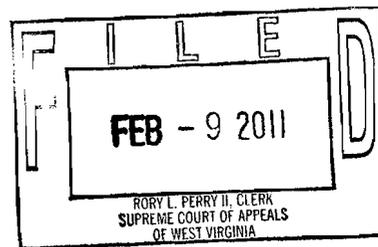


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0166

**FRONTIER WEST VIRGINIA INC.
SUB NOM. VERIZON WEST VIRGINIA INC.,**

Petitioner below,
Respondent,



v.

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

Respondent below,
Petitioner.

**FRONTIER WEST VIRGINIA INC.
SUB NOM. VERIZON WEST VIRGINIA INC.'S
MEMORANDUM IN OPPOSITION TO
WEST VIRGINIA STATE TAX DEPARTMENT'S
PETITION FOR APPEAL**

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I. INTRODUCTION

For the tax year 2004, the Public Service Commission (“PSC”) determined, pursuant to its clear statutory authority, that certain telecommunications services were “subject to competition” and hence were “conclusive[ly]” exempt from the telecommunications tax imposed by W.Va. Code § 11-13B-1 et seq. Two companies – then unaffiliated but now each a subsidiary of Frontier Communications Corporation – filed petitions for refunds of taxes that had been paid during that tax year on account of those exempt services.

The Tax Commissioner denied both refund requests, and the Office of Tax Appeals affirmed both denials as well. One of the companies, Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia (“Citizens”), appealed the denial of its \$1,998,987.78 refund to the Circuit Court of Kanawha County. The other, the current respondent Frontier West Virginia Inc. *sub nom.* Verizon West Virginia Inc. (“Frontier”), appealed its denial of a \$9,259,083.60 refund to the Circuit Court of Berkeley County.

In the *Citizens* case, the Hon. Tod J. Kaufman upheld the Tax Commissioner’s ruling. Citizens petitioned for an appeal in this Court. The Tax Commissioner opposed the petition. The petition (No. 073676) was heard on the Court’s April 16, 2008, motion docket and was denied on April 24.

By contrast, Frontier’s appeal succeeded. The Circuit Court of Berkeley County, the Hon. Gina M. Groh presiding, held that the legislative rule promulgated and relied upon by the Tax Commissioner – W.Va. C.S.R. § 110-13B-2.6 – “is contrary to the legislative enactment that triggered its promulgation, W.Va. Code § 11-13B-2(b)(5).” *Verizon West Virginia Inc. v. Helton*, No. 07-C-524 (Berkeley Co. (W.Va.) Cir. Ct., September 14, 2010), slip op. at 7.

Accordingly, the Court held that it “must set aside a legislative rule that so strips the PSC’s determinations of their legislatively-mandated conclusiveness.” *Id.* at 8.

The Tax Commissioner – having opposed this Court’s review of its invalid rule in the *Citizens* litigation – now embraces this Court’s scrutiny. For the reasons explained below, Judge Groh was perfectly correct in her ruling, and this Court should deny the petition and let the ruling stand.

On the other hand, the Tax Commissioner should not be permitted, in all fairness, to attempt to keep Frontier’s money without putting Citizens’ money on the table as well. Accordingly, if this Court chooses to grant the petition, it should also suspend its rules and grant Citizens a renewed petition out of time regarding its refund. Whatever the outcome of any appeal – and Frontier is very confident that this Court would affirm Judge Groh’s ruling – full and equal justice ought to be done both companies.¹

II. FRONTIER’S RESPONSE TO ASSIGNMENTS OF ERROR

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.

Response: The petition should be denied because the Circuit Court of Berkeley Court applied West Virginia Code § 11-13B-2(b)(5) correctly pursuant to its clear and unambiguous language. If the Court does accept the petition, the Court should also re-open Citizens’ petition in No. 073676, as it addressed the precise same issue presented here.

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

¹ A motion for leave to renew Citizens’ petition (if the instant petition be granted) out of time is filed simultaneously herewith.

Response: West Virginia Code § 11-13B-2(b)(5) is not ambiguous; rather, it leaves no question but that the Legislature granted to the PSC the sole authority to determine when telecommunications services are exempt from the telecommunications tax as being subject to competition.

C. The Legislative Regulation Was Properly Adopted.

Response: The Tax Commissioner's Legislative Rule is inconsistent with the clear language of West Virginia Code § 11-13B-2(b)(5) and therefore invalid.

