep't of Revenue*, 424 N.W.2d 153, 154 (S.D. 1988) (stating "syndicated programs were delivered to broadcasters in some type of media form (film or tape), which form is tangible personal property"); *Sioux Falls Newspapers, Inc. v. Sec'y of Revenue*, 423 N.W.2d 806, 811 (S.D. 1988) (explaining delivered physical papers ("syndicated

[5] Midco mistakenly asserts that in these prior cases "the Court determined that the finished product of an artist's skill was syndicated material, regardless of the medium of transmission" and that "[w]hether a broadcast of an episode of SportsCenter on ESPN or Ann Lander's column in the newspaper, [the television programming] is syndicated material subject to the same sale for resale exemption for tangible property." Midco Br. 15-16.

materials") were photographed and transferred to newsprint). The services at issue here are not syndicated materials, television programming, cannisters of film, printed newspaper articles, or the finished product of an artist's skills—they are business activities (services) Comcast performs for Midco. Other than the apparent assertion that the television programming in *Midco I* was deemed tangible personal property, Midco fails to cite to anything in the record establishing the Management Services here were tangible personal property. Thus, *Midco I* and *Sioux Falls Newspapers* are not applicable to the issues in this case, and the Department is not here challenging those decisions.

Midco did not meet its burden to establish this exemption. Midco failed to establish the Management Services are tangible personal property resold to its subscribers in the regular course of business. Accordingly, the plain language of SDCL 10-46-1(17) has not been met. The Circuit Court clearly erred in finding that either or both exemptions were met and must be reversed.

III. Midco was not entitled to attorney fees under SDCL 10-59-34.

The Circuit Court awarded Midco attorney fees solely because, according to the Circuit Court, the Department "flip-flopped."[6] That

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[6] The Circuit Court decided the Department's order for remand and rejection of the OHE's decision was untruthful or improper. App. 94-95. However, the Department was authorized and required by law to accept, modify, reject, or remand the OHE's proposed decisions. SDCL 1-26D-6; SDCL 1-26D-8; SDCL 1-26D-9. The Department is the agency with final

finding goes against the record of the proceedings and does not comply with the required analysis of the *Pourier* decision. The OHE recognized the Department's position was substantially justified in denying Midco's motion for attorney fees and interest at the administrative level. SR01 92; AR 21. On appeal, the record shows the Department has maintained its position that the Fee encompassed taxable services as supported by the Agreement and Midco's own statements App. 2-3, 37-43; HT 21:8-24:5, 32:15-33:13, 35:4-12, 50:9-52:17. The Department's position was based on credible testimony presented at hearing and the plain language of the Agreement reviewable de novo by this court. *Id.*

The Circuit Court failed to meaningfully examine the three-prong analysis in *Pourier* before awarding attorney fees. Neither the Circuit Court nor Midco provided evidence that the Department presented facts that were untrue, nor legal authority indicating the Department's position was not substantially supported by the law. On the contrary, the Circuit Court recognized the legal issues here were novel and of first impression. App. 97. As the Department's position was not only substantially justified but also correct, awarding Midco attorney fees was an abuse of the Circuit Court's discretion and should be reversed.

Midco's response does little to bolster the Circuit Court's opinion. Midco Br. 21-22. Midco makes no attempt to show the Department's

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decision authority regarding tax matters. SDCL 10-1-41; s*ee also* SDCL Chap. 10-59.

position was based upon false evidence. Moreover, Midco fails to perform the *Pourier* analysis or provide any citations to the record to support its factual assertions. Midco Br. 21-23.

Instead, Midco attempts to belittle the Department by criticizing its investigation of Midco's request for refund. Midco Br. 21-22. For instance, Midco falsely proclaims "the evidence established that the Department had not . . . spoken to anyone at Midco or Comcast about the nature or essence of the Fee"[7] or "Reviewed the Programming Agreement which established the Fee."[8] Midco Br. 22. Midco also asserts the Department "never attempted to contact Midco or Comcast to discuss the Fee." Midco Br. 8.[9] These allegations are both disingenuous and irrelevant.[10]

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[7] Akers testified she "conversed through either phone conference or email . . . back and forth" with Midco's representative and Midco's tax consultants. App. 46; HT 69:15-70:2.

