

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 10-\_\_\_\_\_

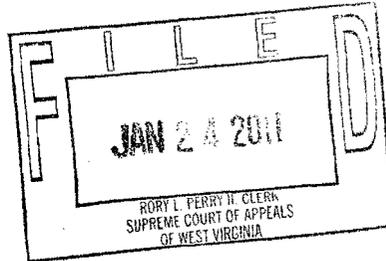
VERIZON WEST VIRGINIA, INC.

Petitioner,

v.

CRAIG A. GRIFFITH, as  
STATE TAX COMMISSIONER OF  
WEST VIRGINIA,

Respondent.



BERKELEY COUNTY  
CIRCUIT CLERK  
2011 JAN 10 PM 3:40  
VIRGINIA M. SINE, CLERK

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FROM THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

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WEST VIRGINIA STATE TAX DEPARTMENT'S  
PETITION FOR APPEAL

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**VERIZON WEST VIRGINIA, INC.,**

**Respondent, Petitioner below,**

v.

**CRAIG A. GRIFFITH,<sup>1</sup>  
STATE TAX COMMISSIONER OF  
WEST VIRGINIA,**

**Petitioner, Respondent below.**

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**WEST VIRGINIA STATE TAX DEPARTMENT'S  
PETITION FOR APPEAL**

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**I. INTRODUCTION**

What constitutes an ambiguous statute? There is nothing novel about two lawyers disagreeing over the precise meaning and application of a statute; lawyers do that everyday. However, when two circuit court judges reach diametrically opposed conclusions regarding the same statute for the same tax year for two different taxpayers on substantially the same facts, then the statute is probably ambiguous. In some respects the financial impacts of the statute are rather large; in other respects the impact is nominal at best.

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On July 1, 2010, Craig A. Griffith was confirmed as Tax Commissioner for the State of West Virginia. Tax Commissioner Griffith is substituted as the party to the case in lieu of Christopher G. Morris pursuant to Rule 27(c)(1) of the WV Rules of Appellate Procedure.

## **II. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER COURT**

The West Virginia State Tax Commissioner appeals from an Order entered on September 14, 2010, by the Circuit Court of Berkeley County, Civil Action No. 07-C-524, which reversed the decision of the West Virginia Office of Tax Appeals.

This case presents a purely legal question; the facts are not in dispute. Verizon filed its 2004 Telecommunications Tax Return and requested a tax refund of \$9,259,083.60. The Tax Department denied the refund. Verizon timely filed a Petition For Reassessment with the West Virginia Office of Tax Appeals (hereinafter, OTA). Both parties agreed that a hearing would not be necessary and submitted Joint Stipulations to OTA. In addition, both parties submitted legal briefs. On April 23, 2007, Administrative Law Judge Robert W. Kiefer, Jr., issued an administrative decision affirming the Tax Department's denial of the tax refund for the 2004 calendar year. Verizon appealed the OTA Decision to the Circuit Court of Berkeley County. Subsequently, the Circuit Court reversed the OTA Decision. The Tax Department appeals from the erroneous decision of the Circuit Court.

Whether Verizon is entitled to the refund for the 2004 calendar year turns on a simple legal question. Is W. Va. Code § 11-13B-2(b)(5) "...plain and unambiguous..." as determined by the Circuit Court of Berkeley County or is the statute ambiguous as determined by the Office of Tax Appeals? If the statutory language at issue is ambiguous as determined by OTA, then the Tax Department properly adhered to the legislative regulation and applied the Public Service Commission's Order to the 2005 tax year.

The Court is not required to decide whether Verizon must claim the tax refund in 2004 or lose the refund forever. The Court must decide whether Verizon can claim the refund for the 2004

calendar year or whether Verizon's tax liability for the 2005 calendar year will be reduced by \$9,259,000.

### **III. STATEMENT OF FACTS**

Verizon West Virginia, Inc. ( hereinafter, Verizon ) is a West Virginia corporation engaged in the telecommunications business of selling or furnishing telegraph, telephone or other telecommunications service within the meaning of W. Va. Code §11-13B-1 & -3. *See Circuit Court Final Order* at Factual Finding 1 (hereinafter, *Circuit Court Order* ). Starting before November 2001 and throughout 2004, Verizon continuously provided local residential and business telecommunications services throughout its incumbent local service area in the State of West Virginia. *See Circuit Court Order* at Finding 2.

