ARGUMENT DOCKET

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0166

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

Respondent below,

Petitioner,

v.

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

Petitioner below,

Respondent.

FRONTIER WEST VIRGINIA INC., *SUB NOM.* VERIZON WEST VIRGINIA INC.'S SUPPLEMENTAL BRIEF

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INTRODUCTION

In a lengthy "Supplemental" Brief, the Tax Commissioner continues his efforts to distract this Court from a straightforward and accurate reading of the statute that imposes West Virginia's telecommunications privilege tax. That statute, W.Va. Code §11-13B-3, imposes an "annual privilege tax" *only* upon earnings derived from telecommunications services that were "not subject to competition" *when those services were provided.* In its prior Memorandum in Opposition, Frontier demonstrated that the Tax Commissioner's argument cannot be reconciled with the plain and unambiguous language of W.Va. Code § 11-13B-2(b)(5), which grants to the Public Service Commission ("PSC") the exclusive authority to determine when telecommunications services are subject to competition and therefore not subject to the tax. Those arguments will not be repeated here. However, in addition to those arguments, the Tax Commissioner's position defies common sense.

As the Circuit Court properly recognized, "[W]hen the [PSC] determines that particular telecommunications services 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, p. 9).

The statute could scarcely be clearer:

> .... 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.

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

The Tax Department's implementing regulation, W.Va. C.S.R. § 10-13B-2.6, simply restates § 11-13B-2(b)(5), but then adds a final few words that improperly ignore the Legislature's grant of authority to the PSC and attempt to usurp that authority for the Tax Commissioner. The regulation provides:

> 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.**

(Emphasis added showing regulation's added language).

As Frontier has pointed out previously, this rule does not "clarify" the statute; it *changes* the statute. No rule – "legislative" or otherwise – may do so. *See, e.g.*, *Kessel v. Monongalia County General Hospital Co.*, 220 W.Va. 602, 648 S.E.2d 266 (2007); *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).

The Tax Commissioner's creative but misguided arguments ignore (1) the multiple provisions in Article 13B that corroborate Frontier's position, and (2) the fundamental and logical premise underlying a tax *exclusion*.

I. READING RELEVANT PROVISIONS OF CHAPTER 11, ARTICLE 3B, IN *PARI MATERIA* OVERWHELMINGLY DEMONSTRATES THAT THE TAX COMMISSIONER'S ARGUMENT CANNOT BE SUSTAINED.

The statute defining "gross income," W.Va. Code 11-13B-2(b)(5), is not the only pertinent provision. The section that actually imposes the tax just as clearly refutes the Tax Commissioner's position. W.Va. Code §11-13B-3(a) provides:

> Tax imposed.--Upon every telecommunications business selling or furnishing telegraph, telephone or other telecommunications service, there is hereby imposed an annual privilege tax on account of the business, or other activities, of the taxpayer **engaged in or carried on within this state, during the taxable year. The amount of taxes due shall be determined by application of rates against gross income**, as specified in subsection (b) for telecommunications business effective on and after the first day of July, one thousand nine hundred eighty-seven.

(Emphasis added).

As logic dictates, this provision makes clear that the subject privilege tax is "on account of the business" engaged in "during the taxable year." *Id.* Thus, the business in which Frontier engaged during calendar year 2004 determined what tax it owed or did not owe in 2004. One would think that this proposition would be uncontroversial enough, but it is one that the Tax Commissioner necessarily disputes. Second, §11-13B-3(a) goes on to provide that "the amount of taxes due shall be determined by application of rates against gross income." Again, there is nothing remarkable about such a tax statute, yet the Tax Commissioner's regulation would deny it any effect. If the "amount of taxes" due is determined by multiplying a given rate against "gross income," then the definition of "gross income" from W.Va. Code § 11-13B-2(b)(5) must also be used.

The Tax Commissioner contends that because the definition of "gross income" does not contain the words "tax year," "the Legislature did not direct the [PSC] to determine the tax year to which the PSC List would apply." (Appellant's Supp. Brief, p. 7). However, "taxable year" *is* defined. "'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, *upon the basis of which tax liability is computed under this article.*" W. Va. Code, § 11-13B-2(b)(9) (Emphasis added). This perfectly cogent definition leaves no doubt: the time period in which the tax on "gross income" is earned cannot be different from the time period in which that "gross income" is incurred and computed.

I. THE TAX COMMMISSIONER SEEKS THE UNCONSCIONABLE RESULT OF REFUSING TO REFUND ESTIMATED TAX PAYMENTS MADE ON INCOME THAT WAS NEVER SUBJECT TO THE TAX TO BEGIN WITH.

