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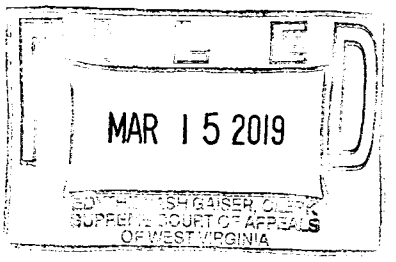
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-1106



ANTERO RESOURCES CORPORATION,
Respondent Below, Petitioner,

v.

DALE W. STEAGER, as
STATE TAX COMMISSIONER of WEST VIRGINIA,
Petitioner Below, Respondent.

Hon. Charles E. King, Jr.
Circuit Court of Kanawha County
Civil Action No. 18-AA-218

BRIEF OF PETITIONER ANTERO RESOURCES CORPORATION

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I. ASSIGNMENTS OF ERROR

Assignment 1: The Circuit Court erred by determining that the Respondent correctly applied the Consumer Sales Tax, W. Va. Code § 11-15-1, *et seq.*, and the applicable legislative rules and that the West Virginia Office of Tax Appeals ("WVOTA") failed to correctly apply the Consumer Sales Tax and the applicable legislative rules.

Assignment 2: The Circuit Court erred by basing its order on the contention that the WVOTA "mooted" the thirteen specific categories of purchases exempt under W. Va. Code §§ 11-15-2(b)(4)(A)(i)-(xiii), which is based on a misguided analysis that focused exclusively on the "catchall" provisions of W. Va. Code § 11-15-2(b)(4)(A)(xiv).

Assignment 3: The Circuit Court erred by determining that rented skid houses/crew quarters were not directly used in Petitioner's natural resource production activities based on the erroneous determination that the skid houses/crew quarters were provided for the comfort or convenience of well site workers, and consequently that these rental charges did not qualify for the direct use exemption set forth in W. Va. Code § 11-15-2(b)(4).

Assignment 4: The Circuit Court erred by determining that rented bathroom facilities were not directly used in Petitioner's natural resource production activities based on a pervasive misapplication of the West Virginia Code and West Virginia Code of State Rules, and consequently that these rental charges did not qualify for the direct use exemption set forth in W. Va. Code § 11-15-2(b)(4).

Assignment 5: The Circuit Court erred by determining that rented trash trailers and bins were not directly used in Petitioner's natural resource production activities based on the misconception that economic waste was not the primary type of waste disposed of in the trailers

and bins, and consequently that these rental charges did not qualify for the direct use exemption set forth in W. Va. Code § 11-15-2(b)(4).

II. STATEMENT OF THE CASE

A. INTRODUCTION

Antero Resources Corporation ("Antero"),[1] by counsel Craig A. Griffith, L. Frederick Williams, and John J. Meadows of Steptoe & Johnson PLLC, presents this brief in support of its appeal of the order of the Circuit Court of Kanawha County (the "Circuit Court") reversing the decision of the West Virginia Office of Tax Appeals (the "WVOTA") that had modified a sales and use tax assessment imposed on Antero by the State Tax Commissioner (the "Respondent").

Antero explores, drills for and produces natural gas and oil at various well sites in West Virginia. In order to properly operate at the various well sites, Antero purchases or rents a voluminous amount of tangible personal property and services from various vendors. Antero's purchases or rentals of property or services that are directly used in the production of natural resources qualify for the direct use exemption under W. Va. Code §§ 11-15-9(b)(2) and 11-15A-3(a)(2) (the "Direct Use Exemption").

