

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 11-0166**

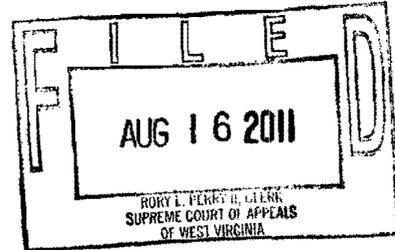
**CRAIG A. GRIFFITH,  
STATE TAX COMMISSIONER OF  
WEST VIRGINIA,**

**Respondent below, Petitioner.**

**v.**

**FRONTIER, WEST VIRGINIA, INC.,**

**Petitioner below, Respondent.**



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**WEST VIRGINIA STATE TAX DEPARTMENT'S  
SUPPLEMENTAL BRIEF**

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COMES NOW the West Virginia State Tax Department, by counsel, pursuant to the Supreme Court's order to file this supplemental brief. In the *Petition For Appeal* the Tax Department referred to the appeal from the decision of the Honorable Gina M. Groh of the Berkeley County Circuit Court as the Verizon appeal. Judge Groh's decision referred to the Taxpayer as Verizon. Similarly, the Tax Department referred to the decision issued by the Honorable Tod Kaufman of the Kanawha County Circuit Court as the Frontier appeal in the *Petition For Appeal*. Currently, Frontier West

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<sup>1</sup>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.

Virginia, Inc., owns what was formerly known as Verizon West Virginia, Inc.<sup>2</sup> The Tax Department will continue to refer to the two circuit court cases as such in order to prevent undue confusion.

## I.

### **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

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<sup>2</sup> On May 13, 2010 the Public Service Commission of West Virginia approved the transfer of Verizon's local exchange and long distance business in West Virginia to companies owned and controlled by Frontier Communications. See generally Public Service Commission Order 09-0871-T-PC (order available on Public Service Commission website).

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 calendar year.

The Court must decide whether Verizon can receive 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.<sup>3</sup>

## II.

### STATEMENT OF FACTS

The Tax Department has fully articulated the essential facts in the *Petition For Appeal* and will not reiterate the facts at length. The case before the Supreme Court revolves around the application of the list of services issued by the West Virginia Public Service Commission in an order dated December 23, 2004 which enumerated certain telecommunications services as commodity services (competitive services which are exempt from the Telecommunications Tax) and non-commodity services which are subject to tax. The Tax Department has referred to the list of services as the PSC List throughout this litigation. According to statute the PSC List constitutes a conclusive determination regarding which telecommunications services are taxable and which services are exempt.

The Tax Department and Verizon dispute whether the PSC List should apply to the 2004

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<sup>3</sup>Although the Supreme Court *Order* setting the briefing schedule strongly encourages the parties not to simply reiterate the previously filed *Petition For Appeal*, the Tax Department has included the Kind of Proceeding and Nature of the Ruling in the Lower Court in order to fully reflect the correction to this section from the Tax Department's corrective letter dated January 31, 2011.

calendar year or the 2005 calendar year. 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 Tax Department will include additional relevant facts as necessary in the argument below.

### III.

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

### IV.

## 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

Verizon timely filed its 2004 Telecommunications Tax Return and requested a tax refund of \$ 9,259,083.60 which the Tax Department denied. Subsequently, Verizon filed a *Petition For Reassessment* with the West Virginia Office of Tax Appeals (hereinafter, OTA). On April 23, 2007, Administrative Law Judge Robert W. Kiefer, Jr., (hereinafter, ALJ Kiefer) issued an administrative decision affirming the Tax Department's denial of the tax refund for the 2004 calendar year. ALJ Kiefer based his decision on a finding that WV Code § 11-13B-2(b)(5) was ambiguous regarding the calendar year to which the PSC List applies and that the Tax Department properly applied the relevant provision of the legislative rules for the Telecommunications Tax. Verizon appealed the OTA Decision to the Circuit Court of Berkeley County. The Honorable Gina M. Groh determined that WV Code § 11-13B-2(b)(5) "...plain and unambiguous..." and proceeded to strike down the applicable section of the legislative rule.

