No. 35299

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

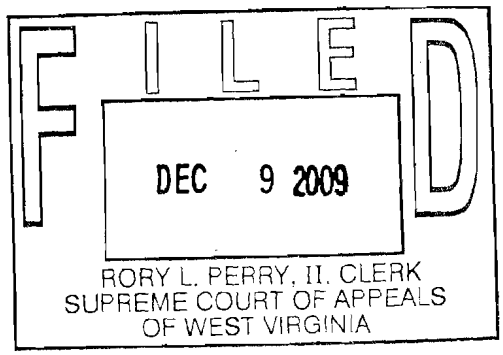
DAVID KOKOCHAK,

Plaintiff below, Appellee,

v.

WEST VIRGINIA STATE
LOTTERY COMMISSION

Defendant, Appellant.



WEST VIRGINIA STATE LOTTERY COMMISSION'S BRIEF

SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL
Attorney General's Office
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2522

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTS 1

III. STANDARD OF REVIEW 2

IV. ARGUMENT 4

A. West Virginia Code of State Rules § 129-7-2.2 does not affect private rights. 5

B. West Virginia Code of State Rules § 12–7-2.2c is valid under the Administrative Procedures Act is entitled to *Cheuron* deference. 7

C. Applying *Cheuron* deference clearly supports the validity of the West Virginia Code of State rule § 129-7-2.2c 11

V. CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995) 2, 3, 4, 7, 11

Alliance for Community Media v. F.C.C., 529 F.3d 763 (6th Cir. 2008) 8

American Trucking Ass'ns v. United States, 344 U.S. 298 (1953) 9

Arnold Agency v. West Virginia Lottery Com'n, 206 W. Va. 583, 526, S.E.2d 814, (1999) . . . 6

Bukhtia v. Bureau of State Lottery, 475 N.W.2d 475 (Mich. Ct. App.1991) 6

California State Grange v. National Marine Fisheries Serv., 620 F. Supp. 2d 1111 (E.D. Cal. 2008) 4

CB&T Oper. Co., Inc. v. Tax Comm'r, 211 W. Va. 198, 564 S.E.2d 408, (2002) 2

Cf. American Civil Liberties Union of Tennessee v. Bredesen, 441 F.3d 370 (6th Cir. 2006) . 6

Cheney R. Co., Inc. v. I.C.C., 902 F.2d 66 (D.C. Cir. 1990) 7, 8

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837,1984) 4, 7, 8, 9, 11

Cities v. West Virginia Econ. Dev. Auth., 214 W. Va. 277, 588 S.E.2d 655 (2003) 5, 11

Clinchfield Coak Co. v. Federal Mine Safety and Health Review Comm'n, 895 F.2d 773, (D.C. Cir. 1980) 9

Club Association v. Wise, 293 F.3d 723 (4th Cir. 2002) 9, 10, 11

Director, Office of Work. Comp. Programs v. Bethlehem Mines Corp., 669 F.2d 187 8

Entery Corp. v. Riverkeeper, Inc. 129 S. Ct. 1498 (2009) 10, 11

Farley v. Worley, 215 W. Va. 412, 599 S.E.2d 835 (2004) 7, 8

Financial Planning Association v. S.E.C., 482 F.3d 481 (D.C. Cir. 2007) 8

International Union, United Mine Workers of America v. Mine Safety and Health Admin., 407 F.3d 1250 (D.C. Cir. 2005) 3

Iowa Network Serv., Inc. v. Qwest Corp., 385 F. Supp. 2d 850 (S.D. Iowa 2005) 8

Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th 1988) 4

Kikalos v. C.I.R., 190 F.3d 791 (7th Cir. 1999) 3, 4

Lansing Dairy, Inc. v. Espy, 39 F.3d 1339 (6th Cir. 1994) 10

Lincoln Sav. and Loan Association v. Federal Home Loan Bank Board, 856 F.2d 1558 (D.C. Cir. 1988) 9

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007) 3

Mourning v. Family Publ. Serv., Inc., 411 U.S. 356 (1973) 10

National Fisheries Institute, Inc. v. Mosbacher, 732 F. Supp. 210 (D.D.C. 1990) 9

Newport News Shipbuilding and Dry Dock Co. v. Howard, 904 F.2d 206 (4th Cir. 1990) . . . 10

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) 8

Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524 (1991) 10

Paxton v. State Department of Tax and Revenue, 192 W. Va. 213, 451 S.E.2d 779 (1994) . . . 6