III. ARGUMENT

A. WEST VIRGINIA CODE § 11-13B-2(b)(5) IS CLEAR AND UNAMBIGUOUS IN ITS DIRECTIVE THAT THE PSC IS GRANTED THE EXCLUSIVE AUTHORITY TO DETERMINE WHEN TELECOMMUNICATIONS SERVICES ARE SUBJECT TO COMPETITION AND THEREFORE EXEMPT FROM THE TELECOMMUNICATIONS TAX.

On December 23, 2004, the PSC issued an Order in Case No. 04-1082-T-GI ("2004 PSC Order") clearly identifying certain enumerated services or commodities that it found "subject to competition ... *for tax year 2004.*" 2004 PSC Order, Finding of Fact No. 2 and second Ordering clause (emphasis added). West Virginia Code § 11-13B-2(b)(5) makes plain that "[s]uch listing *shall constitute a conclusive determination* for the purposes of defining 'gross income'" subject to the tax. (Emphasis added.) Nevertheless, in direct defiance of the 2004 PSC Order and the plain language of West Virginia Code § 11-13B-2(b)(5), the Tax Commissioner included revenues from these exempt services and commodities within the definition of gross income subject to taxation for tax year 2004. But the Legislature had already chosen the agency to which that determination was assigned – the PSC. Hence, the PSC's determination must prevail as conclusive in order to serve both the plain language of the statute and its underlying purpose.

As the Court well knows, any interpretation of a statute is aimed at giving full effect to the Legislature's intent. Syl. Pt. 1, *Smith v. State Workmen's Compensation Comm'r.*, 159 W.Va. 108, 219 S.E. 2d 361 (1975). When the meaning of statutory language is plain, no further inquiry is needed, or even permitted. See *Appalachian Power Co. v. State Tax Dep't*, 195 W.Va. 573, 587, 466 S.E. 2d 424, 436 (1995) (“[i]f the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.”); *State v. Berrill*, 196 W.Va. 578, 584, 474 S.E. 2d 508, 514 (1996) (“When the statute is unambiguous on its face, there is no real need to consider its legislative history.”). Moreover, in interpreting a statute, each part must be considered to have meaning, and significance and effect must be given to every word, as well as the statute as a whole. *Mitchell v. City of Wheeling*, 202 W.Va. 85, 88, 502 S.E.2d 182, 195 (1998) (citing *State v. General Daniel Morgan Post No. 548*, 144 W.Va. 137, 107 S.E.2d 353 (1959)); *Wilson v. Hix*, 136 W.Va. 59, 65 S.E.2d 717 (1951).

West Virginia Code § 11-13B-3 imposes a 4% annual privilege tax upon the “gross income” of “every telecommunications business selling or furnishing telegraph, telephone or other telecommunication service ... on account of the business, or other activities, of the taxpayer engaged in or carried on within this state, during the taxable year.” *Id.* (Emphasis added).

But the tax truly is a privilege tax in the sense that it applies only to the extent that a telecommunications company is enabled by law to provide services within the state without any other provider competing with it. Accordingly, the tax does not apply to services that are “subject to competition” during a given tax year. Responsibility for this determination is naturally assigned to the state agency with expertise regarding and substantive regulatory oversight of the telecommunications industry generally – i.e. the PSC. Accordingly, West

Virginia Code § 11-13B-2(b)(5) requires that the PSC annually inquire into which services are or have been competitive, and thereupon make a “conclusive determination” as to what services are exempt from the tax. The Legislature is at times justifiably accused of using vague or inscrutable language. But no such accusation can be launched here. Frontier commends the Legislature's words to the Court:

.... On and 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. On or before [December 31] 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 purpose of defining "gross income" within the meaning of this subsection.***

(Emphasis added).

Hence, and as Judge Groh recognized, there really is nothing here for a court to even decide. Once the PSC determines that particular telecommunications services are subject to competition, gross income from providing those services is not to be taxed for the taxable year to which the PSC's determination applies.

B. THE TAX COMMISSIONER'S LEGISLATIVE RULE IS AN IMPROPER USURPING OF THE PSC'S LEGISLATIVELY GRANTED JURISDICTION AND MUST BE HELD INVALID.