On December 19, 2014, Respondent issued a sales and use tax assessment against Antero for $1,072,003.92 of tax, plus $201,594.95 of interest (the "Antero Assessment"), based on the fact that Antero did not pay sales or use tax on purchases or rentals of certain tangible personal property and services that were used at its various well sites for the audit period of January 1, 2011 through December 31, 2013. On the same date, a sales and use tax assessment was issued against Antero Bluestone for $1,058.25, plus $267.34 of interest (the "Bluestone Assessment"

[1] This matter also involves a small assessment against Antero Resources Bluestone LLC ("Antero Bluestone"), a subsidiary of Antero that was merged into Antero in 2014. The two assessments will be discussed separately where necessary, and the two entities will generally be referred to as "Antero."

and, together with the Antero Assessment, collectively the "Assessment"), based on the same reasoning as was given for the Antero Assessment. Antero paid the full amount of the Assessment, and subsequently filed petitions for reassessment with the WVOTA. In the petition for reassessment for Antero, Antero only appealed a portion of the Antero Assessment, $1,048,343.73, plus interest of $198,583.07, based on Antero's determination that a portion of the Antero Assessment was valid and that certain purchases did not qualify for the Direct Use Exemption. The full amount of the Bluestone Assessment was appealed via a separate petition for reassessment. The WVOTA conducted an administrative hearing on May 5, 2016, and the parties subsequently submitted briefs. Following briefing, the WVOTA found that Antero's purchase or rental of various items of tangible personal property that are directly used in the production of natural resources are qualified for the Direct Use Exemption. The WVOTA modified the Antero Assessment, holding that tax of $22,601.94 and interest of $3,011.88 was owed by Antero, and vacating the remainder of the Antero Assessment, and vacating the entire Bluestone Assessment.[2]

By order dated November 15, 2018, the Circuit Court reversed the WVOTA's decision, holding that the purchases and rentals included in the Assessment are not subject to the Direct Use Exemption.

The Circuit Court erred in holding that the Direct Use Exemption does not apply to Antero's rental or purchase of the following items, all of which are integral and essential to the operation of Antero's well sites: 1) skid houses/crew quarters, and the generators, transformers and electrical and water hook ups necessary to make each skid house/crew quarters usable and habitable, used exclusively by specific workers required to remain on the well site around the

[2] Antero A.R. 0135.

clock; 2) bathroom facilities, including port-a-potties, conex weatherized water and sewer boxes that are used to service the skid houses/crew quarters, potable water for the bathroom facilities, and services to clean the well site septic systems; and 3) trash bins and trailers that are used for the storage, removal, or transportation of economic waste.

Because the Circuit Court improperly reversed the decision of the WVOTA, Antero urges this Court to reverse the Circuit Court's ruling in all respects. Antero is entitled to have $1,049,401.98 of the Assessment, plus $198,850.41 of interest, vacated and these amounts, which were paid under protest, should be refunded to Antero. Additionally, interest on Antero's overpayment that has accrued pursuant to W. Va. Code § 11-10-17(d) should be remitted to Antero.

B. STATEMENT OF FACTS[3]

Antero is engaged in the exploration, development and acquisition of natural gas and oil from properties located in the Appalachian Basin, including the Marcellus and Utica Shales. Antero registered to do business under the laws of the State of West Virginia in 2008, and has been producing natural gas at wells in the State since that time, with its primary operations in various north central West Virginia counties. Antero Bluestone was merged into Antero in 2014.[4]

A typical well site for Antero is located in a remote location, and it is generally necessary to build roads to access the well sites.[5] For the sake of efficiency and safety, Antero builds one drilling pad and drills several wells from the one pad.[6] During the drilling and initial production

[3] References to the Appendix Record submitted by Antero are set forth as "Antero A.R. __."
[4] Antero A.R. 0253–55 and 0796–97.
[5] Antero A.R. 0253–56 and 0796–97.
[6] Antero A.R. 0256–57.

phase, Antero operates its well sites twenty-four hours per day, seven days a week, three hundred and sixty-five days per year. Workers at Antero's well sites can be on location for six to nine months a year.[7] In order to operate the well sites, Antero purchases or rents various items and services from vendors. Most of the rented items are essential to operating the well sites, including skid houses/crew quarters that are used by certain workers at the sites, port-a-potties, conex weatherized water and sewer boxes that are used for various purposes, including sewage waste treatment and removal and housing of potable water, and trash bins and trailers used almost exclusively to dispose of commercial waste resulting from the production of natural gas.[8]