Quesenberry v. Estep, 142 W. Va. 426, 95 S.E.2d 832 (1956) 10

R.V.H., Third, Inc. v. State Lottery Commission, 716 N.E.2d 127 (Mass. Ct. App. 1999) 6

Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc., 166 W. Va. 775, 277 S.E.2d 613 (1981) 2

State v. Euman, 210 W. Va. 519, 558 S.E.2d 319 (2001) 7

Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685 (D.C. Cir.1991) 8, 9

Tworek v. United States, 46 Fed. Cl. 82 (2000) 5

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) 8, 9

Virginia Agricultural Growers Association v. Donovan, 579 F. Supp. 768 (W.D. Va.1984), 756 F.2d 1025 (4th Cir.1985) 4

Whetsel v. Network Prop. Serv., 246 F.3d 897 (7th Cir. 2001) 8

STATUTES

W. Va. Code § 29-22-1 1

W. Va. Code § 29-22-1(e) 4

W. Va. Code §29-22-5(a)(1) 1

W. Va. Code §029-22-20(a), (b) 4

W. Va. Code § 29-22B-102 . . . . . 10, 11

W. Va. Code § 29-22B-1201 9

W. Va. Code § 29-22B-1201(a) 2, 7

W. Va. Code § 29-22B-1202 9

W. Va. Code § 29-22B-203(1) & (2)(d) 5

W. Va. Code § 29A-1-2(3) 4, 5, 9, 10

W. Va. Code § 29A-1-2(c) 10

W. Va. Code, 29A-4-2 2,7

MISCELLANEOUS

ABA Section of Taxation Report of the Task Force on Judicial Deference, 57 Tax Law. 717, (2004) 4

Jim Rossi, Antitrust Process and Vertical Deference: Judicial Review of State Regulatory Inaction, 93 Iowa L. Rev. 185, 215 3

Antoin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, ... 10

Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071 (1990) 8

Einer Elhauge, Preference-estimating Statutory Default Rules, 102 Colum. L. Rev. 2027, (2002) 4

Evan J. Criddle, Chevron's Consensus, 88 B.U. L. Rev. 1271 (2008) 3

Paul Verkuil, Crosscurrents in Anglo-American Administrative Law, 27 Wm. & Mary L. Rev. 685, 711 (1986) 8

Thomas E. Baker, Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves, 22 Fla. St. U. L. Rev. 913, 914 (1995) 8

Jonathan B. Cleveland, Comment, Variable Annuity Life Insurance Company v. Clarke: A Second Look at National Bank Annuity Sales and 12 U.S.C. § 92, 78 Minn. L. Rev. 911 (1994) 8

No. 35299

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID KOKOCHAK,

Plaintiff below, Appellee,

v.

WEST VIRGINIA STATE
LOTTERY COMMISSION

Defendant, Appellant.

WEST VIRGINIA STATE LOTTERY COMMISSION'S BRIEF

I.

INTRODUCTION

In this case, the circuit court concluded that West Virginia Code of State Rules § 179-7-2.2c is an invalid interpretive rule. Because the rule is consistent with the West Virginia Administrative Procedure Act, the circuit court erred in invalidating the rule.

II.

FACTS

"[T]e Legislature . . . vests tremendous and broad authority in the lottery commission and the lottery." 65 W. Va. Op. Atty. Gen. 5 (Apr. 20, 1993). W. Va. Code § 29-22-1 ("The Legislature finds and declares that the purpose of this article is to establish and implement a state-operated lottery under the supervision of the state lottery commission and the director of the state lottery office who shall be appointed by the governor and hold broad authority to administer the system in a manner which will provide the state with a highly efficient operation."). W. Va. Code 29-22-5(a)(1) authorize the Lottery

Commission to promulgate rules under the West Virginia Administrative Procedures Act. Under this grant of authority, the Lottery Commission (herein "Commission") promulgated–after notice and comment – West Virginia Code of State Rules § 179-7-2.2c an interpretive rule providing, "Licensed limited video lottery location approved by the commission, as the term is found in W. Va. Code § 29-22B-1201(a), means the location in excess of the following straight-line distances from any of the following places: . . . The location is at least three hundred feet from a business that sells petroleum products capable of being used as fuel in an internal combustion engine." Mr. Kokochak wanted to apply for a limited video lottery (herein, "LVL") license, but he is precluded from placing his LVL where he wishes because that location falls within the 300 foot rule of interpretive rule 2.2c.

