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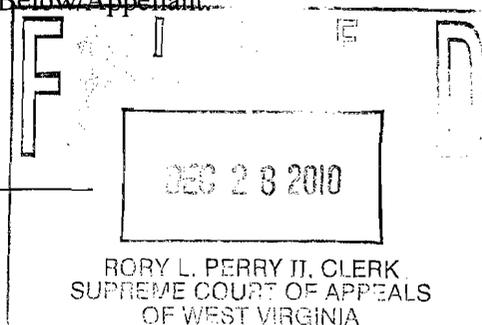
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COMMUNITY ANTENNA SERVICE, INC, Plaintiff Below/Appellee,

v.

CHARTER COMMUNICATIONS VI, LLC, Defendant Below/Appellant.

APPELLANT'S REPLY BRIEF



Honorable Judge J.D. Beane
Circuit Court of Wood County, West Virginia
Civil Action No. 00-C-505

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TABLE OF CONTENTS

INTRODUCTION1

I. CAS FAILS TO DEMONSTRATE ANY PRIVATE RIGHT OF ACTION FOR ITS CHALLENGE TO CABLE PRICE COMPETITION.....3

 A. CAS’ Arguments Cannot Be Reconciled With W. Va. Code § 24D-1-13, Which Directs the PSC, Not Courts, to Decide Whether Cable Prices are Unduly Discriminatory.3

 B. Nothing in West Virginia Code Chapter 24D Authorizes a Private Party to Seek Damages for Alleged Violations of State Cable Laws.....4

II. CAS’ REMAINING ARGUMENTS DO NOT SUPPORT THE CIRCUIT COURT’S RULINGS ON RATIONAL BASIS, CAUSATION, AND DAMAGES.....7

 A. CAS Does Not Show the Circuit Court Properly Applied the Law for Whether Cable Rates are Unduly Discriminatory, But Rather Only That CAS Disagrees with the Applicable Test.....7

 B. CAS Cannot Prove That Charter’s Pricing Plans Proximately Caused Any Alleged Harm.....10

 C. The Tortious Interference and Punitive Damages Awards Should Be Vacated.12

 1. The Record Warrants Relief From Damages Awarded For Tortious Interference.12

 2. CAS Fails to Rebut the Need for Elimination of Punitive Damages.....14

CONCLUSION AND RELIEF SOUGHT16

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996).....	15
<i>Johansen v. Combustion Eng'g, Inc.</i> , 170 F.3d 1320 (11th Cir. 1999)	15
STATE CASES	
<i>Adams v. Sparacio</i> , 196 S.E.2d 647 (W. Va. 1973).....	12
<i>Community Antenna Serv., Inc. v. Public Serv. Comm'n</i> , 633 S.E.2d 779 (W. Va. 2006).....	2, 8, 9
<i>Edwards v. Hobson</i> , 54 S.E.2d 857 (Va. 1949).....	12
<i>England v. Central Pocahontas Coal Co.</i> , 104 S.E. 46 (W. Va. 1920).....	6
<i>Garnes v. Fleming Landfill, Inc.</i> , 413 S.E.2d 897 (W. Va. 1991).....	15
<i>Oates v. Continental Ins. Co.</i> , 72 S.E.2d 886 (W. Va. 1952).....	12
<i>Skaggs v. Elk Run Coal Co.</i> , 479 S.E.2d 561 (W. Va. 1996).....	10
<i>Spencer v. McClure</i> , 618 S.E.2d 451 (W. Va. 2005).....	12
<i>State ex rel. Chesapeake & Potomac Tel. Co. v. Ashworth</i> , 438 S.E.2d 890 (W. Va. 1993).....	6
<i>Tolley v. ACF Indus., Inc.</i> , 575 S.E.2d 158 (W. Va. 2002).....	11, 12
FEDERAL STATUTES	
47 U.S.C. § 543(e)	3