Wolf Pack Energy, through its subsidiary Wolf Pack Rentals, LLC (hereinafter "Wolf Pack"), rented or sold a variety of goods to Antero, including the skid houses/crew quarters, port-a-potties, conex weatherized water and sewer boxes, potable water, and trash bins and trailers. The purchases and rentals from Wolf Pack comprise a majority of the Assessment against Antero. Port-a-potty rentals from M&M Septic Pumping were also included in the Assessment.[9]

Respondent determined that "skid houses" or "crew quarters" rented from Wolf Pack are partially exempt and partially taxable.[10] The skid houses/crew quarters are modular buildings used by certain workers at the well site, and they are used exclusively by Antero as temporary office and living space.[11] The modular buildings are physically located at the well site and remain at the well site only during the drilling and initial production phase for each well, and are removed from the well site following the drilling and initial production for each well and either

[7] Antero A.R. 0262–63 and 0294–95.
[8] Antero A.R. 0256–0258, 0260–61, 0263–66, 0274–75, 0282–84, 0286, and 0483–86.
[9] Antero A.R. 0269–70, 0481, 0303, 0305, 0309, 0506–0663, and 0329–0472.
[10] Antero A.R. 0304, 0308, 0483, and 0726–36.
[11] Antero A.R. 0259–60, 0274, 0315, and 0317.

returned to Wolf Pack or moved to another of Antero's well sites by Wolf Pack.[12] Respondent determined that the generators and electrical and water hookups for the skid houses/crew quarters are partially exempt and partially taxable.[13]

Using the square footage utilized of the skid houses/crew quarters, Respondent treated the 32.4% portion of the units composed of office space as directly used in natural resource production activities and, thus, exempt from sales and use tax, and the 67.6% portion of the units composed of "living quarters" as subject to sales and use tax.[14] The "living quarters" consists of bedrooms, bathrooms, a kitchen and dining area and a living room; however, this "living" space is primarily used by certain workers to sleep and bathe, since food is typically brought in for consumption at the well site from food delivery trucks.[15] Respondent's conclusion that the office space in the skid houses/crew quarters are directly used in the natural resource production activities was based on the determination that workers assist with "steering the well" from the office space area, and that this activity is an integral and essential part of natural resource production.[16]

During the audit period, the skid houses/crew quarters rented from Wolf Pack were only used by the company man and directional drillers, both of whom, per best industry practices, are required to remain at the well site around the clock to ensure that the well site operates in the safest manner possible.[17] Respondent has acknowledged that these workers are essential to the

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[12] Antero A.R. 0316–17.
[13] Antero A.R. 0274, 0303, 0312, 0315, 0484, and 0726–36.
[14] Antero A.R. 0273, 0304, 0312–13, 0484, and 0726–36.
[15] Antero A.R. 0262, 0274–75, and 0484.
[16] Antero A.R. 0304 and 0308.
[17] Antero A.R. 0262 and 0264.

production of natural gas by Antero.[18] From January 1, 2011 to November 2012, the "company man," an independent contractor paid by Antero on a daily basis who makes the ultimate drilling and operational decisions at the well site, remained on site around the clock for two weeks straight.[19] From November 2012 to December 31, 2013, Antero used two company men for each well site, with each company man working alternating twelve hour shifts and then leaving the well site.[20] Antero generally uses four "directional drillers" at each well site, with two staying at the well site around the clock for two weeks straight.[21] The directional drillers are tasked with "steering the well" in order to ensure that the drilling process is safe and that the drill bit follows the proper path to lead to natural gas and oil being extracted as intended.[22] Two directional drillers are required to remain on site for two straight weeks and the other two drillers leave the site during this two week time frame, and do not have access to the crew quarters during that time.[23]

Respondent determined that all items used for bathroom facilities rented from Wolf Pack are subject to sales and use tax.[24] The bathroom facilities treated as taxable include port-a-potties, conex weatherized water and sewer boxes that serve the skid houses/crew quarters, and potable water used for the septic system, all of which are necessary because the well site locations are often miles away from the nearest public restroom facilities.[25] The United States Department of Labor's Occupational Safety and Health Administration ("OSHA") requires that

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[18] Antero A.R. 0275–76, 0281, and 0315.
[19] Antero A.R. 0262–63, 0275, 0289, and 0297.
[20] Antero A.R. 0275–77, 0290, and 0297.
[21] Antero A.R. 0278–79, 0291, and 0484.
[22] Antero A.R. 0278–80, and 0484.
[23] Antero A.R. 0280, 0291, and 0484.
[24] Antero A.R. 0305, 0485, 0679–0725, and 0726–36.
[25] Antero A.R. 0257, 0265, 0282–83, 0485, 0679–0725, 0726–36, and 0797.