Without applying for a license, Mr. Kokochak filed for a declaratory judgment under West Virginia Code § 29A-4-2 to test the legality of Rule 2.2c. The circuit court granted Mr. Kokochak summary judgment finding Rule 2.2c invalid.

III.

STANDARD OF REVIEW

"Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. Pt. 1, *Appalachian Power Co. v State Tax Dep't*, 195 W.Va. 573, 466 S.E.2d 424 (1995). Notwithstanding this *de novo* standard, a court is not entirely free to substitute its own judgment for that of an administrative agency, as "'[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.'" Syl. pt. 4, *Security Nat'l Bank & Trust Co. v First W. Va. Bancorp., Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981)." *CB& T Oper. Co., Inc. v Tax Comm'r*, 211 W. Va. 198, 202, 564 S.E.2d 408, 412 (2002). Therefore, "[a]n inquiring court-even a court empowered to conduct *de novo* review-must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Appalachian Power Co.*

v State Tax Dep't, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995).

Under Syllabus point 2 of *Appalachian Power Co*, "[i]n reviewing a rule . . . of an administrative agency, a West Virginia court must first decide whether the rule is interpretive or legislative. If it is interpretive, a reviewing court is to give it only the deference it commands. If it is a legislative rule, the court first must determine its validity. Assuming its validity, the two-pronged analysis from *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984), should be applied." However, "[b]eing concerned with legislative rules only, *Chevron* simply did not deal with the level of consideration a court should give to an interpretive rule." *Appalachian Power Co.*, 195 W. Va. at 583 n.6, 466 S.E.2d at 434 n.6. Thus, while "'interpretive rules ... enjoy no *Chevron* status *as a class*[,]'" *Long Island Care at Home, Ltd. v Coke*, 551 U.S. 158, 172 (2007) (citation omitted) (emphasis in original), individual rules may, nevertheless, be entitled to *Chevron* deference. In the years since *Chevron* and *Appalachian Power Co.*, courts have looked to an institutional basis for applying *Chevron* deference rather than bright line rules. "*Chevron* is best explained by a more pragmatic set of institutional concerns aimed at improving the quality of agency decisions and the accountability of the process that produces them." Jim Rossi, *Antitrust Process and Vertical Deference: Judicial Review of State Regulatory Inaction*, 93 Iowa L. Rev. 185, 215 (2007).

Rule 2.2c was adopted with notice and comment, West Virginia Regulation Text-Netscan, 2008wvcp002aft256, Notices of Comment Period Sep 12, 2008, Lottery Commission, 2008 WV REG TEXT 156332 (NS). Indeed, in the years since *Chevron* and *Appalachian Power Co.*, Courts have examined the underlying basis for according *Chevron* deference rather than simple bright line rules. In other words, "[i]nterpretive regulations of this sort, when subject to a notice and comment procedure, are reviewed deferentially, under the criteria articulated in *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984), and its progeny." *Kikalos v C.I.R.*,

190 F.3d 791, 795 (7th Cir. 1999).[1]

IV.

ARGUMENT

The Administrative Procedures Act provides that an interpretive rule is every rule adopted by an agency "independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests . . . ." W. Va. Code § 29A-1-2(3). "An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where

---

[1] *Appalachian Power Co.*, stated (in a footnote, without examples, and without any citation to authority) that "[t]here is, indeed, a great danger in giving *Chevron* deference (and often legislative effect) to rules promulgated without the benefit of legislative oversight." 195 W. Va. at 583 7, 466 S.E.2d at 434 n.7.

But, *Chevron* itself observed:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 865-66. Indeed, regular legislative oversight is provided by the requirement that Commission members be appointed by the Governor with the advice and consent of the Senate, W. Va. Code § 29-22-1(a), and that the Commission provide regular reports to the Joint Committee on Government and Finance and the Legislature as a whole *Id.* § 29-22-1(e), § 29-22-20(a), (b). *See Kenaitze Indian Tribe v State of Alaska*, 860 F.2d 312, 316 (9th Cir. 1988) ("Federal agencies are also entitled to deference because their activities are subject to continuous congressional supervision by virtue of Congress's powers of advice and consent, appropriation, and oversight."). And, of course, the federal government has function for decades with administrative rules promulgated solely by federal agencies without any catastrophe or cataclysm.

the interpretive rule established the conditions for the exercise of discretionary power as herein provided." *Id.* Thus, "[w]here any provision of th[e] code lawfully commits any decision . . . or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions[.]" *Id.*

The Plaintiff asserts Rule 2.2(c) is invalid because: (1) it is in reality a legislative rule because it affects private rights; and, (2) it exceeds the authority the Legislature has granted to the Commission. These arguments are unavailing.