STATE STATUTES

W. Va. Code § 24-4-72, 6, 7

W. Va. Code § 24D-1-13 *passim*

W. Va. Code § 24D-1-22 *passim*

W. Va. Code § 24D-1-232, 5, 6

W. Va. Code § 55-7-96

INTRODUCTION

In its initial brief, Charter Communications VI, LLC (Charter) explained that W. Va. Code § 24D-1-13 – which contains the substance of Community Antenna Service, Inc.’s (CAS) central claim – does not allow private parties to seek damages for unduly discriminatory cable television rates. Section 24D-1-13 only directs the Public Service Commission (PSC) to regulate cable rates to ensure they are “not unduly discriminatory.” W. Va. Code § 24D-1-13(b)-(c). The provision does not obligate cable operators to do or refrain from doing anything. And it grants no rights of any kind – express or implied – to any private entity.

CAS does not analyze W. Va. Code § 24D-1-13 in any meaningful way. Instead, it jumps to different provisions, W. Va. Code § 24D-1-22(a)-(c), which in turn speaks repeatedly and only to “[c]omplaints of affected parties regarding the operation of a cable system.” Those complaints “must be made in writing and filed with” the PSC. *Id.* § 24D-1-22(a). In the limited context of that complaint proceeding, “the complainant and cable operator shall be afforded all rights including the right of appeal as set forth in chapter twenty-four of this code.” *Id.* § 24D-1-22(c). Charter’s brief explained that the phrase “all rights,” read in context, can only mean that cable operators and complainants have the same rights that exist in other complaint proceedings before the PSC.

CAS, however, seeks to create a non-existent cause of action by shearing the words “all rights in chapter twenty-four” of all statutory context: its argument divorces “all rights” from the sentence, paragraph and chapter that otherwise define the phrase. By ignoring the context in which “all rights” are granted – namely, the complaint proceeding before the PSC – CAS and the court below ignore the vastly different statutory roles and tools the Legislature assigned to the PSC with respect to cable television (Chapter 24D) and traditional utilities (Chapter 24).

In defending the Circuit Court, CAS likewise fails to reconcile its claim with the provision of the West Virginia Code that restricts private parties “aggrieved” by violations of the cable television statute to seeking only equitable relief. More specifically, § 24D-1-23(e) authorizes only actions for “mandamus, or injunctive or other relief to compel compliance ... or to restrain or otherwise prevent” certain conduct. Once again, CAS argues that two words – “other relief” – should be read in the abstract, freed from the limits of context. The statute, however, does not allow unqualified “other relief,” such as damages.

Even if CAS were correct that “all rights” in § 24D-1-22(c) means that a private party is entitled to an action under § 24-4-7, CAS does not address this Court’s decisions that limit claims under § 24-4-7 to refund actions where there is no policy issue for the PSC to decide. CAS seeks no refund. Moreover, this case involves “a complex maze of interrelating applicable federal and state laws,” *Community Antenna Serv., Inc. v. Public Serv. Comm’n*, 633 S.E.2d 779, 785 (W. Va. 2006) (“*CAS v. PSC*”), raising policy matters of first impression for the PSC, not the courts.

Finally, CAS cannot meaningfully defend the Circuit Court’s erroneous application of the rational basis test – a test this Court directed the PSC to consider. Nor can CAS explain away the Circuit Court’s fundamental errors on issues of causation and damages. Ultimately, the failings in CAS’ arguments stem from the sheer depth of the Circuit Court’s error in allowing CAS to pursue a non-existent private right of action for allegedly discriminatory cable pricing. For these reasons, the judgment below should be vacated.

ARGUMENT

I. CAS FAILS TO DEMONSTRATE ANY PRIVATE RIGHT OF ACTION FOR ITS CHALLENGE TO CABLE PRICE COMPETITION.

A. CAS' Arguments Cannot Be Reconciled With W. Va. Code § 24D-1-13, Which Directs the PSC, Not Courts, to Decide Whether Cable Prices are Unduly Discriminatory.