[8] Akers testified she reviewed the pre-amendment Agreement, various invoices, and memos supplied by Midco's tax consultant. App. 45-46; HT 67:16-69:6. Midco refused to provide the full Agreement until after the refund was denied and Midco requested a hearing. SR03 351-61; AR 1999-2000.

[9] Akers testified she communicated with "Kristine Mihm" at Midco and "Diane Seidel" at Midco's consultant's office to work through Midco's refund request. App. 45; HT 67:21-68:4.

[10] Midco's attempts to discredit the Department undermine its own position. For instance, Midco's assertion that there was "considerable confusion and contradiction in [the Department's] internal discussions" before the refund was denied is unsupported, irrelevant, and confiicts with Midco's alternative claim that there was not "any real investigation into the essence of the Agreement." Midco Br. 8. Similarly, Midco claims the Department did not review the Agreement in one sentence but argues

Midco attempts to mischaracterize this action as a Department collection action rather than an unsupported request for refund.[11] Midco Br. 24-25; SR03 61. As the matter at issue was a request for refund initiated by Midco, it was Midco's burden to establish an exemption and not the Department's burden to disprove one. ***Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc. v. S. Dakota Dep't of Revenue***, 2002 S.D. 145, ¶ 11, 654 N.W.2d 779, 783–84 (citations omitted); SDCL 10-59-7; SDCL 10-59-8. Midco held the duty to provide records both in response to the Department's audit and to support its exemption request. SDCL 10-59-3; SDCL 10-59-7. Considering Midco's inability or refusal to present evidence to support its claimed exemptions,[12] the Department had no duty to investigate further. ***Matter of State Sales &***

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one sentence later that the Department's "Audit Supervisor Hertel reviewed the Agreement." Midco Br. 22. These competing theories do not support an award of attorney fees in Midco's favor especially considering it is the Department's Final Decision that is under review not statements made by Department employees prior to that determination.

[11] For instance, Midco argues that, under ***Robinson & Muenster Associates, Inc. v. S. Dakota Dep't of Revenue***, 1999 S.D. 132, 601 N.W.2d 610, the Department had a duty to investigate the "essence of the transaction" in determining whether a part of the transaction was taxable. However, Midco holds the duty to establish any exemption here.

[12] Prior to remand for the evidentiary hearing, the Department and Midco's arguments centered around Midco's refusal to provide the Agreement as amended to the Department until well after Midco's request for hearing. SR03 72-73. In an about-face, Midco now attempts to mischaracterize their refusal to provide key evidence (i.e. the amended Agreement) to support their request for refund as the Department's failure to investigate. Midco Br. 21-22.

Use Tax Liab. of Pam Oil, Inc., 459 N.W.2d 251, 257 (S.D. 1990) (finding "the Department was not obliged to consider" records untimely submitted by the taxpayer). The Department's reliance on this position is based on well-established law, which Midco has yet to refute by citation to any authority. *Id.*; *Graceland Coll. Ctr.*, 2002 S.D. 145, ¶ 11, 654 N.W.2d at 783–84 (citations omitted).

The testimony at hearing indicates the Department's auditor based her opinion to deny Midco's request for refund upon reviewing the invoices (indicating Midco itself believed the management fee was taxable in South Dakota), various memos from Midco and Midco's tax consulting group, and the Agreement. App. 45-46; HT 67:16-69:6. These steps were more than adequate considering Midco held the burden to establish an exemption. Midco's confiicting contentions and unsupported conclusions to the contrary are meritless.[13]

Midco alternatively argues the Department's position was unreasonable because "This Court directed the Department to treat the Programming under the Agreement as a sale for resale in *Midco I*." Midco Br. 22-23. As previously explained, the programming is not at issue here,