Antero provide bathroom facilities and potable water for bathroom facilities at its well sites.[26] Respondent has acknowledged that: 1) the "pollution control" and "environmental quality or protection activity" provisions under the Direct Use Exemption statutes contain no language that mandates that the pollution is required to result from the actual drilling of the well, and that "pollution control" under the West Virginia Code of State Rules, W. Va. C.S.R. § 110-15-1 *et seq.* (the "Legislative Rule") for sales and use tax refers to "any service, system, method, construction, device or appliance that is used or intended for the primary purpose of eliminating, preventing, or reducing . . . water pollution";[27] 2) "environmental quality or protection activity" under the Legislative Rule for sales and use tax encompasses "services, devices, systems, or facilities" used or intended for use primarily for the protection of the public, and the public interest through the control or reduction of, in part, water pollution;[28] 3) the Legislative Rule defines "water pollution" as including "the discharge or deposit of *sewage*, industrial wastes or other wastes of such condition and such manner or in such quantity as to cause ground or surface water to be contaminated, unclean or impure to such an extent to make said waters detrimental to the public and public interest";[29] and 4) that bathroom facilities at the site prevented the discharge of sewage at the well sites.[30] In direct contrast to its decision to subject Antero's bathroom facility rentals and purchases to sales tax, Respondent has previously determined that "[t]he availability of portable toilets [at a natural resource production site] is considered to be a

[26] Antero A.R. 0266, 0282–83, and 0491–92.
[27] Antero A.R. 0318; W. Va. C.S.R. § 110-15-2.27.1.13.a.
[28] Antero A.R. 0318–19; W. Va. C.S.R. § 110-15-2.27.1.13.b.
[29] Antero A.R. 0318–19; W. Va. C.S.R. § 110-15-2.27.1.13.d.
[30] Antero A.R. 0319.

safety item. As a result, the rentals of the portable toilets are considered to be exempt as the toilets are directly used in the production activity."[31]

Respondent also determined that trash bins and trailers rented from Wolf Pack are subject to sales and use tax.[32] As with the bathroom facilities, the remote nature of the well sites makes the trash bins a necessity for the disposal of trash and the trailers a necessity for hauling the trash off site. OSHA requires that Antero provide trash bins and trailers at its well sites.[33] The two primary types of waste placed in the trash bins and trailers that Respondent deemed subject to sales and use tax are waste created by humans and commercial waste. Antero's witness at the WVOTA hearing, Alvyn Schopp, Chief Administrative Officer, Regional Senior Vice President and Treasurer for Antero, testified that at least 90% of the waste disposed of in the trash bins and trailers is commercial waste.[34] Furthermore, Respondent's sole witness, auditor Evelyn Furbee, acknowledged that not having trash bins and trailers at the well site would result in substantial pollution at the well sites.[35]

On December 19, 2014, Antero received the Assessment.[36] On January 15, 2015, Antero paid the Assessment in full, and under protest, to cease the continued accrual of interest on the Assessment. Of the combined disputed tax amount of $1,049,401.98, $1.043,388.00 is associated with Antero's purchases from Wolf Pack Energy and $1,010.25 is associated with purchases from Wolf Pack by Antero Bluestone. The remainder is related to purchases from various vendors by both entities, including port-a-potty rentals from M&M Septic Pumping.

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[31] Antero A.R. 0756.
[32] Antero A.R. 0477, 0679–0725, 0726–36.
[33] Antero A.R. 0264–66, 0286–87, 0322–23, and 0490.
[34] Antero A.R. 0267 and 0287.
[35] Antero A.R. 0321.
[36] Antero A.R. 0506–0642, 0643–0671, and 0329–0472.