Apparently, Verizon is a calendar year taxpayer. Therefore, Verizon's 2003 tax year is the period from January 1, 2003 to December 31, 2003. *See Circuit Court Order* at Finding 3. Verizon's 2004 tax year is the period from January 1, 2004 to December 31, 2004. *See Circuit Court Order* at Finding 4. Verizon's 2005 tax year is the period from January 1, 2005 to December 31, 2005. *See Circuit Court Order* at Finding 5. Throughout the 2004 tax year , Verizon reported and paid estimated telecommunications tax to the State Tax Department on the revenues it received from providing local residential and business services to customers in West Virginia. *See Circuit Court Order* at Finding 6.

On December 31, 2003, the Public Service Commission (the "PSC") issued a Commission Order in Case No. 03-1359-T-GI ("2003 PSC Order") in which it listed 63 separately enumerated services or commodities that it found to be subject to competition [tax exempt services]. *See Circuit Court Order* at Finding 7. A true and correct copy of the 2003 PSC Order is attached in the

administrative record. *See* OTA Document Index– Document No. 2. On December 23, 2004, PSC issued a Commission Order in Case No. 04-1082-T-GI (“2004 PSC Order”) in which it listed 66 separately enumerated services or commodities (hereinafter, PSC List) that it found to be subject to competition. *See Circuit Court Order* at Finding 8. A true and correct copy of the 2004 PSC Order is attached in the administrative record. *See* OTA Document Index– Document No. 7.

On May 31, 2005, Verizon filed a timely telecommunications tax refund claim in the amount of \$9,259,083.60 with the State Tax Commissioner of West Virginia (hereinafter, Tax Department) for the alleged overpayments of tax it made during the period of January 1, 2004 through December 30, 2004, with respect to the revenues it received for providing the local business and residential telecommunications services that the PSC had determined were subject to competition in its 2004 PSC Order. *See Circuit Court Order* at Finding 9. The Tax Department denied Verizon’s claim for the telecommunications tax refund on August 15, 2005. *See Circuit Court Order* at Finding 10. On October 14, 2005, Verizon timely filed a petition for refund with the West Virginia Office of Tax Appeals seeking administrative review of the denial of the refund claim. *See Circuit Court Order* at Finding 11.

On April 23, 2007, Administrative Law Judge Robert W. Kiefer (hereinafter, ALJ Kiefer) issued an administrative decision which affirmed the Tax Department’s denial of the requested refund. The administrative decision was based upon the application of the legislative regulations regarding the Telecommunications Tax set forth in 110 CSR § 110-13B-2.6 which state that the PSC List shall be used to determine the gross income of telecommunications providers for the next succeeding calendar year. *See Circuit Court Order* at Finding 12.

On June 22, 2007, Verizon filed a *Petition for Appeal* in the Circuit Court of Berkeley

County seeking judicial review of the OTA Decision pursuant to W. Va. Code § 11-10A-19. *See Circuit Court Order* at P.1. The Circuit Court established a briefing schedule, received briefs from both parties, and issued its decision on September 14, 2010 which reversed the administrative decision.<sup>2</sup> The Circuit Court ruled that statutory definition of “gross income” set forth in WV Code § 11-13B-2(b)(5) is “...plain and unambiguous...” and vests the Public Service Commission with the authority to determine the calendar year to which the PSC List applies. Therefore, the Circuit Court of Berkeley County concluded that the legislative rule which requires the application of the PSC List to the next succeeding calendar year is improper.

The Circuit Court of Kanawha County has addressed the same legal issue on substantially the same facts for the same tax year in the case of *Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia, v. Helton, State Tax Commissioner*, Civil Action No. 06-AA-180, *Final Order* entered on July 26, 2007. (*Petition For Appeal* to the West Virginia Supreme Court of Appeals, Appeal No. 073676, was refused by the Supreme Court on April 24, 2008.) The Circuit Court of Kanawha County affirmed the Tax Department’s position:

The Tax Department appeals from the ruling of the Circuit Court of Berkeley County, Civil Action No. 07-C-524.

#### **IV. ASSIGNMENTS OF ERROR**

A. The Supreme Court Should Accept the Petition For Appeal and Resolve the Conflict

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<sup>2</sup>Originally, the circuit court appeal was assigned to the Honorable David H. Sanders. Subsequently, the case was reassigned to the Honorable Gina M. Groh. In addition, the circuit court decision was held in abeyance by agreement of the parties pending the decision of the West Virginia Supreme Court of Appeals regarding whether to accept the *Petition For Appeal* filed by Frontier Communications on the same issue from the Circuit Court of Kanawha County.