A. West Virginia Code of State Rules § 129-7-2.2c does not affect private rights.

The first argument that Mr. Kokochak raises is that West Virginia Code of State Rules §129-7-2.2c affects private rights and is, therefore, not an interpretive rule but a legislative one. This is in error.

Mr. Kokochak "has no right to a license or to the granting of the approval sought. Any license issued or other commission approval granted pursuant to the provisions of this article is a revocable privilege and . . . The licensing, control and regulation of limited video lottery by the state does not create . . . the accrual of any value to the privilege of participation in any limited video lottery activity . . . ." W. Va. Code § 29-22B-203(1) & (2)(d). Further, West Virginia Constitution Article 6, Section 36 requires a lottery to be "regulated, controlled, owned, and operated by the State[,]" which is consistent with the LVL Act. Syl. Pt 9. *State ex rel. Cities v West Virginia Econ. Dev Auth.*, 214 W. Va. 277, 588 S.E.2d 655 (2003).

"It is well established that a state can authorize itself to conduct a lottery and not give that same right to *private* individuals." *Tworek v United States*, 46 Fed. Cl. 82, 86 (2000). This is what the State has done here. *See State ex rel. Cities*, 214 W. Va. at 291, 588 S.E.2d at 669 (rejecting claim that the lottery

machines are privately operated, controlled, and owned). Those who apply for LVL licenses do so basically as volunteers for the state lottery system (even though they are entitled to a portion of the monies generated by the operation of their licensed games). *See Paxton v State Dep't of Tax and Revenue*, 192 W. Va. 213, 219, 451 S.E.2d 779, 785 (1994) ("the Lottery Commission does more than merely license lottery locations. It controls . . . the lottery system."). Licensees have no any property right in the license issued pursuant to this article, no right to alienate the license, no vested right in a license, nor the accrual of any value to the privilege of participation in any limited video lottery activity. W. Va. Code § 29-22B-203. *See also Bukhtia v Bureau of State Lottery*, 475 N.W.2d 475, 478 (Mich. Ct. App. 1991) (no constitutionally protected property interest in a lottery license); *R.V.H., Third, Inc. v State Lottery Com'n*, 716 N.E.2d 127, 130 (Mass. Ct. App. 1999) (no property interest in unissued Keno license). *Cf. American Civil Liberties Union of Tennessee v Bredesen*, 441 F.3d 370, 378 (6th Cir. 2006) (noting that if the state paid drivers to display on license plates a particular message the government wished to advance, then the speech would indisputably be government speech and not private speech.). Unlike a license that the state issues regulating conduct that is purely private–where the underlying conduct of using the license advances no state interest (for example, a driver's license)– an LVL license is indisputably used to further a purely government purpose, the operation of a state owned and operated lottery. The constitutional requirement of Article VI, § 36, which firmly requires that any lottery be under the aegis of the State, is determinative in the present case. *Arnold Agency v West Virginia Lottery Com'n*, 206 W. Va. 583, 592, 526 S.E.2d 814, 823 (1999). Rule 2.2(c) does not, therefore, regulate the kind of *private* rights or privileges that would make it a legislative rule. As such, the circuit court erred and should be reversed.

B. West Virginia Code of State Rules § 129-7-2.2c is valid under the Administrative Procedures Act and is entitled to *Chevron* deference.

In *Appalachian Power*, this Court explained in Syllabus Points 3 & 4 the schema for evaluating administrative rules:

> 3. Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage.
>
> 4. If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982).

The Limited Video Lottery Act provides that "[v]ideo lottery terminals allowed by this article may be placed only in licensed limited video lottery locations approved by the commission[,]" W. Va. Code § 29-22B-1201(a), but it does not elucidate what a "licensed limited video lottery location[] approved by the commission" is. The circuit court looked to W. Va. Code § 29-22B-1202 and concluded that this later provision--requiring a new LVL licensee to be at least 150 feet away from an established LVL licensee--was the only distance limitation the Lottery could enforce applying the

principle of *expressio unius est exclusio alterius*. *Expressio unis* does not apply under *Chevron*.