[13] Citing only the hearing transcript, Midco alleges the Department's auditor displayed "uncomfortable pauses and visible consternation during cross examination which Hearing Examiner Williamson personally observed." Midco Br. 20 (citing HT 93:23-94:18). These purported observations and subjective conclusions are nowhere to be found in the record, were not contained in the OHE's Proposed Decision, and cannot be considered here on appeal.

so *Midco I* and *Sioux Falls Newspapers* do not apply. The Circuit Court also recognized the issue here is unique and has not previously been addressed, so *Midco I* would be of little assistance to the Department under the circumstances presented here. App. 97.

Midco also argues the parol evidence rule was used to exclude evidence. Midco Br. 23. However, as previously explained, Midco and the Circuit Court overstate the Department's reliance on the parol evidence rule. SR01 222-34 (Department's Brief before OHE). Despite the rule being cited in the Department's Final Decision, the testimony at hearing and the Agreement both support the finding that taxable services were provided by Comcast to Midco in exchange for the Fee. The Department has always maintained this position.

Midco finally argues the Department's assertion that certain presumptions should apply was "dishonest" and "biased." Midco Br. 21-22. However, Midco does not indicate which presumptions it is referring to or provide citation to contrary authority. It is unclear how legal presumptions demonstrate the Department's untruthfulness or bias.

The Department's position has been consistent and substantially justified given the novelty of the case, the terms of the Agreement, and the testimony presented—especially considering Midco held the burden to establish a tax exemption. Neither Midco's argument nor the Circuit Court's findings support or meet the requirements of the *Pourier* factors. The Department's position was, therefore, substantially justified. The

Circuit Court's decision awarding Midco attorney's fees under SDCL 10-59-34 should be reversed or, at a minimum, remanded to require the Circuit Court to apply and analyze the *Pourier* factors.

IV. Statutory interest is unavailable under SDCL 10-59-24.

Under SDCL 10-59-24, "A recovery credit or recovery refund shall include interest at the same rate the taxpayer would be charged, except a recover of an overpayment, resulting from a taxpayer's error, may not include interest." Here, interest is not available because Midco voluntarily paid use tax to the Department on the Fee. SR02 672; AR 1450 (Midco's tax consultant stating, "Midco, therefore, improperly self-assessed tax on the payments of the administrative fee and is entitled to a refund"). Thus, any overpayment was due to Midco's error, not the Department's, and interest was not awarded to Midco on this basis by the OHE, the Department, or the Circuit Court.

Midco attempts to argue, without citing to any evidence or authority, that it should still be awarded statutory interest because "the Department improperly collected taxes on the Fee." Midco Br. 25. "Failure to cite relevant supporting authority [on appeal] is a violation of SDCL 15-26A-60(6) and is deemed a waiver." *Shevling v. Major,* 2026 S.D. 27, ¶ 51, 35 N.W.3d 833, 850 (quoting *Kostel v. Schwartz*, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363, 377. Midco failed to establish it can receive interest.

CONCLUSION

The record shows Midco paid Comcast for taxable services under South Dakota law. Midco failed to meet its burden to establish an exemption for the Management Services. Specifically, Midco failed to prove an exemption certificate was provided; failed to qualify the Fee as a service for resale; and failed to establish its use of the Management Services qualified as a sale of tangible personal property. Any award of attorney fees or interest was inappropriate, and the Department respectfully requests this Court reverse the Circuit Court's decision or, in the alternative, remand with further instructions.

THE DEPARTMENT REQUESTS ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE

I certify Reply Brief of Appellant complies with the type-volume limitations of SDCL 15-26A-66. Reply Brief of Appellant was prepared with Microsoft Word, contains 4,305 words, and utilizes Bookman Old Style 12-point font.

Dated this 8th day of July, 2026.

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CERTIFICATE OF SERVICE

I, Nicholas M. Ramos, certify that on the 8th day of July, 2026, I served a true copy of the foregoing Appellant's Reply Brief upon the following:

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