CAS acknowledges, as it must, that its unprecedented cause of action against Charter for “unduly discriminatory rates” expressly rests on W. Va. Code § 24D-1-13. (CAS Br. 17; Ans. & Counterclaim (filed Nov. 20, 2000) Count III.) CAS’ brief does not acknowledge, however, that the text of that provision directs only the PSC to regulate cable rates to ensure they are not unduly discriminatory.¹ (Charter Br. 16.) In fact, CAS does not meaningfully analyze this substantive provision.

Charter’s brief explained that this provision of the West Virginia Code is consistent with federal law, which “allows only government entities to ‘prohibit discrimination’ in cable pricing.” (Charter Br. 16.) Charter also explained that an implied private right of action, like that brought by CAS, violates the federal law that allows only government entities to regulate cable rates. Numerous cases Charter cites have rejected court claims made by private parties against cable rates on this basis. (Charter Br. 17-19.)

CAS never responds to the central point of these cases. Instead, CAS seems to suggest that it has the same status as a state enforcing consumer protection laws. (CAS Br. 18-19.) But of course state agencies – not private parties – are expressly permitted to enforce state laws by 47 U.S.C. § 543(e). A private right, like the one CAS presses here, is not to be found in the state statute, and such a private right would not be permitted by federal law even if it were.

¹ The Statutory Appendix submitted with Charter’s initial brief contains the text of W. Va. Code § 24D-1-13, as well as the text of other key provisions.

No court other than the Circuit Court below has ever allowed a cable company to pursue a damages claim based on a state law that authorizes a government agency to regulate cable rates. The West Virginia statute on which CAS' substantive claim rests authorizes only the PSC to determine when cable rates are unduly discriminatory. The Circuit Court gave that task to a jury, usurping the PSC's authority, and the judgment should be reversed on that basis alone.

B. Nothing in West Virginia Code Chapter 24D Authorizes a Private Party to Seek Damages for Alleged Violations of State Cable Laws.

CAS claims that W. Va. Code § 24D-1-22 grants it a gateway to a private cause of action. That provision, however, simply does not mention any private right or remedy in court. (*See* Charter Br. 21-23.) Instead, each of the four subsections of § 24D-1-22 speaks to complaint proceedings against cable operators before the PSC. Under subsection (a), “[c]omplaints of affected parties regarding the operation of a cable system must be made in writing and filed with the commission.” Under subsection (b), the PSC is directed to “resolve all complaints,” and the form of complaints is described. In subsection (c) – the provision that CAS says opens the courthouse doors – the Legislature allowed “the complainant [to] file a formal request to the [PSC] and the complainant and cable operator shall be afforded all rights including the right of appeal as set forth in chapter twenty-four of this code.” Subsections (d) and (e) describe the PSC's ability to obtain fines or penalties (*not* damages) in the event a cable operator is found to violate a material term of its franchise, Chapter 24D, or any “rules or orders prescribed by the Commission.” Given these plain and repeated references to PSC complaint proceedings in each subsection of § 24D-1-22, CAS can only justify its claim by removing the “all rights” language from its statutory context.

Ignoring context, CAS argues that the phrase assuring litigants before the PSC “all rights including the right of appeal as set forth in chapter twenty four of this code” is somehow “clear

and unambiguous in incorporating ‘all rights’ of chapter twenty-four.” (CAS Br. 21.) According to CAS, the word “including” as used in this provision is “a word of enlargement.” (*Id.* at 22.) Yet CAS offers no theory to reconcile its position with the Legislature’s plain and express intent that “all rights afforded” in § 24D-1-22(c) are those of a “complainant and cable operator” after a complaint is filed *with the PSC*. (See Charter Br. 22 for examples of Chapter 24 rights that are triggered.) This provision simply assures that parties to cable complaint proceedings will have the same detailed procedural rights that exist for other PSC disputes. This Court should reject CAS’ invitation to create a brand new cause of action by lifting “all rights” out of the statutory text that otherwise repeatedly and unambiguously limits “all rights” to those available in a PSC proceeding.