The Circuit Court of Kanawha County 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. The Circuit Court of Kanawha County affirmed the Tax Department's position that WV Code § 11-13B-2(b)(5) is ambiguous regarding the year to which the PSC List applies and determined that the relevant provision of the

legislative regulations regarding the Telecommunications Tax was proper.<sup>4</sup>

By taking the Verizon appeal, the Supreme Court will resolve the two different legal opinions on the question of whether WV Code § 11-13B-2(b)(5) is plain and unambiguous as Judge Groh determined or whether the definition of “gross income” contains an ambiguity which has been resolved by the proper use of a legislative regulation as determined by Judge Kaufman.

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

The threshold issue before the Court is the statutory language found in W. Va. Code § 11-13B-2(5). Verizon argues that W. Va. Code § 11-13B-2(b)(5) is clear and unambiguous. *See Verizon’s Response to Petition For Appeal* at P. 5. Judge Groh agreed. *See Verizon Circuit Court Decision* at P. 7. However, the definition of “gross income” does not refer in any way, shape, or form, to the tax year to which the Public Service Commission list applies. Verizon’s argument simply rewrites the statutory definition of “gross income” to empower the Public Service Commission to determine the tax year to which the Public Service Commission list applies.

In the recent Supreme Court decision in *Fountain Place Cinema* this Court restated one obvious rule of statutory construction : “Plain language should be afforded its plain meaning.” *Fountain Place Cinema 8, LLC., v. Morris*, 227 W. Va. 249 at \_\_\_\_, 707 S.E.2d 859 at 864 (WV

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<sup>4</sup>Frontier Communications sought review of Judge Kaufman’s decision before the Supreme Court of Appeals of West Virginia. Frontier Communications’ *Petition For Appeal*, Appeal No. 073676, was refused by the Court on April 24, 2008. Subsequently, when the Tax Department appealed the Verizon decision from the Circuit Court of Berkeley County to this Court, Frontier Communications filed a *Motion to Renew Its Petition For Appeal Out Of Time* for the decision from the Circuit Court of Kanawha County. The Supreme Court refused Frontier’s *Motion to Renew Its Petition For Appeal Out Of Time* on June 13, 2011.

2011) (quoting *Crockett v. Andrews*, 153 W. Va. 714 at 719, 172 S.E.2d 384 at 387 (WV 1970)). The plain language of the term “gross income” must be analyzed. It is basic law that the Tax Department should not be allowed to rewrite the statute in order to create an ambiguity where an ambiguity does not exist. By the same token, Verizon should not be allowed to rewrite the statutory definition so as to remove an ambiguity created by the Legislature.

Verizon argues that the Supreme Court should apply the plain language of the statutory definition of “gross income.” See Verizon’s *Response to Petition For Appeal* at P. 5. The Tax Department agrees. As the Tax Department argued below, the statutory definition of “gross income” does not include or define the term “taxable year.”

(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).

The plain language of the definition of “gross income” under the Telecommunications Tax does not even mention the words “tax year.” The Legislature directed the Public Service Commission to

determine which services are taxable and which services are exempt; the Legislature **did not** direct the Public Service Commission to determine the tax year to which the PSC List would apply. The plain language of the statute is silent regarding the year to which the PSC List applies.

Verizon's argument simply conflates two different sources to rewrite the statutory definition of "gross income" and eliminate the ambiguity in the statute.

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 a competition during tax year 2004 - as was found from the facts disclosed and known to the only designated fact finder - the PSC.

*Verizon's Response to Petition For Appeal* at P. 7, Paragraph 3 (emphasis in original).

The genesis of Verizon's argument is found in the PSC Order which states :

IT IS FURTHER ORDERED that the following telecommunications services are certified as competitive telecommunications services 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)....