The Tax Commissioner's position is utterly illogical: the time period for which Frontier owes the subject taxes cannot be divorced from the time period for which it does not. Services subject to competition are *excluded* from the "gross income" upon which the tax is levied *in the first place.* In other words, no tax *was ever imposed* upon these services, and so the State cannot refuse to refund estimated payments made simply because Frontier was uncertain whether tax would be due on these services.

Indeed, as explained in Frontier's Memorandum in Opposition, the subject legislative rule ignores W.Va. Code 11-13B-2(b)(5)'s requirement that the PSC make *findings* – and not *predictions* – regarding what services are, or have been, subject to competition by December 31st of each year. Here, the PSC specifically ordered – similar to its Orders in past years – that "the following telecommunications services are certified as competitive telecommunications services *for the 2004 tax year*[.]" *See* PSC Order, Case No. 04-1082-T-GI (Dec. 23, 2004) (emphasis added). Indeed, the Commissioner's rule could

conceivably *deprive* the State of privilege taxes to which it would be entitled, if the PSC finds in December that a formerly competitive service ceased to be so during that year.

Moreover, Frontier does not seek a tax "credit," which is an asset that may be appropriate to apply prospectively.[1] Frontier seeks a refund of money that it paid but never owed. The statute says that revenues for services subject to competition are not subject to the tax – period.

Finally, the Tax Commissioner's concessions speak louder than his arguments. The Tax Commissioner *concedes*, as he must, that "[a]ccording to statute the PSC List constitutes a conclusive determination regarding which telecommunications services are taxable and which services are exempt." Appellant's Supp. Brief, at 3. The Tax Commissioner *concedes*, as he must, that "the Legislature directed the [PSC] to determine which services are taxable and which services are exempt." *Id.* at 7-8. What, then, is this Court to decide? These concessions are decisive, and the Tax Commissioner's efforts to argue past them are simply entreaties to the Court to avert its eyes from the straightforward language of Article 3B.[2]

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[1] *See, e.g.,* W. Va. Code § 11-13C-5 (Business Investment and JOBS Expansion Tax) Credit, including as a component of the tax "credit" "(a)(1) The one-tenth part allowed under section four of this article for qualified investment placed into service or use during a prior taxable year;"

[2] The Tax Commissioner also concedes that his office has in the past attempted to increase tax revenues by adopting a regulation that attempted to create an ambiguity in a statute that "contained no ambiguity whatsoever." (Appellant's Supp. Brief, p. 13). In discussing this Court's holding in *Syncor International Corp. v. Palmer*, 208 W.Va. 658, 524 S.E.2d 199 (2001), the Tax Commissioner admits that his office tried to limit application of a tax exemption where "[t]he Legislature could not have employed broader language[.]" in creating the exemption. *Id.* at 12-13. Notwithstanding the attempted distinction, the Tax Commissioner's subject regulation is guilty of the same offense here.

IV. CONCLUSION

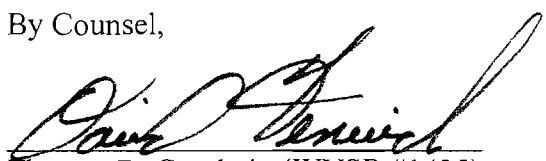
West Virginia Code § 11-13B-2(b)(5) is clear and unambiguous in its declaration that the PSC is charged with determining whether particular telecommunications services are subject to competition. The PSC's determination that certain telecommunications services were subject to competition "for the 2004 tax year" is dispositive of the issue – Frontier is entitled to a refund of monies that it paid but did not owe during the 2004 calendar year. The Tax Commissioner cannot ignore this clear statutory directive.

For these compelling reasons, Frontier respectfully requests that this Court affirm the Berkeley County Circuit Court's ruling that Frontier is entitled to a refund of monies that it paid, but never owed, for the West Virginia telecommunications privilege tax during calendar year 2004.

Respectfully submitted,

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

By Counsel,



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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 SUPPLEMENTAL BRIEF** has been served upon the following counsel of record by mailing a true copy thereof this 15th day of September 2011 to:

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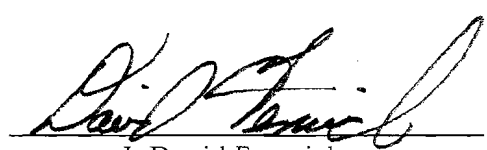

J. David Fenwick