Nor does CAS reconcile its position with the statutory remedies the Legislature expressly provided for alleged violations of Chapter 24D. As Charter explained, in § 24D-1-23(e), the Legislature expressly considered the rights private parties would have against cable operators and authorized court actions *only* seeking equitable remedies (“mandamus, or injunctive or other relief to compel compliance with this chapter, or any [PSC] rule, regulation, or order” and similar injunctive relief). (Charter Br. 23-24.) The Legislature did not include a damages remedy. Once again, CAS’ argument depends entirely on lifting selected words out of statutory context and ascribing them meaning inconsistent with that context.

To CAS, the phrase “other relief” trumps and eradicates all of the other words in the sentence that allow only equitable remedies. (CAS Br. 20, 23.) “Other relief,” however, is allowed explicitly only “to compel compliance with [Chapter 24D], or any rule, regulation, or order” of the PSC. Because the PSC has no authority to award damages against a cable operator under § 24D-1-22(d), a claim for damages simply would not “compel compliance with [Chapter 24D],

or any rule, regulation, or order.” CAS’ interpretation of § 24D-1-23, like the Circuit Court decision it supports, nullifies the statutory text that confines remedies to equitable relief, fails to give meaning to the Legislature’s silence on damages actions, and should be rejected.

Likewise, §§ 24D-1-22(c) and (d) allow fines or penalties by the PSC, or a court – but only if it is enforcing a PSC order. CAS does not try to reconcile its claim for damages with this scheme other than to mention W. Va. Code § 55-7-9, which, as Charter explained, “was merely enacted to preserve *existing causes of action* and to prevent defendant[s] from setting up the payment of the statutory penalty in bar thereof.” (Charter Br. 24 n.47 (quoting *England v. Central Pocahontas Coal Co.*, 104 S.E. 46, 47 (W. Va. 1920)) (emphasis added).) CAS does not respond to Charter’s authorities or explain what relevance § 55-7-9 could possibly have in the absence of a right of action arising from some other source.

Finally, even if CAS were permitted to file a claim against Charter’s pricing under W. Va. Code § 24-4-7, Charter explained how this Court has restricted that provision to “a limited number of cases – namely, those cases seeking a refund based on rules and practices of the PSC that are clear and unambiguous.” (Charter Br. 27 (citing and quoting Syl. pt. 1, *State ex rel. Chesapeake & Potomac Tel. Co. v. Ashworth*, 438 S.E.2d 890, 894 (W. Va. 1993).) CAS’ only response is to suggest some significance in the failure of the *Ashworth* plaintiff to exhaust its administrative remedies. (CAS Br. 21). CAS, however, also has *not* exhausted the administrative process for its complaint, which remains pending at the PSC. (Charter Br. 5.)

More importantly, this Court ruled in *Ashworth* that § 24-4-7 did not apply because the case raised “policy issues that should be considered by the PSC in the interest of a uniform and expert administration.” *Ashworth*, 438 S.E.2d at 894. Under *Ashworth*, the precedents it relied on, and other cases CAS cites that apply § 24-4-7 to public utilities governed by Chapter 24, the

Circuit Court would be required to defer to the PSC under the doctrine of primary jurisdiction because standards for decision in this dispute are not “clear and unambiguous.” Indeed, the presence of complex questions of policy and the need for careful interpretation of § 24D-1-13 strongly support the Legislature’s decision to allow only the PSC to decide when cable rates are “unduly discriminatory,” and its decision not to provide a private right for a damages action under Chapter 24D at all.

In sum, CAS cannot explain how, as a matter of law or logic, § 24D-1-22(c) incorporates the private right of action allowed for refund actions against public utilities in § 24-4-7. Because the Legislature expressly provided remedies for violations of Chapter 24D, and did not include a private right of action for damages, this Court should vacate the judgment below.