Between Circuit Court of Berkeley County and the Circuit Court of Kanawha County.

- B. Contrary to the Circuit Court of Berkeley County's Legal Conclusion, The Statute Is Ambiguous.
- C. The Legislative Regulation Was Properly Adopted.

## **V. STANDARD OF REVIEW**

The West Virginia Supreme Court of Appeals has frequently addressed the standard of review on appeal. Factual findings made by the Tax Department or any other administrative agency receive deference. *See CB&T Operation, Co. v. Tax Commission*, 2311 W. Va. 198, 564 S.E. 2D 408 at Syll. Pt. 2 (WV 2002). On the other hand, questions of law are subject to *de novo* review. *CB&T*, at Syll. Pt.1; *See also Muscatell v. Cline*, 196 W.Va. 588, 474 S.E. 2D 518 (WV 1996) at Syll. Pt.1; and *Helton v. REM Community Options, Inc.*, 218 W.Va. 165 at 167-168, 624 S.E.2d 512 at 514-515 (WV 2005). The case before the Court was based upon agreed stipulations which were submitted to the Office of Tax Appeals; therefore, the case only presents a legal question regarding whether WV Code § 11-13B-2(b)(5) is “...plain and unambiguous...” as determined by the Circuit Court of Berkeley County or whether the statute is ambiguous as determined by the Office of Tax Appeals.

## **VI. ARGUMENT**

### **A. The Supreme Court Should Accept the Petition For Appeal and Resolve the Conflict Between Circuit Court of Berkeley County and the Circuit Court of Kanawha County.**

The case presents a simple legal question. West Virginia imposes a Telecommunications Tax on all providers of telecommunications services. *See* West Virginia Code Section 11-13B-3. The

tax is imposed on the gross income of the telecommunications company. The key question is the definition of “gross income” for the purposes of the Telecommunications Tax.

(b) Terms defined.

...

(5) Gross income.--The term “gross income” of a telephone company or communications carrier shall be defined as all gross income received from the provision of local exchange or long distance voice or data communications services but shall not include gross income from the provision of network access, billing or similar services provided to end users, other telephone companies, or communications carriers: Provided, That on and after the first day of July, one thousand nine hundred eighty-eight, the term “gross income” of a telephone company or communications carrier shall not include gross income from the provision of commodities or services which shall be determined by the public service commission of West Virginia to be subject to competition. **On or before the thirty-first day of December of each calendar year, the public service commission of West Virginia shall submit to the tax commissioner a listing of those commodities or services which it has determined to be subject to competition. Such listing shall constitute a conclusive determination for the purposes of defining “gross income” within the meaning of this subsection.**

W. Va. Code § 11-13B-2(b)(5) (emphasis added).

The statute clearly imposes a mandatory duty on the West Virginia Public Service Commission (hereinafter, PSC) to determine which services are commodity services - services subject to competition - and which services are non- competitive services. *Id.* Competitive services are clearly exempt from the telecommunications tax. *Id.* Non-competitive services are taxable services.

On December 23, 2004, the PSC issued a Commission Order listing sixty-six services which are commodity services - competitive services which are not subject to tax. The statute clearly states that the PSC’s determination is conclusive for purposes of calculating gross income under West

Virginia Code Section 11-13B-2(b)(5). The Tax Department does not dispute the PSC's determination that the sixty-six services are competitive and exempt from the telecommunications tax. For example, the Tax Department does not dispute that "Service Number 3 - Multi-line call waiting" is a competitive service. *See* OTA Document Index - Document 1, Attachment H at P.13. There is no doubt that the PSC's determination of competitive services – tax exempt services – is conclusive by statute.

The legal question is whether the list of competitive services issued by the PSC on December 23, 2004, should be used to determine gross income for the 2004 calendar year or the 2005 calendar year. The Tax Department argues that the PSC List issued on December 23, 2004 should be applied in order to calculate gross income for the 2005 calendar year as required by the legislative regulation. Verizon argues the opposite. The OTA decision affirmed the Tax Department's position.

Verizon has interpreted Section 11-13B-2(b)(5) as empowering the Public Service Commission to decide to which tax year the PSC List applies. *See* OTA decision at P. 8. The PSC Order on which Verizon relies clearly states that the list of taxable services applies to the 2004 tax year. *See* OTA Decision at P. 8.