"Importantly, *expressio unius* is not a rule of law, but merely an aid to construing an otherwise ambiguous statute." *State v Euman*, 210 W. Va. 519, 524, 558 S.E.2d 319, 324 (2001) (per curiam) (McGraw, J., concurring). "[C]ourts have frequently admonished that '[t]he maxim is to be applied with great caution and is recognized as unreliable.'" *Id.* (quoting *Director, Office of Work. Comp. Programs v Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir.1982)). And "[s]cholars have long savaged the *expressio* canon." *Cheney R. Co., Inc. v I.C.C.*, 902 F.2d 66, 68 (D.C. Cir. 1990).[2] Indeed, where an administrative agency is involved, *expressio unius* is a dead letter. "Whatever its usefulness in other circumstances, however, this canon has little force in the administrative setting." *Texas Rural Legal Aid, Inc. v Legal Serv Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991). *See also Cheney R. Co., Inc. v I.C.C.*, 902 F.2d 66, 69 (D.C. Cir. 1990) ("Whatever its general force, we think it an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved."); *Iowa Network Serv, Inc. v Qwest Corp.*, 385 F. Supp.2d 850, 892 (S.D. Iowa 2005) (same). Likewise, academics have observed that "[t]he view that the *expressio unius* principle is defeated by *Chevron* seems correct, since that canon is a questionable one in light of the dubious reliability of inferring specific intent from silence." Cass R. Sunstein, *Law and Administration after Chevron*, 90 Colum. L. Rev.2071, 2109 n. 182 (1990); Jonathan B. Cleveland, Comment, *Variable Annuity Life Insurance Company v Clarke: A Second Look at National Bank Annuity Sales and 12 U.S.C § 92*, 78 Minn.

---

[2]In the past, this Court has looked to the District of Columbia Circuit as providing persuasive case law because of its expertise in the interpretation of the Freedom of Information Act. *Farley v Worley*, 215 W. Va. 412, 420 n.7, 599 S.E.2d 835, 843 n.7 (2004). The decisions of that particular court should also be of significant persuasive value here, since the D.C. Circuit "presides over a docket originating in the federal seat of government that is dominated by difficult and complex issues of administrative law[,]" Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913, 914 (1995), which has resulted in that court, "as a practical matter [developing into] an expert administrative judiciary[.]" Paul Verkuil, *Crosscurrents in Anglo-American Administrative Law* 27 Wm. & Mary L. Rev. 685, 711 (1986).

L. Rev. 911, 936-37 (1994) ("courts should not rely on the *expressio unius* rule of statutory construction to determine Congress's intent under the first step of *Chevron*.").

Furthermore, *Chevron* applies when a statute has "directly spoken to the precise question at issue." Where a statute is *silent*, it has not (and cannot have) spoken directly to the precise question at issue. Here, the Circuit Court's finding that the *expressio unius* applied was a recognition that the statute "necessarily has not 'directly spoken' to the issue. *See* Cleveland, *Variable Annuity Life Insurance Company v. Clarke*, 78 Minn. L. Rev. at 942 n.151. Thus, the statute is silent as to the issue of other distance requirements and *Chevron* applies.

Additionally, contrary to the Circuit Court's analysis, the Legislature did not combine W. Va. Code § 29-22B-1201 and 1202 nor did it specifically state that no other distance limitations could be imposed which weighs against the Circuit Court's decision. *Clinchfield Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990) (emphasis in original) ("Clinchfield would obviously have a better case if provision for interest were made elsewhere *within* § 111.").[3]

Finally, "an equally pertinent canon of interpretation states that a [legislative] decision to prohibit certain activities does *not* imply an intent to disable the relevant administrative body from taking similar action with respect to activities that pose a similar danger." *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991). "[I]t [i]s not[,] 'a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. . . . .'" *Mourning v. Family Pub. Serv., Inc.* 411 U.S. 356, 372 (1973) (citation omitted). *State of Texas v. American Tobacco Co.*, 14 F. Supp.2d 956, 964 (E.D. Tex. 1997) (*expressio unius* "is problematic, because it assumes that a legislative body considers all conceivable issues that may arise and seeks to address them all by only addressing a few.") "[S]uch prescience, either

[3]This would, of course, also apply to West Virginia Code of State Rules § 179-5-34.

in fact or in the minds of Congress, does not exist. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.'" *Mourning*, 411 U.S. at 372 (citation omitted). *See also Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1508 (2009) (silence in the relevant may "convey nothing more than a refusal to tie the agency's hands"). *See Quesenberry v. Estep*, 142 W. Va. 426, 446, 95 S.E.2d 832, 844 (1956) (the purpose of administrative agency authority is to provide an agency with the flexibility and authority necessary to protect the public). All of which is completely consistent with the APA.