II. CAS’ REMAINING ARGUMENTS DO NOT SUPPORT THE CIRCUIT COURT’S RULINGS ON RATIONAL BASIS, CAUSATION, AND DAMAGES.

If this Court corrects the Circuit Court’s error in allowing CAS to proceed with a claim of “unduly discriminatory pricing,” all other assignments of error become moot. CAS acknowledges that Charter’s pricing practices are the sole basis for its Count IV (tortious interference with business expectancies), and concedes that if there is no private right of action for unduly discriminatory pricing under W. Va. Code § 24D-1-13, there is no “wrong” to support its tortious interference claim. (CAS Br. 25-26.) That result leaves no basis for the jury’s damages awards. Beyond that, CAS does not meaningfully rebut Charter’s arguments in support of the remaining grounds for reversal.

A. CAS Does Not Show the Circuit Court Properly Applied the Law for Whether Cable Rates are Unduly Discriminatory, But Rather Only That CAS Disagrees with the Applicable Test.

In *CAS v. PSC*, this Court required the PSC to employ a “rational basis standard” in deciding whether cable rates are unduly discriminatory. CAS simply disagrees with that test.

(*See* Charter Br. 28 (quoting 603 S.E.2d at 794-95).) CAS argues, for example, that “rational basis [] stripped of ... legislative and government classification” is “not appropriate to [] actions of private parties.” (CAS Br. 34.) But complaints that the rational basis test is not “appropriate to [a] civil action for damages [and] private party litigants” are just CAS’ opinions unsupported by any law. (*Id.* at 32.) This Court was clear in *CAS v. PSC* what test it was adopting.

The task of actually applying the test to a private, rather than government, defendant surely presents challenges. But that only reinforces the point detailed above in Section I that no cause of action exists. The rational basis test adopted in the *CAS v. PSC* case was meant for the expert agency to apply, not for a lay jury (or circuit court). Charter in fact urged the court below to follow precedents which hold that the existence of a rational basis is a question of law, a point CAS did not rebut and thus concedes. (Charter Br. 30.) Regardless, it is not surprising that a circuit court struggled in its attempt to apply the standard to nongovernmental conduct. For that reason alone, if this Court does not resolve the issue as a matter of law, it would be appropriate at the very least to vacate the judgment and remand for retrial with clarified instructions.

There is no doubt, in any event, that this Court intended a rational basis test employing equal protection principles, and that the test establishes a lenient standard Charter easily met. CAS simply argues that the standard is too deferential. (CAS Br. 30-31.) Charter has not sought, as CAS suggests, the same deference the government receives in rational basis analyses. (*Id.*) At the same time, in specifying the rational basis test, this Court selected a “minimal scrutiny” standard,² establishing a low threshold – a point CAS does not, and cannot, dispute. Charter’s “reliance ... on such authority” is therefore not “misplaced” in any way. (CAS Br. 31.)

² *See* Charter Br. 29, 31-33 (citing adoption of equal-protection-based rational basis standard in *CAS v. PSC*, 633 S.E.2d at 794-95, and Supreme Court and other cases showing that standard to be a lenient test).

Nor is CAS aided by block-quoting language in *CAS v. PSC* to the effect that “the phrase ‘rational basis’ ... in the federal scheme concerning the providing of cable services ... is not dispositive.” (CAS Br. 32 (quoting 633 S.E.2d at 790).) That this test is “not dispositive” does not mean Charter could not prove its rates were lawful, as they were here.

In that regard, it is simply wrong to say there were “no differences in economic benefit” that formed a rational basis for the rate plans Charter offered CAS customers, but not households without cable or satellite service, or Charter’s own customers (Charter offered similar plans to DBS subscribers). (CAS Br. 26, 33.) As Charter explained, it was rational to make one set of offers to customers who already had service and a different set to potential subscribers who did not have any service. (Charter Br. 32.) This pricing structure provided a “clear economic benefit,” as Charter showed. (*Id.*) CAS suggests that proof of economic benefit was required by means of some cost or technological difference in serving different categories of customers (CAS Br. 33), but that is not the law.³ Rather, those are but examples (“including but not limited to” in the charge to the jury) of the kinds of economic factors that can support finding a rational basis.