The Tax Department agrees that the PSC List is conclusive regarding which telecommunications services are subject to tax and which services are exempt from taxation. However, the Tax Department applied the PSC List issued December 23, 2004, to the 2005 calendar year as required by the applicable legislative regulation to the Telecommunications Tax which was adopted in 1988.

2.6. Gross income. The term "gross income" of a telephone company or communications carrier shall be defined as all gross income received from the provision of local exchange or long distance voice

or data communication services but shall not include gross income from the provision of network access, billing or similar services provided to end users, other telephone companies, or communications carriers. On or after July 1, 1988, the term "gross income" of a telephone company or communications carrier shall not include gross income from the provision of commodities or services which shall be determined by the Public Service Commission of West Virginia to be subject to competition. **The Public Service Commission of West Virginia will submit to the Tax Commissioner, on or before December 31 of each calendar year, a listing of those commodities or services the trading in which it has determined to be subject to competition. Such listing shall constitute a conclusive determination for the purpose of defining "gross income" of a telephone company or communications carrier for the next succeeding calendar year.**

110 CSR 13B- § 110-13B-2.6 (emphasis added).

The legislative regulation is clear. The list of services determined by the PSC to be competitive services or tax exempt services applies to the following calendar year and not the year in which the list is issued. Therefore, the list issued on December 23, 2004 applies to the 2005 calendar year.

The Office of Tax Appeals concurred. *See* OTA Decision at Conclusion of Law 4.

Judge Groh reversed the OTA Decision and concluded that Section 11-13B-2(b)(5) is plain and unambiguous.

The plain and unambiguous language of W. Va. Code § 11-13B-2 indicates that the Legislature intended the PSC's determination as to those services and commodities subject to competition to be conclusive for the purposes of calculating a telecommunication company's gross income: "Such listing *shall constitute a conclusive determination* for the purposes of defining 'gross income' within the meaning of this subsection." (Emphasis added). In 2003, the PSC ordered "that the following [57] services be certified as competitive telecommunications services *for the 2003 tax year* and that a list of such services be submitted to the West Virginia Tax Commissioner pursuant to W. Va. Code § 11-13B-2(b)(5)." Page 20, PSC Order, Case No. 03-1359-T-GI (2003) (emphasis added). In 2004, the PSC ordered that "the following [66] telecommunications services are

certified as competitive for the 2004 tax year and that a list of such services be submitted to the West Virginia Tax Commissioner pursuant to W. Va. Code § 11-13B-2(b)(5).” Page 34, PSC Order, Case No. 04-1082-T-GI (2004) (emphasis added). Therefore, under W. Va. Code § 11-13B-(b)(5), the PSC conclusively determined for tax years 2003 and 2004 which services were competitive and thus to be excluded from the calculation of a telecommunications company’s gross income for tax purposes. Stated simply, the PSC does not operate in a time vacuum when producing its determinations, a fact further evidenced by the Legislature’s mandate that the PSC provide this conclusive list to the Commissioner no later than the 31st of December each calendar year.

Circuit Court Decision at PP. 7 & 8 (emphasis in original).

Judge Groh proceeded to strike down the legislative regulation at issue.

W. Va. C.S.R. § 110-13B-2.6 is hereby **SET ASIDE** as contrary to the intent of the W. Va. State Legislature, evidenced by the plain language and meaning of W. Va. Code § 11-13B-2(b)(5), to-wit: when the W. Va. Public Service Commission determines that certain services and commodities are subject to competition within a given tax year, the PSC’s determinations are to be given conclusive effect for that tax year.

Circuit Court Decision at P. 9 (emphasis in original).

Judge Groh’s single legal conclusion could not have been stated more clearly. Is W. Va. Code § 11-13B-2(b)(5) “plain and unambiguous” as determined by the Circuit Court or is it ambiguous ?

The Circuit Court of Kanawha County has addressed the same legal issue for the 2004 tax year in the case of *Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia, v. Helton, State Tax Commissioner*, Civil Action No. 06-AA-180, *Final Order* entered on July 26, 2007.<sup>3</sup> The Honorable Tod Kaufman of the Circuit Court of Kanawha County has considered the exact same legal issue for the same tax year on substantially

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<sup>3</sup> Frontier Communications filed a *Petition For Appeal*, Appeal No. 073676, with the West Virginia Supreme Court of Appeals which was refused by the Court on April 24, 2008.

the same facts in the case of Citizen's Telecomm (*Frontier Communications*).