Under the APA, an interpretive rule may be employed to establish the conditions for the exercise of exclusive agency discretion. W. Va. Code § 29A-1-2(3). The only agency empowered to approve locations is explicitly the Commission. The authority of the Commission must be extremely broad to provide it the maximum discretion in operating an LVL system that must balance a number of considerations for effective functioning. *See Club Ass'n. v. Wise*, 293 F.3d 723, 724 (4th Cir. 2002) ("The avowed purpose of this [LVL] was to establish a single state owned and regulated video lottery thus allowing the State to collect revenue therefrom, control the operators of the machines, and stem the proliferation of gambling in the State.").

The exclusive right to approve locations is vested with the Respondent which brings the Rule 2.2(c) clearly within the ambit of the agency discretion portion of W. Va. Code § 29A-1-2(3). And, in so doing, the interpretive rule is limited only when "such conditions are . . . prescribed by statute or by legislative rule[.]" Thus, W. Va. Code § 29A-1-2(c) creates not a negative on agency authority, but imposes the an affirmative obligation on the Legislature. That is, the Legislature must specifically and explicitly speak to create conflict between a positive statute and the interpretive rule to invalidated the

interpretive rule – an interpretive rule cannot be invalided (in the agency discretion sphere at least) by Legislative silence. All W. Va. Code § 29-22B-102 does is to establish a minimum requirement–it does not establish an exhaustive criteria.

C. Applying *Chevron* deference clearly supports the validity of West Virginia Code of State Rules § 129-7-2.2c

Under *Appalachian Power* and *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. The agency "view governs if it is a reasonable interpretation of the statute-not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.*, 129 S. Ct. at 1505.

Here, the Commission must balance allowing the State to collect income from the lottery, controlling the operators of the machines, and stemming the proliferation of gambling in the State. *See State ex rel. Cities,* 214 W. Va. at 289, 588 S.E.2d at 667; *Club Ass'n. v Wise*, 293 F.3d 723, 724 (4th Cir. 2002). Here, the presence of video lottery terminals near petroleum selling facilities [4]–including convenience stores, supermarkets, club stores, and mass merchandisers– would mean that recovering

[4]The selling of petroleum is no longer limited to the old "gas station" model where a service station sold gas and repaired and maintained cars. "Today, as anyone familiar with the needs of automobiles knows, gasoline is sold primarily at self-service outlets often associated with a convenience store[.]" Peter Carstensen & David Hart, *Knaring the Court: How the Antitrust Establishment Obtained an Advisory Opinion Legalizing "Maximum" Price Fixing*,, 34 U. Tol. L. Rev. 241, 307 n.82 (2003). Approximately 80% of convenience stores in the United States now sell gasoline. National Association of Convenience Stores, *Brief History of the Convenience Store Industry*, http://www.nacsonline.com/NACS/RESOURCES/RESEARCH/HISTORY/Pages/default.aspx. Likewise, supermarkets, club stores, and mass merchandisers are also entering the fuel field. U.S. FED. TRADE COMM'N, *the Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* 42 (2004).

gambling addicts or people who might not otherwise gamble would be enticed to use the machines, and could not volitionally avoid them because of their proximity to shops that a person must frequent daily to obtain gas for their cars and groceries for their table. *See, e.g.*, Iowa Lottery Comm'n, Public Hearing, http://www.ialottery.com//LegalRequirements/transcript1102006.pdf (Jan. 6, 2006).

V.

CONCLUSION

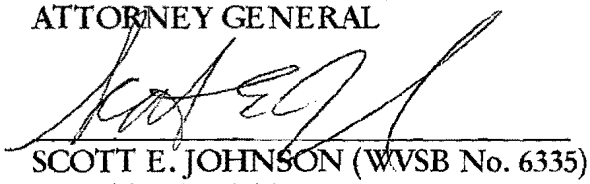
For the above reasons, this Court should reverse the circuit court.

Respectfully submitted,

WEST VIRGINIA STATE
LOTTERY COMMISSION,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
Building 1, Room W-435
State Capitol Complex
Charleston, WV 25305
(304) 558-2522