Nor was Charter limited, as CAS suggests, to proving rational basis based on categories of customers identified by the FCC, such as those offered introductory rates, or who are senior citizens or are economically disadvantaged. (CAS Br. 27-30, 34.) This Court adopted a test analogous to the rational basis standard applied in equal protection cases, with all that entails, including the ability to furnish any reasonable economic justification for different rates. Thus, Charter could not, for example, discriminate based on race or religion, and it could not develop

³ The Charge to Jury, at 7, recognized this threshold point, allowing differential rates “based upon justifiable differences Charter derived from serving such categories [of customers] including but not limited to technological or cost differences in serving such categories” Technological and cost differences were just two examples, and did not define the universe of possible differences.

different rate plans out of sheer malice or other improper, non-economic motives. But so long as Charter could show a reasonable economic impetus for its conduct, the low-threshold rational basis test that this Court adopted is met.⁴ Because Charter did just that, the verdict below cannot stand.

B. CAS Cannot Prove That Charter's Pricing Plans Proximately Caused Any Alleged Harm.

CAS expends significant energy attempting to knock down a straw man that it created. Specifically, CAS goes to great length to undercut Charter's (supposed) argument that proximate cause can only be proved by direct evidence; CAS argues that circumstantial evidence can suffice. Charter did not argue that circumstantial evidence is never sufficient to prove proximate causation. Rather, Charter argues, and the record shows, that CAS did not present sufficient evidence – direct, circumstantial, or otherwise – to prove causation in this case.

CAS had the burden “to show why [] customers changed service providers and how many [] left for what reasons.” (Order, entered Nov. 15, 2007, at 4.) Yet, the only evidence introduced – consisting solely of Charter work orders and records that showed only which subscribers received the pricing plans at issue – provides no proof of causation. CAS proffered this evidence hoping the jury would assume causation for 800 customers as a group, without bothering to offer any specific reason why any one of them chose Charter over CAS. As CAS acknowledges, a plaintiff may not ask a jury to engage in this type of speculation. (CAS Br. 40 & n.6.)

Charter elicited testimony from CAS' President and CEO, his daughter (also a CAS officer), and CAS' expert, Dr. Rizzuto, that some CAS customers left for reasons other than

⁴ *Cf. Skaggs v. Elk Run Coal Co.*, 479 S.E.2d 561, 583 (W. Va. 1996) (cited in CAS Br. 34) (if “jury can determine [defendant] acted without a good reason ... but not for an illicit reason ... the plaintiff loses”).

the challenged pricing. (Charter Br. 10-12, 37-37.) In an effort to neutralize this evidence of ambiguous causation, CAS states: “What third parties may have done in some instances does not provide evidence of specific conduct by specific persons in the specific instances ... represented by the [] work orders and other documentation.” (CAS Br. 39.) Yet this is exactly why the record cannot support the theory of causation CAS presented at trial: there was no evidence that even one person switched companies because of a pricing offer and not for other reasons in the record. There thus was no basis to allow the jury to find that *all* of the customers who received one of the challenged offers switched because of price.

While CAS claims the fact a customer received a price is strong circumstantial evidence that a customer switched *because* of that price, without specific evidence of *any* customer’s motivation, there is no evidence that a customer was more likely motivated by price rather than some other potential cause. (See Charter Br. 36.) For example, the evidence shows that the video programming and Internet services offered by Charter and CAS were substantially different.⁵ Thus, a desire for particular services offered by Charter, but not CAS, is one reason a customer *might* switch. But that fact does not provide insight into whether any specific customer switched *for that reason*. The same is true for price.