W. Va. Code §11-13B-2(b)(5) defines gross income as excluding that income derived from competitive services and directs the West Virginia Public Service Commission (hereinafter PSC) to submit a listing of those services by December 31st of each calendar year. It further states that "such listing shall constitute a conclusive determination for the purposes of defining "gross income" within the meaning of this subsection." **It does not state in § 11-13B-2(b)(5) whether the list issued by the PSC applies to the year in which it is issued or whether it applies to the next calendar year.**

Judge Kaufman's Decision at PP. 2 & 3 in attached Exhibit A(emphasis added).

Judge Kaufman, subsequently, proceeded to apply the same legislative regulation in the *Frontier Communications* case that Judge Groh struck down. See Judge Kaufman's Decision at P. 3.

Judge Kaufman applied the legislative regulation and affirmed the Tax Department's denial of a Telecommunications Tax refund in the amount \$ 1,998,987.78. The Circuit Court of Berkeley County has examined the same statutory language for the same tax year and reached the opposite conclusion on substantially the same facts.<sup>4</sup>

The West Virginia Supreme Court of Appeals has an obligation to resolve the difference of opinion between two circuit courts similar to the same obligation found in the federal court system. The United States Supreme Court has a responsibility to resolve differences among the federal courts of appeals on questions of federal law. See *Braxton v. United States*, 500 US 344 at 347-348, 111 S.Ct. 1854 at 1857, 114 L. Ed. 2d 385 at \_\_\_\_\_ (1991) (use of *certiorari* jurisdiction to resolve different views among the courts of appeal) and *Colby v. J.C. Penney Company, Inc.*, 811 F.2d. 1119 (7th Cir., 1987) (the courts of appeal are responsible for maintaining a consistency of opinion within

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<sup>4</sup> Counsel represents that the only significant factual distinction between the two circuit court cases is the amount of the tax refunds at issue.

their respective circuit).

The Supreme Court should grant the *Petition For Appeal* in order to resolve the conflict between the two circuit courts. The same question may arise in future years if the Public Service Commission determines that additional services would be exempt from the definition of “gross income.” Whether a telecommunications company receives a refund in the year in which the PSC List is issued or the following calendar year should not be determined by whether the company appeals an administrative decision in Kanawha County or Berkeley County. Telecommunications companies provide statewide services and the Telecommunications Tax applies statewide. One reading of the same statutory language should apply statewide as well.

B. Contrary to the Circuit Court of Berkeley County’s Legal Conclusion,  
The Statute Is Ambiguous

The Supreme Court has enunciated a clear test to determine whether a statute is ambiguous. In the case of *Davis Memorial Hospital v. WV State Tax Commissioner*, 222 W.Va. 677, 671 S.E.2d 682 (WV 2008) the Court restated its long held view :

Both Davis Memorial and the Tax Commissioner contend that W. Va.Code 11-15-9(a)(6)(f)(i)(II) is a plainly worded statute. Therefore, they contend, its plain provisions should be applied. We disagree. **An examination of that section of the code reveals that the “language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions” and that the provision is “of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.”** *Sizemore*, 202 W. Va. at 596, 505 S.E.2d at 659. Accordingly, we find that W. Va.Code 11-15-9(a)(6)(f)(i)(II) is ambiguous. “A statute that is ambiguous must be construed before it can be applied.” Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992). *See also United Bank, Inc. v. Stone Gate Homeowners Ass’n, Inc.*, 220 W. Va. 375, 379, 647 S.E.2d 811, 815 (2007) (“statutory language that is ambiguous must be construed before it can be applied.”).

*Davis* at 683, 688 (internal footnote omitted) (emphasis added).

*See also Hereford v. Meek*, 132 W. Va. 373 at 386, 52 S.E.2d 740 at 747 (WV 1949) (A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.).

Both Verizon and the Circuit Court of Berkeley County have interpreted W. Va. Code § 11-13B-2(b)(5) as empowering the Public Service Commission to determine which telecommunications services are subject to tax as well as the taxable year in which the PSC List applies. The Tax Department has interpreted W. Va. Code § 11-13B-2(b)(5) as authorizing the Public Service Commission to conclusively determine which telecommunications services are subject tax while remaining silent regarding to which tax year the PSC List applies.

ALJ Kiefer was correct in the OTA Decision. A simple reading of the definition of gross income disproves Verizon's reading of the statute. W. Va. Code § 11-13B-2(b)(5) does not explicitly authorize the Public Service Commission to determine tax year to which the PSC List applies.