Antero only disputes the portion of the Assessment associated with rentals or purchases from Wolf Pack and M&M Septic Pumping.[37]

II. SUMMARY OF ARGUMENT

The Circuit Court incorrectly reversed the decision of the WVOTA that had modified the Assessment. The Circuit Court incorrectly determined that Respondent correctly applied the sales and use tax statutes and the Legislative Rule in denying application of the Direct Use Exemption for certain purchases and rentals made by Antero in furtherance of its natural resource production activities. Antero demonstrated that the Direct Use Exemption applies to its rental or purchase of the following items that are integral and essential to the operation of its well sites: 1) skid houses/crew quarters, and the generators, transformers and electrical and water hook ups necessary to make each skid house/crew quarters usable and habitable, for use exclusively by specific workers required to remain on the well site around the clock; 2) bathroom facilities, including port-a-potties, conex weatherized water and sewer boxes that are used to service the skid houses/crew quarters, potable water for the bathroom facilities, and services to clean the well site septic systems; and 3) trash bins and trailers that are used for the storage, removal, or transportation of economic waste.

Accordingly, Antero respectfully requests that this Court reverse the order of the Circuit Court and modify the Assessment to reflect the application of the Direct Use Exemption to various purchases and rentals of tangible personal property by Antero in furtherance of its natural resource production activities.

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[37] Antero A.R. 0329–0472, 0672–78, and 0679–0725.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Antero requests Rule 20 Oral Argument, pursuant to W. Va. R. App. P. 20, because this matter presents an issue of first impression regarding the breadth of the application of the Direct Use Exemption for natural resource producers.

IV. ARGUMENT

A. STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals "reviews the decisions of the circuit court under the same standard of judicial review that the lower court was required to apply to the decision of the administrative agency."[38] Administrative appeals from state agencies are reviewed by the circuit court, which applies a *de novo* standard of review for questions of law.[39]

Under the Administrative Procedures Act, W. Va. Code § 29A-5-4(g), a "circuit court 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,

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[38] *Webb v. West Virginia Bd. of Med.*, 212 W. Va. 149, 569 S.E.2d 225 (2002).

[39] *See* Syl. pt. 4, *Corliss v. Jefferson Cty. Bd. of Zoning Appeals,* 214 W. Va. 535, 591 S.E.2d 93 (2003) ("'While the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable.'"); *see also Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review"); Syl. pt. 1, *Davis Mem'l Hosp. v. West Virginia State Tax Comm'r*, 222 W. Va. 677, 671 S.E.2d 682 (2008) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, [the West Virginia Supreme Court of Appeals] appl[ies] a *de novo* standard of review" (Quoting syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)); and Syl. pt. 1, *Ashland Specialty Co. Inc. v. Steager*, 241 W. Va. 1, 818 S.E.2d 827 (2018), *Petition for Cert. filed*, No. 18-1053 (U.S. Feb. 11, 2019) ("'In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in *W. Va. Code*, 29A-5-4(g) [1988]. Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound consideration, this Court will review questions of law *de novo*.' Syllabus point 1, *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 728 S.E.2d 74 (2012).").

inferences, conclusions, decisions 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.*"[40] The Circuit Court, without explaining which portion of W. Va. Code § 29A-5-4(g) applied, reversed the WVOTA decision based on the determination that it "violates the Administrative Procedures Act on several fronts[.]" However, as this Court has held, "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an administrative agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis."[41] In this matter, the WVOTA's decision was supported by substantial evidence and by a rational basis.