But notwithstanding the PSC's explicit determination that certain services were competitive “for tax year 2004,” the Tax Commissioner instead decided here that those services would not be treated as competitive until tax year 2005. Hypothesizing that the language just quoted is somehow ambiguous, the Tax Commissioner substituted his judgment for that of the PSC, even though the PSC is the expert agency vested by the Legislature with regulating

telecommunications and determining whether and when services are or are not subject to competition. *See, e.g.*, W. Va. Code § 24-2-3c (rate deregulation of services subject to workable competition).

Why would the Tax Commissioner have done such a thing? He eschewed the PSC's *factual* finding based upon his "clarifying" legislative rule set forth in C.S.R. § 110-13B-2.6. This rule declares, in relevant part, that the PSC's annual list of services subject to competition during a tax year "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." (Emphasis added).

But this rule does not "clarify" the statute; it *changes* the statute. Not even a so-called "legislative" rule may do that much. *See, e.g., Kessel v. Monongalia County General Hospital Co.*, 220 W.Va. 602, 648 S.E.2d 266 (2007) (attorney general's legislative rule making "tying" arrangements unlawful *per se* was invalid in light of statute's mandate that state antitrust law be read in harmony with Sherman Act); *Syncor International Corporation v. Palmer*, 208 W.Va. 658, 524 S.E.2d 479 (2001) (legislative rule could not subject prescription drugs to sales tax, in contravention of statute, merely because buyer was technically health care provider rather than ultimate consumer of drug).

No administrative rule may add to, subtract from, or otherwise alter a statute's substantive terms. *See* syl. pt. 3, *Syncor*. Indeed, when an agency's interpretation of its regulations is "...unduly restricted and in conflict with the legislative intent, the agency's interpretation is inapplicable." *Syncor*, 542 S.E.2d at 483 (quoting *Boley v. Miller*, 187 W.Va. 242, 418 S.E.2d 352, 356 (1992)); *Appalachian Power*, 466 S.E.2d at 439 ("[w]hen the agency's

interpretation goes beyond that scope of whatever ambiguity the statute contains, *no* deference is due.”) (Emphasis added).

Moreover, even if the definition in the regulations, as interpreted by the Tax Commissioner, were entitled to some level of deference, such deference “cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by’ the Legislature.” *Appalachian Power*, 195 W. Va. at 588-589, 466 S.E.2d at 439-440 (quoting *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983)). Indeed, as the Court explained in *Appalachian Power*, “[j]udicial review must not become judicial abdication, and we must carefully consider each case to determine whether deference is warranted and if so, how much to accord.” *See id.*

Here, the Tax Commissioner’s interpretation of the regulation would set at naught the Legislature’s plain policy intention to apply the telecommunications tax to services that are not subject to competition, but not to services that are subject to competition. In the present case, the PSC has explicitly and specifically found certain services to be subject to competition throughout “tax year 2004.” 2004 PSC Order Finding of Fact No. 2 and second Ordering clause. The plain language of West Virginia Code § 11-13B-2(b)(5) does not impose a privilege tax on income from telecommunications services that were, in fact, subject to competition during tax year 2004 – as was found from the facts disclosed and known to the only designated fact finder – the PSC.

Time and again, this Court has admonished the Tax Commissioner for attempting to alter or amend a particular statute by adding limiting language in the regulations that it promulgates. *See Syncor*, 542 S.E.2d at 483 (2001) (overturning a legislative rule of the Tax Commissioner that added limiting language not in the statute, and holding that “when the language of a statute

is clear and unambiguous, an administrative agency's rules and regulations must give such language the same clear and unambiguous force and effect.") (*quoting Appalachian Power Co.*, 466 S.E.2d 424)). *See also CNG Transmission Corporation v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002) (overturning a longstanding regulation of the Tax Commissioner restricting the application of a statutory definition, and again holding that "an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.")

At any rate, and at least for the purposes of just this case, the regulation can be applied "in harmony with the governing statute." *Syncor*, 542 S.E.2d at 483. Why? Because this case is only about tax year 2004, and nothing in the regulation *prohibits* the conclusive application of the PSC's determination to that "current" tax year. The regulation goes astray only to the extent that the PSC's determination is also deemed conclusive for the following tax year, even if the PSC's findings in that subsequent year had changed. If such a case arises, the Commissioner and courts may address it. This case is not that one.

In sum, there simply is no ambiguity in the operative statute. West Virginia Code § 11-13B-2(b)(5) deems the decision of the PSC – not the Tax Commissioner – to be the conclusive determination of what constitutes gross income subject to the privilege tax under these circumstances. The Legislature could have directed the PSC to merely advise the Tax Commissioner, or it could have left out the final sentence of the section entirely. But it did not. The Legislature knew what it wanted to do, and it did it. The Tax Commissioner is not free to substitute his judgment.