As this very Court has previously determined, a statute is ambiguous if the statute is susceptible to more than one reasonable interpretation. Verizon has interpreted the statutory language at issue as authorizing the Public Service Commission to determine both the taxable services and the tax year to which the PSC List applies. The plain language of W. Va. Code § 11-13B-2(b)(5) does not grant such authority to the Public Service Commission.

The case before the court demonstrates that Verizon and the Tax Department have

fundamentally disagreed on the reading of W. Va. Code § 11-13B-2(b)(5). As noted *supra*, two circuit court judges have reached diametrically opposite decisions on whether the statutory language at issue is “plain and unambiguous” or ambiguous. There is nothing novel about two lawyers reading the same statute differently. However, when two circuit court judges disagree on the reading of the same key language of a statute, the statutory language is ambiguous.

Furthermore, ALJ Kiefer specifically noted that the statutory language was silent regarding the year to which the PSC List applies. “In the present action, the statute is silent with respect to the issue of the year to which the Public Service Commission’s Order applies.” OTA Decision at P. 12. ALJ Kiefer noted in footnote 4, “It may not be said that the statute is ambiguous in its entirety. The statute is silent with respect to the issue presented. It simply does not address the issue which is the subject of the dispute between the parties.” OTA Decision at P. 12 at Footnote 4.

ALJ Kiefer further noted :

A review of the statute discloses that “the Legislature [did not] directly [speak] to the precise question at issue.” The text of the statute, given its plain meaning, does not speak to whether an order of the Public Service Commission applies to the calendar year in which it enters its Order, or to the calendar year following the date on which it enters its Order. The statutory language merely authorizes the Public Service Commission to list those commodities and services that are subject to competition, to do so by a specified date, and makes its listing conclusive for the purposes of defining “gross income.” [FN. 3] There is no language by which the Legislature expressly states the year to which the Public Service Commission’s determination applies.

The Petitioner argues that the term “conclusive” in the statute makes the Public Service Commission’s determination binding with respect to all matters addressed in the Order, including the year to which its order is deemed applicable. However, no language in the statute, either express or implied, supports this proposition. Instead, the Public Service Commission is limited to determining the status of commodities and services on a particular date, the date of its

determination. The statute does not make the Public Service Commission's determination applicable to a particular tax year, nor does it make the commission's determination conclusive with respect to any other issue. The language of the statute does not answer the precise legal question presented.

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FN. 3 The language in the statute making the Public Service Commission's determination conclusive refers only whether goods and services are subject to competition. This serves the purpose of preventing the State Tax Commissioner from looking behind this determination of the Commission, because it is within the particular expertise of the Commission, and not within the particular expertise of the State Tax Commissioner.

OTA Decision at PP. 10 & 11 (Footnote No. 3 in OTA Decision).

ALJ Kiefer concluded that the statutory language was ambiguous due to the gap in the telecommunications tax on this one specific point. The statute did not answer the question of whether the PSC List applies to the year in which it is issued or whether it applies to the following tax year.

ALJ Kiefer proceeded to analyze the legislative regulations for the Telecommunications Tax under the stringent test adopted by the West Virginia Supreme Court in 1995. *See* OTA Decision at PP. 9-12. The Supreme Court has enunciated a two-part test.

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).

*Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573 at 578-579, 466 S.E. 2d 424 at 429-430 (WV 1995) (Syllabus Points 3&4) (emphasis added).

*See also Sniffen v. Cline*, 193 W.Va. 370 at 374, 456 S.E.2d 451 at 455 (WV. 1995) (also quoting *Chevron, supra*).

ALJ Kiefer concluded that the legislative regulations are valid and necessary due to the statutory silence regarding the calendar year to which the PSC List applies. The West Virginia Supreme Court has adopted a two-part test for reviewing legislative regulations promulgated by administrative agencies. The first question is whether the statute has addressed the specific question at issue. If the Legislature has addressed the specific question in the statute, then the agency's interpretation is meaningless. As noted *supra*, the Telecommunication Tax does not say whether the PSC List of competitive services applies to the year in which it is issued or applies to the following year. West Virginia Code Section 11-13B-2(b)(5) is silent.

Since the Legislature left a gap in the statute, the Tax Department issued the legislative regulation to fill in the gap. The Supreme Court recognized the necessity of legislative regulations to plug holes in statutes.

We believe that if the Legislature explicitly leaves a gap in legislation, then an agency has authority to fill the gap and the agency is entitled to deference on the question. Thus, an agency's interpretation will stand unless it is "arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782, 81 L.Ed.2d at 703.

