

11-0166

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

VERIZON WEST VIRGINIA, INC.,

Petitioner,

v.

HELTON, VIRGIL T., as
STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

BERKELEY COUNTY
CIRCUIT CLERK
2010 SEP 14 PM 2:24
VIRGINIA M. SINECLOTH
Case No.: 07-C-24
Judge Gina M. Cron

FINAL ORDER

This matter comes before the Court on a Petition for Appeal filed by Verizon West Virginia, Inc., ("Verizon") on June 22, 2007, pursuant to W.Va. Code § 11-10A-19. Verizon asks this Court to reverse the Final Decision of Robert W. Kiefer, Jr., Administrative Law Judge ("ALJ") for the West Virginia Office of Tax Appeals ("OTA"), dated April 23, 2007. That decision held that in accordance with the W.Va. Tax Commissioner's ("Commissioner's") legislative rule, W.Va. C.S.R. § 110-13B-2.6, the determination performed by the Public Service Commission ("PSC") as to whether commodities or services are subject to competition, made pursuant to W.Va. Code § 11-13B-2(5), is applicable to the succeeding calendar year. In so concluding, the OTA denied Verizon's petition for a refund in the amount of \$9,259,083.60 for its calendar year 2004 telecommunications tax.

After careful and independent review of the record, the parties' memoranda of law, and the pertinent legal authority, for the reasons stated in the following Opinion, the Court concludes that the decision of the OTA must be reversed.

SEP 17 2010

OPINION

Factual and Procedural Background

In August of 2006, the W.Va. State Tax Department ("Tax Department") and Verizon entered into a joint stipulation of facts concerning this matter. Thus, the facts of this case are not in dispute, but are reiterated in pertinent part from the decision of the OTA, for clarity of this Opinion upon appeal.

1. Verizon is a W.Va. corporation engaged in a telecommunications business selling or furnishing telegraph, telephone, or other telecommunications service within the meaning of W.Va. Code § 11-13B-1, 3.
2. Starting before November 2001 and throughout 2004, Verizon continuously provided local residential and business telecommunications services throughout its incumbent local service areas in W.Va.
3. Tax year 2003 is the period from January 1, 2003, through December 31, 2003.
4. Tax year 2004 is the period from January 1, 2004, through December 31, 2004.
5. Tax year 2005 is the period from January 1, 2005, through December 31, 2005.
6. Throughout tax year 2004, Verizon reported and paid estimated telecommunications taxes to the Tax Department on revenues it received from providing local residential and business services to customers in W.Va.
7. On December 31, 2003, the PSC issued a Commission Order in Case No. 03-1359-T-GI in which it listed 63 separately enumerated services or commodities that it found to be subject to competition.

8. On December 31, 2004, the PSC issued a Commission Order in Case No. 04-1082-T-GI in which it listed 66 separately enumerated services or commodities that it found to be subject to competition.
9. On May 31, 2005, Verizon filed a timely telecommunications tax refund claim in the amount of \$9,359,083.60 with the Tax Department for the alleged overpayments of taxes it made for the period January 1, 2004, through December 30, 2004, with respect to revenues it received for providing the local business and residential telecommunications services that the PSC had determined were subject to competition in its 2004 Order.
10. The Commissioner denied Verizon's claim for a telecommunications tax refund on August 15, 2005.
11. On October 14, 2005, Verizon filed a timely petition for refund seeking administrative review by the OTA of the Commissioner's denial of its tax refund. Through that petition Verizon sought the aforementioned amount as a refund for taxes it allegedly overpaid for the year 2004, with any applicable interest.
12. In his Final Decision dated April 23, 2007, the ALJ held that in accordance with the Commissioner's legislative rule, W.Va. C.S.R. § 110-13B-2.6, the determination performed by the PSC as to whether commodities or services are subject to competition, made pursuant to W.Va. Code § 11-13B-2(5), is properly applicable to the succeeding calendar year. In so concluding, the ALJ denied Verizon's tax year 2004 refund petition.

Standard of Review

This Court reviews the ALJ's Final Decision pursuant to W.Va. Code § 11-10A-19(f):

The circuit court shall hear the appeal as provided in section four, article five, chapter twenty-nine-a of this code: Provided, That when the appeal is to review a decision or order on a petition for refund or credit, the court may determine the legal rights of the parties, but in no event shall it enter a judgment for money.

Accordingly, the Court must follow the State Administrative Procedures Act's appellate review protocols embodied in W.Va. Code § 29A-5-4(g):

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The facts not being at issue in this matter, the Court now turns to review *de novo* the ALJ's conclusions of law and application of law to the facts. See e.g. Martin v. Randolph County Bd. of Educ., 195 W.Va. 297, 304-305, 465 S.E.2d 399, 406-407 (1995).

Discussion

The issue squarely before this Court is whether the ALJ correctly held that in accordance with the Commissioner's legislative rule, W.Va. C.S.R. § 110-13B-2.6, the determination performed by the PSC as to whether commodities or services are subject to competition, made pursuant to W.Va. Code § 11-13B-2(5), is properly applicable to the succeeding calendar year. Although the ALJ's ultimate conclusion was in error, the ALJ pinpointed the dispositive legal issues in this matter, to-wit: whether W.Va. Code § 11-13B-2(5) is ambiguous, and whether the Commissioner's legislative rule properly cures that potential ambiguity.

First, W.Va. Code § 11-13B-2(b)(5) delineates what constitutes gross income for telecommunications providers:

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.