The Court should defer to factual findings of the WVOTA in the underlying action.[42]

B. PURPOSE OF THE DIRECT USE SALES AND USE TAX EXEMPTION FOR PURCHASES OF TANGIBLE PERSONAL PROPERTY AND SERVICES USED IN THE PRODUCTION OF NATURAL RESOURCES

West Virginia's sales tax article states that "for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the [sales tax imposed under articles 15 and 15B of Chapter 11 of the West Virginia Code], and shall pay the amount of [sales] tax to the tax

[40] Syl. pt. 1, Webb, 212 W. Va. at 150, 569 S.E.2d at 227 (emphasis added and citations omitted).
[41] Syl. pt. 2, *Ashland Specialty Co. Inc.*, 241 W. Va. at 1, 818 S.E.2d at 828.
[42] Syl. pt. 2, *CB&T Operations Co., Inc. v. Tax Comm'r of the State of W. Va.*, 211 W. Va. 198, 564 S.E.2d 408 (2002); Syl. pt. 1, *Ashland Specialty Co. Inc. v. Steager*, 2018 WL 2071935, *supra*.

commissioner[.]"[43] Similarly, use tax is levied and imposed on the use in West Virginia of tangible personal property or taxable services.[44] Under West Virginia's use tax, "[e]very retailer engaging in business in this state and making sales of tangible personal property, custom software or taxable services for delivery into this state, or with the knowledge, directly or indirectly, that the property or service is intended for use in this state . . . [is required to,] at the time of making the sales, whether within or without the state, collect [the use tax] from the purchaser[.]"[45]

West Virginia Code § 11-15-9(b)(2) provides a broad exemption[46] from sales tax for "[s]ales of services, machinery, supplies and materials directly used or consumed in the activit[y] of . . . production of natural resources," with the only specific exception to this broad exemption being purchases of gasoline or special fuel.[47] Any person having a right to claim this exemption

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[43] W. Va. Code § 11-15-3(a).

[44] W. Va. Code § 11-15A-1 *et seq.* and W. Va. Code § 11-15B-1 *et seq.*

[45] W. Va. Code § 11-15A-6(a).

[46] One example of West Virginia's broad construction of the Direct Use Exemption is found in *Mt. State Bit Serv., Inc., v. State of W. Va., Dep't of Tax and Revenue*, 217 W. Va. 141, 617 S.E.2d 491 (2005). In that case, this Court extended the Direct Use Exemption for natural resource production to a blasting company that was not subject to West Virginia severance tax. The majority opinion held that the taxpayer had demonstrated that blasting supplies that it had purchased outside of West Virginia and used in providing blasting services to coal companies were directly used or consumed within the activity of natural resource production and that the taxpayer was engaged in one or more activities or operations that constituted the act or process of producing natural resources, even though the taxpayer had no economic interest in the coal that was ultimately produced.

[47] Until 1993, the prior version W. Va. Code § 11-15-9(v) provided a sales tax exemption for both directly and indirectly used tangible personal property and services purchased by entities subject to the severance tax. This old exemption is still reflected in W. Va. C.S.R. § 110-15-123.4.3.4, which has not been updated in over a quarter century, but is no longer valid as a result of the passage of SB 463 during the first regular legislative session of 1993. The long-since superseded provisions of W. Va. C.S.R. § 110-15-123.4.3.4 are also reflected in Respondent's official publication on the "Direct Use Concept," Publication TSD-358 (last revised July 2008), which contains language under the category of "Taxable Items" for various natural resource producers stating that "(Special rules exist for severance taxpayers)." In fact, special rules have not existed for severance taxpayers for over twenty-five years. Indeed, even the West Virginia Supreme Court of Appeals was justifiably confused by the continued existence of the severance tax language in the Legislative Rule, noting in 2005 that "[p]ursuant to the regulations, an entity who pays severance tax, in comparison to non-severance tax payers, does receive a benefit. By

may either pay the sales tax and request a refund or present a direct pay permit or exemption certificate (with the direct pay permit number listed on it) to vendors, who are generally not required to collect and remit sales tax as a result.[48] The Direct Use Exemption also applies to use tax.[49]

In applying the Direct Use Exemption to oil and natural gas production activities, "production of natural resources" means "the performance by either the owner of the natural resources, a contractor or a subcontractor of the act or process of ***exploring, developing***, drilling, well stimulation activities such as logging, perforating or fracturing, well-completion activities such as the installation of the casing, tubing and other machinery and equipment ***and any reclamation, waste disposal or environmental activities associated therewith***, including the installation of the gathering system or other pipeline to transport the oil and gas produced or environmental activities associated therewith and any service work performed on the well or well site after production of the well has initially commenced."[50] All work performed to install or maintain facilities ***up to the point of sale*** for severance tax purposes is included in the