*Appalachian Power* at 589, at 440.

Certainly, the question of which year to apply the list of tax exempt services must be addressed in order for taxpayers to know which services are tax exempt in which year. W. Va. Code § 11-13B-2(b)(5) does not specifically state whether the PSC List applies to the year in which it was issued or the following year. As argued before the circuit court below, the Legislature included an unintended gap in the statute which the Tax Department filled over twenty years ago. Therefore, the legislative regulation is proper. The Circuit Court of Berkeley County erred in striking down the legislative regulation at issue.

#### C. The Legislative Regulation Was Properly Adopted

Verizon also challenged the legitimacy of the legislative regulation before the Office of Tax Appeals and in the Circuit Court. The Circuit Court of Berkeley County concluded that WV Code § 11-13B-2(b)(5) was "...plain and unambiguous..." and did not need to address whether the legislative regulation was properly adopted. The Circuit Court simply struck down the legislative regulation.

As noted above, the legislative regulation is proper. The list of services determined by the PSC to be competitive services or tax exempt services applies to the next succeeding calendar year and not the year in which the list is issued. Therefore, the list issued on December 23, 2004 applies to the 2005 calendar year.

Under West Virginia law legislative regulations have the force of law.

Because the legislative rules govern such important and occasionally controversial issues, we believe it is extremely important that the members of the legislature be fully aware of the new rules or changes to the existing rules when voting. Especially, since our legislature does not simply review the rules recommended by the agencies, but, instead gives our rules the same effect as statutes. *See State ex rel. Barker v. Manchin*, 167 W.Va. 155, 169, 279 S.E.2d 622, 631 (1981).

*Kincaid v. Mangum*, 189 W.Va. 404 at 411-412, 432 S.E. 2d 74 at 81-82 (WV1993).

The West Virginia Supreme Court affirmed the significance of legislative regulations in *Appalachian Power Company v. State Tax Department*, 195 W.Va. 573 at 585, 466 S.E.2d 424 at 436 (WV 1995) by stating “Once a disputed regulation is legislatively approved, it has the force of a statute itself.” By applying the PSC List of tax exempt services to the next succeeding calendar year as mandated by the legislative regulation, the Tax Department has acted correctly.

Nevertheless, Verizon disputed the validity and the application of the legislative regulation based upon *Kincaid, supra*. *See Proposed Order* at PP. 12- 14 filed November 19, 2007 in Circuit Court. In *Kincaid*, two inmates challenged the validity of the legislative regulations issued by the West Virginia Jail and Prison Standards Commission. *Kincaid* at 406, 76. The legislative regulation had been adopted through an omnibus bill which encompassed authorization of all agency rules considered and approved by the Legislature in 1988 through S.B. 397. *Kincaid* at 407, 77. Mr. Kincaid challenged the use of an omnibus bill to adopt a multitude of legislative regulations from different agencies covering different topics. *Kincaid* at 408-409, 78-79.

The Supreme Court rejected the process of adopting legislative regulations through an omnibus bill such as S.B. 397. However, the Supreme Court decided to apply the ruling on a

prospective basis.

In the case before us, our holding that the use of the omnibus bill to authorize legislative rules violates the one-object rule found in *W. Va. Const.* Art. VI, § 30 was clearly not foreshadowed. Furthermore, if we applied our holding today, it would invalidate hundreds of legislative rules which regulate many different subjects ranging from air pollution to jails. Our governmental agencies would be unable to carry out their functions. **Therefore, we will apply our holding in this case prospectively.**

*Kincaid* at 416, at 86 (emphasis added).

Consequently, the legislative regulations adopted by S.B. 397 in 1988 are valid.

ALJ Kiefer observed that the legislative regulations for the Telecommunications Tax were also included in S.B. 397 from the 1988 legislative session. *See* OTA Decision at PP. 15 & 16. The Supreme Court refused to overturn the legislative regulations scrutinized in *Kincaid* and adopted in S.B. 397. Thus, the West Virginia Supreme Court has previously reviewed and approved the legislative regulation at issue in this case.

The question becomes whether the Tax Department's view of the legislative regulation constitutes a permissible construction of the statute. ALJ Kiefer noted the logic supporting the Tax Department's position. First, the PSC does not determine which services are taxable and which services are tax exempt until late in the year. In the case at bar, the PSC issued its list of exempt services on December 23, 2004. If the list of tax exempt services applies to the 2005 calendar year, then telecommunications companies know with certainty which services will be taxable beginning January 1, 2005. Telecommunications companies can better predict their taxable sales for the 2005 calendar year since they know the taxable services from day one.