*Order WV Public Service Commission, December 23, 2004, Exhibit B to Office of Tax Appeals record; Case No. 04-1082-T-GI* (emphasis added).<sup>5</sup>

Verizon has conflated the superfluous language from the PSC Order into the plain language of the

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<sup>5</sup> In the administrative decision ALJ Kiefer specifically pointed out the error contained in the PSC Order of designating the tax year to which the PSC List applies. See *Verizon West Virginia, Inc., v. Helton*, OTA Docket No. 05-545 RTC at Footnote 1 on P. 8, Footnote 2 on P.9 and Footnote 3 on P. 10.

statutory definition found in W. Va. Code § 11-13B-2(b)(5) which is quoted above. The Public Service Commission determined that its order – the PSC List issued a December 23, 2004– would apply to the “2004 tax year.” In turn, Verizon conflates the language regarding the applicable tax year from the PSC Order into the statutory definition found in W. Va. § 13B-2(b)(5). The statutory definition of the term “gross income” does not include any references to tax year. The Tax Department argued before the Circuit Court of Berkeley County, that the Public Service Commission was not statutorily authorized to determine the tax year to which the PSC List applies. *See Tax Department’s Rebuttal to Proposed Order of Verizon West Virginia, Inc.*, at P. 8, Paragr.2.

Judge Groh erred in her decision by adopting the conflated argument advocated by Verizon.

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.**

*Verizon* Circuit Court Decision at P. 9 (emphasis in original; **emphasis** added).

The plain language of W. Va. Code § 11-13B-2(b)(5) does not include the term “tax year” anywhere in the statutory definition of “gross income.” The Circuit Court of Berkeley County erroneously conflated the language from the PSC Order into the statutory definition of “gross income.”

In the case of *Frontier Communications*, the Honorable Tod Kaufman, Circuit Court of Kanawha County, reviewed the same legal issue for the same tax year and affirmed the Tax Department’s analysis.

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 (hereafter 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.**

*Citizen Telecommunication Company of West Virginia, dba Frontier Communications v. Helton*, Civil Action No. 06-AA-180, Entered July 23, 2007; *Petition for Appeal* denied April 24, 2008 (emphasis added).<sup>6</sup>

The one point of contention in this case is simply not addressed in the plain language of the relevant statute. Judge Kaufman astutely noted “... that the lack of a directive in the statute with respect to what year the PSC list applies does amount to an “ambiguity” that can easily be reconciled when reading the regulation at issue.” Kaufman Decision, *Frontier Communications* at P. 4, Paragraph 1. The plain language of the relevant statutory definition is silent on this one point.

Administrative Law Judge Keifer specifically noted in the OTA Decision, that the statutory definition of “gross income” is silent regarding the year to which the PSC List applies.

In its briefs, the Petitioner repeatedly and very studiously states that the statute is “conclusive for purposes of this subsection.” See Petitioner’s Brief, pp. 1, 2 & 4. It argues that this makes the Public Service Commission’s order conclusive for everything that is set out in its Order, including the year to which the Commission’s determination is applicable. However, that is not what the statute says. The statute says, “Such listing shall constitute a conclusive determination for the purposes of defining ‘gross income’ within the meaning of this subsection.” thus, the Commission’s authority is limited to determining those items that are subject to competition, thus establishing whether or not they are subject to the telecommunications tax. **With respect to the year to which the Public Service Commission’s determination applies, the statute is silent.**

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<sup>6</sup>Judge Kaufman’s decision was included as Exhibit A to the Tax Department’s *Petition For Appeal* of the Verizon decision.

See OTA Decision in *Verizon v. Helton*, at Footnote 2 (emphasis added).

ALJ Kiefer reached the same conclusion as Judge Kaufman in the *Frontier Communications* decision quoted *supra*, the statute is silent regarding the year to which the PSC List applies. Furthermore, ALJ Kiefer noted the syllogism employed by Verizon in its argument that the Public Service Commission has the authority to decide the tax year to which the PSC List applies :

Basically the Petitioner's [Verizon's] argument follows the following logical steps:

1. The statute provides that the Public Service Commission shall make an annual determination listing those commodities and services are subject to competition;
2. The statute further provides that the Public Service Commission's determination respecting commodities and services that are subject to competition is conclusive;
3. In its orders, the Public Service Commission stated that the list of commodities and services that were subject to competition were for the calendar year in which the orders were entered;
4. Because the Public Service Commission determined that the commodities and services were subject to competition for the year in which the orders were entered, its determinations in this respect were conclusive with respect to those tax years for purposes of the telecommunications tax.

See OTA Decision in *Verizon v. Helton*, at P. 8.