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paying severance taxes, a taxpayer is exempted from having to meet the 'direct use' test that ordinarily must be fulfilled before the producer exemption can be implemented." *Mt. State Bit Serv., Inc.* 217 W. Va. at 143, 617 S.E.2d at 493. The Supreme Court found it reasonable to refer to a currently active Legislative Rule, unaware that the statutory provisions that the Legislative Rule language is based on had been repealed twelve years prior to its decision. *See also* West Virginia State Tax Department Legal Log 09-248, written by Legal Division Attorney Matthew R. Irby, and dated April 8, 2010 ("While this former exemption [repealed W. Va. Code § 11-15-9(v)] is still reflected in the rules as W. Va. C.S.R. § 110-15-123.4.3.4, it was of no further force and effect as of May 1, 1993 since the statutory provision allowing for the exemption was repealed."). Legal Log 09-248 was written in response to inquiries from a coal producer which had continued to rely upon the exemption for severance taxpayers in W. Va. C.S.R. § 110-15-123.4.3.4 and TSD-358. Antero A.R. 0780–86.

[48] W. Va. Code §§ 11-15-9(b), 11-15-9D and 11-15A-3D.

[49] W. Va. Code § 11-15A-3(a)(2).

[50] W. Va. Code § 11-15-2(b)(14)(B) (emphasis added); *see also* W. Va. C.S.R. §§ 110-15-2.64 and 110-15-123.4.3 ("Production of natural resources" means the performance, by either the owner of the natural resources or another, "of the act or process of ***exploring, developing***, severing, extracting, reducing to possession and loading for shipment for sale, profit or commercial use of any natural resource products and any ***reclamation, waste disposal or [associated] environmental activities***[.]" (emphasis added)).

"production of natural resources" for purposes of the Direct Use Exemption.[51] Thus, the ***production of oil or natural gas for purposes of the Direct Use Exemption begins with the exploration and development stage, carries forward to the point where the oil or natural gas is actually sold to the buyer of the oil or natural gas and includes reclamation, waste disposal or environmental activities associated with production.***[52]

"Directly used or consumed" in the activity of producing natural resources, including oil and natural gas, means "used or consumed in those activities or operations which constitute an ***integral and essential*** part of the activities, as contrasted with and distinguished from those activities or operations which are simply ***incidental, convenient or remote*** to the activities."[53] Specific[54] uses of property or consumption of services that constitute direct use or consumption in the activity of the production of natural resources[55] include, but are not limited to, the following:

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[51] W. Va. Code §11-15-2(b)(14)(C) (emphasis added).
[52] W. Va. Code § 11-15-2(b)(14).
[53] W. Va. Code § 11-15-2(b)(4) (emphasis added); *see also* W. Va. C.S.R. § 110-15-2.27 and W. Va. C.S.R. § 110-15-123.1.
[54] The "integral and essential" and "incidental, convenient or remote" provisions essentially act as "catchall" categories for purposes of the Direct Use Exemption, with certain specific activities designated under the West Virginia Code and the Legislative Rule as qualifying for the Direct Use Exemption. Under Part V of the Circuit Court's order, the WVOTA is deemed to have rewritten the Direct Use Exemption by focusing on the "integral and essential" language under W. Va. Code § 11-15-2(b)(4) and § 11-15-2(b)(4)(A)(xiv) and "incidental, convenient or remote" language under § 11-15-2(b)(4) and § 11-15-2(b)(4)(B)(vi) of the Direct Use Exemption, while "mooting" the greater part of the Direct Use Exemption. Antero's brief will address the specifically listed exempt uses listed under § 11-15-2(b)(4)(A) as well as address the "integral and essential" and "incidental, convenient or remote" elements of direct use. Per the language of W. Va. Code § 11-15-2(b)(4), certain activities are specifically viewed as "integral and essential," but taxpayers have the ability to demonstrate that other activities that are not included under one of the specific "integral and essential" categories are, indeed, integral and essential and, thus, directly used in the natural resource production activity.
[55] Under W. Va. Code § 11-15-9(b)(2), the Direct Use Exemption is available to various activities, including manufacturing, transportation, transmission, communication, gas storage, generation, production or selling of electric power, and the provisions of public utility services. This brief focuses solely on natural resource production activities, with a focus on the particular items that were included in the Assessment.