In addition, telecommunications companies are required to make estimated tax payments.

See West Virginia Code Section 11-13B-6. If the estimated tax payments are insufficient, the telecommunications company will be subject to penalties. See West Virginia Code Section 11-10-18b. Prospective application of the PSC List, as advocated by the Tax Department, makes tax planning easier for telecommunication companies and reduces the possibility of receiving tax penalties.

Furthermore, the prospective application of the PSC List minimizes surprises on both sides of the equation. Telecommunication companies do not receive large tax bills in December that must be paid in January. Nor does the State learn of budgetary shortfalls during the middle of its fiscal year. As ALJ Kiefer pointed out, adopting Petitioner's argument complicates business planning for telecommunications companies. See OTA Decision at P.13.

In addition, Petitioners' argument simply does not work for fiscal year taxpayers. The PSC issued the Commission Order on December 23, 2004 indicating which services were subject to competition. The Commission Order clearly states that the list indicates which services were subject to competition for the "tax year 2004." See *Circuit Court Order* at Finding 8. The PSC's protracted deliberations illustrate the difficulties which would be faced by a fiscal year taxpayer under the Petitioner's view of the legislative regulation.

Assume that a company subject to the Telecommunications Tax has a fiscal year ending on June 30. According to the statute, the company's fiscal year ending June 30, 2004 would be its 2004 tax year. See West Virginia Code Section 11-13B-2(b)(9). Consequently, the company is required by statute to file the Telecommunication Tax return for the 2004 tax year on or before July 31, 2004. See West Virginia Code Section 11-13B-5. As noted *supra*, the PSC issued the Commission Order designating which telecommunications services were subject to competition for the 2004 tax year

on December 23, 2004. *See Circuit Court Order* at Finding 8.<sup>5</sup> Nevertheless, the company with the fiscal year ending June 30, 2004 is still required to file its Telecommunications Tax return for the 2004 tax year on or before July 31, 2004. The tax return is due almost five months before the PSC determined which services are tax exempt. How can the company calculate its tax liability by July 31 when the tax exempt services are not determined by the PSC until late December? How can a company file its tax return by July 31 without knowing its taxable income? Adopting Petitioner's argument would place all fiscal year taxpayers in an untenable situation.

The PSC Commission Order clearly states that the list of competitive services applies to the 2004 tax year. However, the PSC is an administrative agency the same as the Tax Department. The Tax Department must follow the legislative regulations and the PSC must also follow the legislative regulations. Therefore, the PSC Commission Order should properly read 2004 **calendar** year not 2004 tax year. The PSC's drafting error cannot overturn a properly adopted legislative regulation.

According to the Tax Department's theory, the legislative regulation cuts both ways. During any particular year, a service may start the year as a competitive service (a tax exempt service) and become non-competitive in mid-year (subject to tax). A service may be a taxable service at the beginning of the year yet become tax exempt during the calendar year. Either way, telecommunications companies will know which services are taxable and which services are tax exempt beginning on January 1 of the tax year under the Tax Department's view of the legislative regulation.

## **VII. CONCLUSION**

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<sup>5</sup> The Circuit Court *Order* erroneously states that the PSC Order was issued on December 31, 2004; however, the PSC Order was actually dated December 23, 2004.

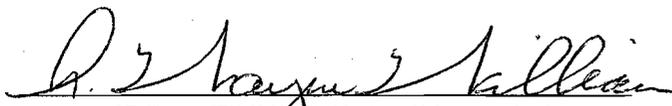
The Circuit Court of Berkeley County erred in concluding that the statutory language at issue was "... plain and unambiguous...". The decision of the West Virginia Office of Tax Appeals was correct under the applicable law. The Supreme Court should grant the Tax Department's *Petition For Appeal* in order to resolve the different lower court opinions regarding the definition of "gross income" under the Telecommunications Tax and to correct the lower court's errors of law.

**Respectfully submitted,**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 10-\_\_\_\_\_

VERIZON WEST VIRGINIA, INC.

Petitioner,

v.

CRAIG A. GRIFFITH, as  
STATE TAX COMMISSIONER OF  
WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, L. Wayne Williams, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing *West Virginia State Tax Department's Petition For Appeal* was served via Federal Express (Michael E. Caryl), and was served by United States Mail (Joseph J. Starsick, Jr.), postage prepaid, this 10th day January, 2011, addressed as follows:

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