This is critical, as CAS fails to distinguish the many cases that require individualized proof of causation where evidence shows multiple potential causes. That the *Tolley* line of cases involved physical injury and not questions of motive does not undercut the fact that a plaintiff still must present more than a mere possibility of causation, particularly in the face of multiple,

⁵ (Trial Tr. Vol. I, 75:23 – 76:1, 136:22-24; Trial Tr. Vol. II, 150:18 – 152:12.)

equally possible causes.⁶ CAS does not cite any authority to support its position that the *Tolley* line of cases apply only to cases of physical injury, or any reason why *Tolley* should be so limited. All CAS has shown is that price is one of many possible causes for its alleged injury, and that kind of evidence is insufficient to prove causation

C. The Tortious Interference and Punitive Damages Awards Should Be Vacated.

1. The Record Warrants Relief From Damages Awarded For Tortious Interference.

Charter has shown that the damage award on tortious interference was duplicative or speculative. In its response, CAS fails to factor in the nature of its damages claims. CAS identified three separate categories of damages, but the alleged cause for each was Charter's pricing. (Trial Exs. 162 A-D.) CAS attempts to differentiate the jury award for Count III (undue discrimination) and Count IV (tortious interference) by pointing to different elements required to prove each claim. (CAS Br. 42.) But CAS presented only one set of facts to support the claims. CAS' only damages argument was that it suffered specific economic harm, as calculated by its expert, and measured by a claimed number of customers multiplied by lost revenue. This proffer was undifferentiated across both claims.

Moreover, the jury's award for Count IV cannot be reconciled with any element of the evidence or expert calculations. Aside from its "different elements" explanation, CAS' only response appears to be that the award was less than the total calculated by its expert, and the jury is entitled to deference. (CAS Br. 43-44.) But this is wholly incompatible with this Court's precedent holding that compensatory damages must be fixed with reasonable certainty and

⁶ *Tolley v. ACF Indus., Inc.*, 575 S.E.2d 158 (W. Va. 2002); *Spencer v. McClure*, 618 S.E.2d 451 (W. Va. 2005); *Adams v. Sparacio*, 196 S.E.2d 647 (W. Va. 1973); *Oates v. Continental Ins. Co.*, 72 S.E.2d 886 (W. Va. 1952); *Edwards v. Hobson*, 54 S.E.2d 857 (Va. 1949).

supported by proof in the record; such damages may not be the result of confusion or mistake by the jury. (Charter Br. 39 (citing cases).) CAS thus offers no reason why the award here should be sustained.

Finally, Charter has not waived its right to such relief against the tortious interference award. (CAS Br. 41.) Any claim that Charter failed to proffer jury instructions that would have instructed against any double recovery is demonstrably incorrect. Charter's proposed instruction 22 requested that the Circuit Court instruct on double recovery, giving the example that:

[I]f CAS prevails on both its claims for unduly discriminatory cable rates and charges and for tortious interference, and establishes a dollar amount for those injuries, you must not award any additional compensatory damages on each claim. CAS is entitled to be made whole only once and may not recover more than it lost.

(Pretrial Mem., App. E-2, at 16 ("No Double Recovery").) Furthermore, in objections to CAS'

Proposed Jury Instructions and Voir Dire, Charter noted:

CAS did not impose instructions on [among other things] double recovery, all of which are appropriate The Court accordingly should give those instructions ... in the absence of any alternative offered by CAS, and even if [it] does not adopt Charter's instructions on these points ... it must instruct on them in some regard.

(Charter's Objections to CAS' Proposed Jury Instructions and Voir Dire at 10 n.11.) Any claim that Charter cannot challenge the award because it largely drafted and offered the Verdict Form is similarly incorrect. The Verdict Form ultimately used was the Circuit Court's substantial revision to Charter's proposed form, which as initially drafted accompanied Charter's proposed jury instructions that addressed double recovery in unequivocal language. Furthermore, Charter is not arguing that recovery on both counts was impermissible (which is something a properly structured jury form might indicate), but rather that recovery on both counts *for the same injury*

is not permitted (which is something a verdict form could not convey, and is thus better captured by an instruction directly on this point).