(Emphasis added). Thus, after July 1, 1988, a telecommunications company's gross income would not include any income from the provision of services or commodities that the PSC determined to be subject to competition. The rub of this matter, indeed the issue that led to the present litigation, is fairly straightforward: the Commissioner concluded that the W.Va. State Legislature ("Legislature") did not indicate in W.Va. Code § 11-13B-2 the year to which an order of the PSC defining those services and commodities subject to competition would apply.

To cure this perceived ambiguity, the Commissioner promulgated a legislative rule establishing the taxable year to which the PSC's determinations apply:

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.**

W.Va. C.S.R. § 110-13B-2.6 (emphasis added). According to the Commissioner, Verizon's gross income for purposes of calendar year 2004 taxation would not include revenue derived from the provision of services or commodities subject to competition as calculated by the PSC in 2003. In effect, W.Va. C.S.R. § 110-13B-2.6 simply mandates that the PSC's determinations be applied prospectively – to the next calendar year. Significantly for the present analysis, this rule was adopted by the Legislature as S.B. 397 in 1988, also the omnibus bill at issue in Kincaid v.

Mangum, 189 W.Va. 404, 432 S.E.2d 74 (1993). See also Acts of the W.Va. Legislature, 2nd Reg. Sess., 1988, Chapter 112.

The ALJ agreed with the Commissioner that W.Va. Code § 11-13B-2(b)(5) is ambiguous:

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 the 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 purposes of defining 'gross income.' There is no language by which the Legislature expressly states the year to which the Public Service Commission's determination applies.

(Page 10, ALJ's Final Decision). After concluding the same, the ALJ evaluated the Commissioner's legislative rule under the analytical framework provided by the W.Va. Supreme Court in Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995). This Court disagrees, however, that W.Va. Code § 11-13B-2(b)(5) is ambiguous, and therefore must analyze whether the language of that section precludes the Commissioner's interpretation of the application of the PSC's determinations.

To begin, the W.Va. Supreme Court of Appeals in Appalachian Power reiterated that judicial review of an agency's construction of a statute must adhere to the standards espoused by the U.S. 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). Further, because this Court is presently considering a legislative rule adopted by omnibus legislation, it must analyze the Commissioner's legislative rule under Chevron and the Kincaid decision, which precludes a reviewing court from "giving controlling weight to omnibus bill legislation without first giving it careful scrutiny." Appalachian Power at 583, 434. As the W.Va. Supreme Court recapitulated: "If it is a legislative rule [at issue], the court must first determine the rule's validity under *Chico* and *Kincaid*. Assuming validity, the appropriate level of consideration due it depends on its clarity

as a legislative rule. If the legislative rule is valid, clear as to its intent, and not *contrary to the legislative enactment that triggered its promulgation*, the need for further review does not arise." Id. at 586, 437 (emphasis added).

The Court finds no cause to perform an exhaustive analysis of the legislative history of the Commissioner's promulgation of the rule at issue: assuming *arguendo* that W.Va. C.S.R. § 110-13B-2.6 is valid under the Chico and Kincaid decisions, the Court nevertheless concludes that the Commissioner's legislative rule is contrary to the legislative enactment that triggered its promulgation, W.Va. Code § 11-13B-2(b)(5). Indeed, "Rules and Regulations of ... [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the [agency's] Rules and Regulations that it has in the statute." Syl. pt. 5, Appalachian Power. Such is not the case in this matter.

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-2(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.

The Commissioner's legislative rule at issue, however, effectively rewrites the conclusive determinations made by the PSC in 2003 and 2004: under W.Va. C.S.R. § 110-13B-2.6, the PSC's determinations for tax year 2003 are applied in calendar year 2004, and the PSC's determinations for tax year 2004 are applied in calendar year 2005. The stipulated facts herein clearly indicate this improper effect: the parties agree that tax year 2003 is the period from January 1, 2003, through December 31, 2003, and that tax year 2004 is the period from January 1, 2004, through December 31, 2004. Therefore, contrary to the direction of the Commissioner's legislative rule, the PSC's 2003 Order referenced above should have been used by the Tax Department in calculating Verizon's gross income for tax year 2003: January 1, 2003, through December 31, 2003. Similarly, the PSC's 2004 Order referenced above should have been used by the Tax Department in calculating Verizon's gross income for tax year 2004: January 1, 2004, through December 31, 2004. Directing the Tax Department otherwise in this case can only contradict the Legislature's intent as ascertained through the plain language and meaning of W.Va. Code § 11-13B-2(b)(5), and the Court must set aside a legislative rule that so strips the PSC's determinations of their legislatively-mandated conclusiveness.

Conclusion

The Final Decision of the Administrative Law Judge for the Office of Tax Appeals is hereby **REVERSED** for its error of law under W.Va. Code 29-A-5-4(g).

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.

The Petitioner's cause is hereby **REMANDED** to the Respondent pursuant to W.Va. Code § 29A-5-4(g) for further proceedings consistent with this Order.

The Clerk is hereby directed to enter this Order and transmit attested copies thereof to all counsels of record and parties.

SO ORDERED.

ENTERED the 14th day of September, 2010.


HONORABLE GINA M. GROH
BERKELEY COUNTY CIRCUIT COURT

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

By: 
Deputy Clerk

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,

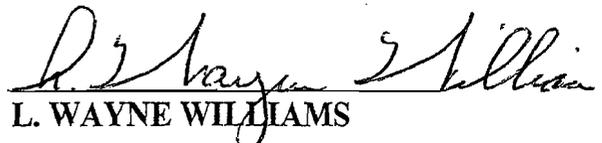
Respondent.

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 *AMENDED Docketing Statement* was served via Federal Express (Michael E. Caryl) and by United States Mail (Joseph J. Starsick, Jr.) postage prepaid, this 13th day January, 2011, addressed as follows:

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