The plain language of W. Va. Code § 11-13B-2(b)(5) does not indicate the tax year to which the Public Service Commission List applies and does not grant that authority to the Public Service Commission. The Tax Department argued before the Office of Tax Appeals that the Legislature could have very easily delegated the authority to the Public Service Commission to determine the

tax year to which the PSC List applies; however, the Legislature did not. See OTA Decision in *Verizon v. Helton*, at P. 9, Paragraph 1.

In addition, Verizon also argues that the Supreme Court has repeatedly admonished the Tax Department from attempting to alter or amend a particular statute under the guise of enacting a legislative rule and cites this Court's decision in *Syncor International Corporation v. Palmer*, 208 W. Va. 658, 524 S.E.2d 199 (WV 2001) as authority for that proposition. See Verizon's *Response to Petition For Appeal* at at PP. 7 & 8.

The Tax Department addressed this argument before the Circuit Court of Berkeley County. *Syncor* is simply not applicable in this case. *Syncor* raised the legal question of whether the exemption from consumers sales tax for sales of prescription drugs applied to all sales of prescription drugs or only applied to sales of prescription drugs which are self-administered by the patient. There was no argument in *Syncor* that sales of prescription drugs are exempt from the consumers sales tax. However, the exemption in *Syncor* was based on the statutory definition of the term "drugs" set forth in the consumers sales tax. The statutory definition of "drugs" at issue in *Syncor* was clear and unambiguous.

"(f) 'Drugs' includes all sales of drugs or appliances to a purchaser upon prescription of a physician or dentist and any other professional person licensed to prescribe.

W. Va. Code § 11-15-2(f) ( 1998).

Clearly, the consumers sales tax statute exempted **all** sales of prescription drugs.

Nevertheless, in *Syncor* the Tax Department attempted to limit the clear language of the statutory exemption by applying the legislative rules for the consumers sales tax in prohibiting hospitals from using the sales tax exemption for prescription drugs. As the Supreme Court noted

in *Syncor*, the Tax Department attempted to limit the clear and very broad statutory exemption for sales of prescription drugs by the use of a legislative regulation which stated :

92.2 Drugs sold to hospitals, licensed physicians, nursing homes, etc., which are to be consumed in the performance of a professional service are subject to consumers sales and service tax.

110 CSR 15 § 110-15-92.2.

The Supreme Court concluded that the Tax Department could not re-write a clear and unambiguous statute under the guise of a legislative regulation. *Syncor*, supra, at Syll. Pt. 3.

The statute at issue in *Syncor* was clear and unambiguous. The statutory definition of “drugs” is only twenty-six words long. The statutory definition of the term “drugs” included “. . . all sales of drugs or appliances to a purchaser upon prescription of a physician . . .” West Virginia Code § 11-15-2(f). The Legislature cannot employ broader language in a statute than “all sales”. All means all. The statutory exemption for prescription drugs in *Syncor* does not mention or even hint at a requirement that the patient self-administer the prescription drug or state that a hospital could not avail itself of the statutory exemption. The statutory exemption at issue in *Syncor* contained no limitations whatsoever. The sales tax exemption contained no ambiguity whatsoever. Consequently, this Court determined that the Tax Department could not create an ambiguity by adopting a regulation and use the regulation to insert a limitation on the clear language of the statute. The Supreme Court had very little difficulty in rejecting the Tax Department’s argument in *Syncor*.

On the other hand, the statute at issue in the telecommunications tax is not clear and unambiguous like the statutory definition in *Syncor*. Where does West Virginia Code § 11-13B-2(b)(5) specify the calendar year to which the PSC List applies? It does not say whether the PSC List applies to the calendar year in which the list is issued or whether the PSC List applies to the

following year. As noted *supra*, Judge Kaufman reached the same conclusion in the *Frontier Communications* appeal to the Circuit Court of Kanawha County that the Tax Department reached. Unlike the statute in *Syncor*, the statute before this Court is ambiguous concerning the legal issue before this Court.