2. CAS Fails to Rebut the Need for Elimination of Punitive Damages

CAS' arguments that punitive damages are appropriate in this case stretches the relevant law of punitives – and the record in this case – beyond recognition. All of the cases CAS relies upon, and indeed punitive damages by their very nature, involve violations of established rules or norms in a manner warranting punishment or deterrence. (CAS Br. 44-49.) As set forth in the initial brief, there was no clear line regarding prohibited cable pricing practices. In this case, Charter's conduct was not drastically different in nature or scope from what CAS did, what DBS providers did, or what Charter did with respect to its DBS competitors. (Charter Br. 40-42.)

Even accepting that Charter's conduct crossed some later-established line, it could not have done so with the malice, willfulness, or recklessness necessary to award punitives. Charter does not argue that punitive damages are never proper where the legal landscape is unsettled, no matter how egregious a defendant's conduct might be. Rather, its position is only that in the circumstances here, the necessary egregiousness – or, as the case law puts it, malice, willfulness, etc. – was not present. Indeed, the PSC found Charter's practices unworthy of punishment. Punitive damages are thus wholly inappropriate, especially given the lack of evidence of improper conduct by Charter. To the extent CAS seeks to support the jury's punitive damages award on grounds that Charter's conduct was anticompetitive and/or allegedly sought to drive CAS out of business (CAS Br. 45-46), CAS *abandoned* its claims under federal and state antitrust and unfair competition laws. (Stip. Regarding Exclusion of Evidence, at 2 ¶ 2 (Sept. 27, 2007).) It cannot now be allowed to recover through punitive damages for those abandoned claims.

CAS fails to provide any support for claims that the punitive damages award was appropriate under *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). CAS asserts that lack of PSC sanctions supports rather than mitigates against punitive damages, (CAS Br. 49), but where an administrative body is empowered to adjudicate and impose penalties and sanctions, its decision declining to do so indicates the conduct complained of is not worthy of additional punishment.⁷ Otherwise, CAS does not respond to the arguments in the initial brief, other than to urge affirmance. (CAS Br. 49.)

Finally, Charter has not waived any assignments of error as to punitive damages based on *Garnes* syllabus point 4 or otherwise. (CAS Br. 48-49.) Charter addressed with specificity each relevant *Garnes* factor, which factors show that the Circuit Court failed in its *Garnes* review and the punitive award should be vacated. (Charter Br. 41-46.) Charter even identified the *Garnes* factors that did not require any further analysis by the Court. (*Id.* at 43 n.92.) Accordingly, this Court should vacate the punitive damages award.

⁷ See, e.g., *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337-39 (11th Cir. 1999) (applying *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583-84 (1996)).

CONCLUSION AND RELIEF SOUGHT

The Legislature directed the PSC to ensure cable rates are not “unduly discriminatory” under W. Va. Code § 24D-1-13. The Circuit Court’s decision to allow CAS’ claim to proceed undermines this and many other elements of the Legislature’s carefully drafted statutes governing cable television systems. For this reason, and all those detailed above and in Charter’s initial brief, Charter respectfully asks this Court to vacate the Circuit Court’s judgment and direct it to enter judgment for Charter. In the alternative, this Court should order judgment entered for Charter on Counts III and IV of CAS’ complaint and vacate the jury’s awards of damages on Count IV and of punitive damages.

Respectfully submitted this 28th day of December, 2010.

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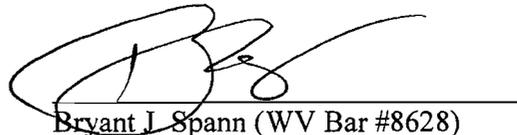
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CERTIFICATE OF SERVICE

I, Bryant J. Spann, certify that I caused a copy of the foregoing Appellant's Reply Brief to be served this 28th day of December, 2010, by electronic mail and postage-prepaid, first class United States mail on the following counsel of record to Plaintiff/Appellee Community Antenna Service, Inc.:

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A handwritten signature in black ink, appearing to read 'Bryant J. Spann', is written over a horizontal line.

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