Furthermore, the Tax Commissioner's rule fails to give any effect to the express statutory direction that income from services "subject to competition" were not to bear privilege tax "[o]n

or after [July 1, 1988].” Under the Tax Commissioner’s reading, the PSC’s filing on December 31 would, in all instances, only be effective for the prospective calendar year. It would have been impossible, therefore, under his interpretation, to have excluded anything from gross income, even from the most competitive of services, for the period between July 1, 1988, and December 31, 1988. Inasmuch as that interpretation would render the statutory language “[o]n or after July 1, 1988” pointless, meaningless, and impotent, it cannot possibly be valid. *See Mitchell v. City of Wheeling*, 202 W. Va. 85, 88, 502 S.E.3d 182, 195 (1998) (all of a statute’s words are to be given full effect).

The Commissioner’s rule also ignores that the statute requires the PSC to make findings regarding what services are, or have been, subject to competition by December 31st of each year. By necessity, then, its findings can only apply to what it has found to have occurred in the past. The PSC is not charged with a duty of soothsaying. It cannot know with certainty what the future will hold or conclusively determine what services will be competitive during the next year. Indeed, the Commissioner’s rule could conceivably deprive the State of privilege taxes to which it would be entitled, should a formerly competitive service cease to be so.²

² Moreover, the Tax Commissioner’s ruling ignores the distinction made in the statute between “tax year” and “calendar year.” The statutory definition of “taxable year” refers to “calendar year,” but recognizes that, for a given taxpayer, the terms are not necessarily the same. W.Va. Code § 11-13B-2(b)(9). For purposes of the telecommunications tax, gross income is measured and taxed “during the taxable year.” W.Va. Code § 11-13B-3. Under the Tax Commissioner’s ruling, taxpayers whose taxable year is other than a calendar year would be faced with changes in the definition of gross income in mid-year, even if the PSC had determined that the services were subject to competition for the entire taxable year.

C. THE PETITION SHOULD ALSO BE DENIED BECAUSE IF ANY AMBIGUITY DOES EXIST IN WEST VIRGINIA CODE § 11-13B-2(b)(5), THAT AMBIGUITY MUST BE CONSTRUED STRICTLY AGAINST THE STATE.

Even if the telecommunications tax statute were ambiguous – and it plainly is not – the Tax Commissioner’s decision also failed to recognize the well-established doctrine that laws imposing taxes must be construed strictly against the state. 18 M.J. Taxation, § 10. Thus, any ambiguity in how a tax statute is applied is resolved in favor of the taxpayer. *Id.* This Court has reiterated this doctrine over and over, noting just a few years ago that where “the statute to be interpreted concerns taxation, we usually construe the tax law in a manner that is favorable to the subject taxpayer.” *Coordinating Council for Independent Living, Inc. v. State Tax Commissioner*, 209 W. Va. 274, 281, 546 S.E.2d 454, 461 (2001). *See also Doran Associates, Inc. v. Paige*, 195 W. Va. 115, 464 S.E.2d 757 (1995); *Ballard's Farm Sausage, Inc. v. Dailey*, 162 W. Va. 10, 246 S.E.2d 265 (1978); *In re Estate of Evans*, 156 W. Va. 425, 194 S.E.2d 379 (1973); *Baton Coal Co. v. Battle*, 151 W. Va. 519, 153 S.E.2d 522 (1967); *State ex rel. Battle v. B & O.R.R.*, 149 W. Va. 810, 143 S.E.2d 331 (1965); *In re Glessner's Estate*, 146 W. Va. 282, 118 S.E.2d 873 (1961); *State ex rel. Lambert v. Carman*, 145 W. Va. 635, 116 S.E.2d 265 (1960); *Thacker v. Crow*, 141 W. Va. 361, 90 S.E.2d 199 (1955); *City of Moundsville v. Brown*, 125 W. Va. 779, 25 S.E.2d 900 (1943); *Darnall v. Board of Park Comm'rs*, 124 W. Va. 787, 22 S.E.2d 542 (1942); *Fry v. Ronceverte*, 93 W. Va. 388, 117 S.E. 140 (1923); and *Pleasants County Court v. Brammer*, 68 W. Va. 25, 69 S.E.450 (1910). Accordingly, even if W.Va. Code § 11-13-B-2(b)(5) were subject to more than one plausible interpretation regarding the applicable tax year, it would have to be construed in a manner favorable to the telecommunications companies.