Furthermore, Verizon also argues that the legislative rule is improper because it ignores the statutory requirement that the PSC determine what services are taxable and what services are exempt. See Verizon's *Response to Petition For Appeal* at PP. 8 &9. This argument fails on its face. The Tax Department has consistently argued that W. Va. Code § 11-13B-2(b)(5) clearly directs the Public Service Commission to make that determination; in fact, the Public Service Commission is probably the only State agency capable of making that determination. The statutory definition of "gross income" **does not** grant the Public Service Commission the authority to determine the tax year to which the PSC List applies. Verizon has conflated the PSC Order into the statutory definition of "gross income" to grant powers to the Public Service Commission which the West Virginia Legislature did not grant.

Verizon argues that nothing in the legislative regulation "prohibits the conclusive application of the PSC determination to the "current" tax year. See Verizon's *Response to Petition For Appeal* at P. 8, Paragraph 2. Verizon's argument ignores the use of the word "shall" in the legislative regulation, quoted *supra* at Page 4. Certainly, Verizon does not argue that the PSC List shall apply to both the "next succeeding calendar year" as stated in the legislative regulation and that the same PSC List can also apply to the year which the PSC List is issued ? By specifying that the PSC List shall apply to the next succeeding calendar year, the regulation must also imply that the PSC List does not apply to the calendar year in which it was issued. For example, according to the legislative regulation, the PSC List issued in December 2003, shall apply to the 2004 calendar year. Similarly,

the PSC List issued in December 2002, shall apply to the 2003 calendar year; the December 2001 PSC List shall apply to the 2002 calendar year, *etc.* Verizon's attempt to harmonize the regulation with the statute ignores both common sense as well as the clear language in the regulation.

Verizon also argues that the legislative rule should be struck down since it cannot be applied to the gap period of July 1, 1988 through December 31, 1988. *See Verizon's Response to Petition For Appeal* at PP. 8 & 9, carryover paragraph. The legislative rule applied the same in 1988 as it applies today. The telecommunications services determined to be exempt in the December 31, 1988 PSC Order – the 1988 PSC List – would be exempt for the 1989 calendar year under the clear language of the rule. The West Virginia Legislature amended the definition of "gross income" in 1987 to add the proviso regarding the determination of taxable and tax exempt services by the Public Service Commission. *See WV Code § 11-13B-2(b)(5)* (Michie's 1987 Replacement Volume). The practical reasons and logic supporting the legislative rule would have been most critical in 1988 and 1989 as the newly amended definition was put into effect. ALJ Kiefer noted, in general, the logic supporting the Tax Department's position and the prospective application of the PSC List under the legislative rule. *See OTA Decision* at PP. 13 & 14.

The Tax Department argued before the Circuit Court and at the Office of Tax Appeals that practical reasons support the prospective application of the PSC List. According to Verizon's gap period argument, the PSC did not determine which services were taxable and which services were tax exempt until December 31, 1988. If the list of tax exempt services applied to the 1989 calendar year, then telecommunications companies knew with certainty which services would be taxable beginning January 1, 1989. Telecommunications companies were better able to predict their taxable sales for the 1989 calendar year since they knew the taxable services from day one. *See Tax*

*Department's Proposed Order* to the Circuit Court in Verizon at P. 10.

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 1988 PSC list, as advocated by the Tax Department, would have made tax planning easier for telecommunication companies and reduced the possibilities of receiving tax penalties for the under payment of the telecommunications tax. *See Tax Department's Proposed Order* to the Circuit Court in Verizon at P. 10.

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. *See Tax Department's Proposed Order* to the Circuit Court in Verizon at PP. 10 & 11. As ALJ Kiefer pointed out, adopting Petitioner's argument complicates business planning for telecommunications companies. *See* OTA decision at P.13. By applying the 1988 PSC List to the 1989 calendar year as required by the legislative rule, telecommunications providers and the State would not have faced unpleasant last minute surprises.

In addition, Verizon's argument related to the gap period is speculation in the extreme regarding an event that may or may not have occurred twenty-three years ago. Verizon submitted no evidence in the administrative record that any telecommunications provider had any objection to the application of the legislative rule in 1989. Consequently, the argument should be barred by the doctrine of laches.

### C. The Legislative Regulation Was Properly Adopted

The Tax Department set forth its primary argument in the *Petition For Appeal* outlining why the legislative rule was properly adopted. That argument need not be repeated at length.

Verizon argues that even if W. Va. Code § 11-13B-2(b)(5) is ambiguous, that the ambiguity should be resolved in favor of the taxpayer. *See Verizon's Response to Petition For Appeal* at P. 10. As Administrative Law Judge Kiefer noted, if a statute is ambiguous on a particular question, then the Tax Department can fill in the gap left in the statute by the use of a legislative regulation. *See* OTA Decision at P. 12. The Tax Department argued that it properly adopted a legislative rule in order to fill the unintended gap left in the definition of “gross income.” *See Tax Department's Petition For Appeal* at PP. 15-17. Furthermore, Judge Kaufman specifically noted in the *Frontier Communications* decision that the legislative rule reflected a permissible interpretation of the statute at issue and was a properly adopted legislative rule to be followed by the Circuit Court. *See Frontier Communications* decision at P.4.

Finally, Verizon argued in its response that the legislative rule “...may represent the sort of impermissible legislative chicanery against which this Court warned in *Kincaid v. Magnum*, 189 W.Va. 404, 432 S.E.2d 74 (1993) and *Appalachian Power*, 466 S.E.2d 424.” *See Verizon's Response to Petition For Appeal* at P. 11. Verizon raised this same argument before the Circuit Court and the West Virginia Office of Tax Appeals when it was represented by Mr. Michael Caryl of the law firm Bowles, Rice, McDavid, Graf and Love. *See Proposed Order of Verizon, Inc.*, at Conclusion of Law 30.

Verizon's accusations of an “... undisclosed administrative intention...” before the Circuit Court or “impermissible legislative chicanery” before the Supreme Court are not supported by any evidence in the record. The assertions are pure balderdash. The legislative regulations for the

telecommunication tax were approved by the Legislature in 1988 and became effective on April 4, 1988. The process of promulgating legislative regulations is rather protracted. The regulations at issue would have been submitted to the Secretary of State in the spring of 1987. According to his resume posted on the Bowles, Rice website, Mr. Caryl, counsel for Verizon before the Circuit Court of Berkeley County and before the Office of Tax Appeals, was the State Tax Commissioner for the period of 1985 through 1988. The Tax Department objects to the insinuation that Mr. Caryl would have engaged in “impermissible legislative chicanery” while serving as Tax Commissioner for the State of West Virginia.

## V.

### CONCLUSION

The West Virginia Supreme Court’s decision will resolve the two different legal opinions from the Circuit Court of Berkeley County and the Circuit Court of Kanawha County. As the Office of Tax Appeals and Judge Kaufman concluded, WV Code § 11-13B-2(b)(5) is ambiguous concerning the year to which the PSC list of tax exempt services should apply. The legislative regulations at issue are based on a permissible interpretation of the statute, are practical, and are also logical. Furthermore, the Tax Department’s legislative rule was properly adopted. This Court has previously reviewed the legislative regulations adopted pursuant to Senate Bill 397 during the 1988 legislative session and refused to strike down the regulations at issue. Senate Bill 397 enacted the legislative regulations at issue in this case. As ALJ Kiefer noted in the administrative decision, the legislative regulations to the Telecommunications Tax pass muster under the more stringent test enunciated by the West Virginia Supreme Court in *Appalachian Power*.

The Supreme Court should reverse the Verizon decision issued by the Circuit Court of Berkeley County and adopt the straight forward decision issued by Judge Kaufman in the *Citizens*

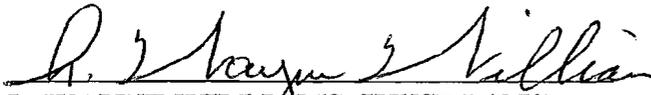
*Telecommunications* case which addressed the exact same legal issues under the same statutory definition for the same tax year.

**Respectfully submitted,**

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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.,**

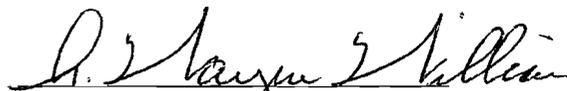
**Petitioner below, Respondent.**

**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 Supplemental Brief* was served by United States Mail, postage prepaid, this 16th day August, 2011, addressed as follows:

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