D. THE OMNIBUS BILL ORIGIN OF THE TAX COMMISSIONER'S LEGISLATIVE RULE ALSO WEIGHS AGAINST ENFORCING IT OVER THE LEGISLATURE'S CONTRARY CLEAR DIRECTIVE IN WEST VIRGINIA CODE § 11-13B-2(b)(5).

Finally, it bears mention that, C.S.R. § 110-13B-2.6 may represent the sort of impermissible administrative chicanery against which this Court warned in *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993), and *Appalachian Power*, 466 S.E.2d 424. In both *Kincaid* and *Appalachian Power*, this Court cautioned against unquestioning reliance on legislative rules adopted in omnibus bills under which the rules of numerous state agencies were approved by the Legislature en masse, in violation of the State Constitution's requirement that legislation encompass only one object or purpose. While *Kincaid* invalidated the practice of enacting legislative rules in an omnibus bill on a prospective basis only, the Court noted that "rules previously enacted in that manner must be given special scrutiny." *Kincaid*, syl. pt. 1. Frontier invites special scrutiny of C.S.R. § 110-13B-2.6, which was so adopted. Moreover, in *Appalachian Power*, the Court cautioned that, because of the nature of omnibus rule-enacting bills, the Legislature had "not specifically register[ed] its approval" of a rule enacted in that manner. *Appalachian Power*, 466 S.E.2d at 435. Indeed, it warned that rules in such omnibus bills have the potential for "deceiving tactics." *Id.*³ In any event, Frontier need not allege, much less prove, that the Tax Commissioner engaged in "deceiving tactics" when C.S.R. § 110-13B-2.6 found its way into the Code of State Regulations. The rule squarely contradicts the statute and the whole point of the statute.

³ *But cf. Swiger v. UGI/AmeriGas, Inc.*, 216 W.Va. 756, 613 S.E.2d 904 (2005): "In response to *Kincaid*, the Legislature amended W.Va. Code 29A-3-12 to provide, in pertinent part, that: In acting upon the separate bills authorizing the promulgation of rules, the Legislature may, by amendment or substitution, combine the separate bills of authorization insofar as the various rules authorized therein are proposed by agencies which are placed under the administration of one of the single separate executive departments ... or the Legislature may combine the separate bills of authorization by agency or agencies within an executive department. W.Va. Code § 29A-3-12(a)."

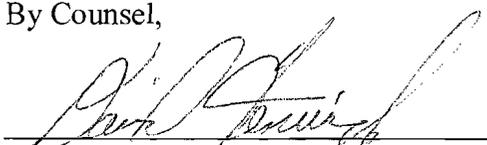
IV. CONCLUSION

The Tax Commissioner's petition should be denied. West Virginia Code § 11-13B-2(b)(5) is clear and unambiguous in its declaration that the PSC is charged with determining whether particular telecommunications services are subject to competition such that gross income from providing those services is not to be taxed. The PSC's determination that certain telecommunications services were subject to competition "for the 2004 tax year" is dispositive of the issue—Frontier is entitled to a refund of taxes paid during the 2004 calendar year on those services. The Tax Commission's legislative rule cannot alter this clear statutory directive. Finally, should the petition be granted, the appeal of Frontier's affiliate, Citizens, on this precise same issue, which previously was denied, should be re-opened.

Respectfully submitted,

FRONTIER WEST VIRGINIA INC. *SUB*
NOM. VERIZON WEST VIRGINIA INC.,

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Petitioner below,
Respondent,

v.

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

Respondent below,
Petitioner.

CERTIFICATE OF SERVICE

I, J. David Fenwick, counsel for Frontier West Virginia Inc., *sub nom.* Verizon West Virginia Inc., do hereby certify that the foregoing **FRONTIER WEST VIRGINIA INC.' SUB NOM. VERIZON WEST VIRGINIA INC.'S MEMORANDUM IN OPPOSITION TO WEST VIRGINIA STATE TAX DEPARTMENT'S PETITION FOR APPEAL** has been served upon the following counsel of record by mailing a true copy thereof this 9th day of February 2011 to:

L. Wayne Williams,
Assistant Attorney General
Office of the Attorney General
Building 1, Room W-435
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Charleston, West Virginia 25305



J. David Fenwick