- ***Storing, removing or transporting economic waste resulting from the natural resource production activity.***[56]
- ***Pollution control or environmental quality or protection activity.***[57]
  - Pollution control means any service, system, method, construction, device or appliance appurtenant thereto used or intended for the primary purpose of eliminating, preventing, or reducing air, noise or ***water pollution***, or for the primary purpose of treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which, if released without such treatment, pretreatment, modification or disposal, might be harmful, detrimental or offensive to the public and the public interest.[58]
  - Environmental quality or protection activity means services, devices (including identifiable parts of devices), systems or facilities used or intended for use primarily for the protection of the public and the public interest through the control, reduction or elimination of air, ***water*** or noise ***pollution*** immediately caused by and directly related to the activity of . . . natural resource production.[59]
    - ***Water pollution means the discharge or deposit of sewage, industrial wastes, or other wastes*** of such condition, in such manner, or in such quantity as to cause ground or surface water to be contaminated, unclean, or impure to such an extent to make said waters detrimental to the public and the public interest.[60]
- ***Personnel, plant, product or community safety*** or security.[61]
- ***Property or services otherwise used as an integral and essential part of the production of natural resources.***[62]

(Emphasis added to the various citations).

Additionally, certain uses of property or services are deemed not to constitute direct use or consumption in the activity of production of natural resources, including, but not limited to: heating and illumination of office buildings; janitorial or general cleaning activities; personal

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[56] W. Va. Code § 11-15-2(b)(4)(A)(xii); *see also* W. Va. C.S.R. §§ 110-15-2.27.1.12 (Direct use includes the "storing, removing or transporting ***economic waste directly resulting*** from the activities of . . . production of natural resources."), 110-15-123.3.1 and 123.3.1.12 ("[u]ses of property or services which will constitute direct use when used by a person engaged in the business of . . . the production of natural resources . . . shall include . . . [t]angible personal property or services used in the storage, removal or transportation of ***economic waste directly resulting*** from the activit[y] of . . . production of natural resources[.] For example, ***trash bins*** used to store waste directly resulting from manufacturing are directly used in manufacturing.") (emphasis added).

[57] W. Va. Code § 11-15-2(b)(4)(A)(xiii); W. Va. C.S.R. §§ 110-15-2.27.1.13 and 110-15-123.4.3.7.a.1.

[58] W. Va. C.S.R. § 110-15-2.27.1.13.a.

[59] W. Va. C.S.R. § 110-15-2.27.1.13.b.

[60] W. Va. C.S.R. § 110-15-2.27.1.13.d.

[61] W. Va. Code § 11-15-2(b)(4)(A)(xiii); W. Va. C.S.R. §§ 110-15-2.27.1.14 and 110-15-123.4.3.7.a.3.

[62] W. Va. Code § 11-15-2(b)(4)(A)(xiv); W. Va. C.S.R. § 110-15-2.27.1.15.

comfort of personnel; production planning, scheduling of work or inventory control; marketing, general management, supervision, finance, training, accounting and administration; or an activity or function incidental or convenient to production of natural resources, rather than an integral and essential part of these activities.[63]

As noted above, West Virginia's Direct Use Exemption in connection with natural resource production activities is applied broadly, with minimal statutory or regulatory restrictions on the right to use the Direct Use Exemption. In fact, Respondent, in discussing the activities that are considered "production of natural resources," has noted that "[a]nalysis of the definition [under W. Va. Code § 11-15-2(b)(14)(B)-(D)] shows that it is **expansive** in defining the activities that are exempt under the [§] 11-15-9(b)(2) 'direct use in production of natural resources' exemption."[64]

In addition to the restrictions imposed under the West Virginia Code and the Legislative Rule, Respondent provides guidance through Taxpayer Services Publication TSD-358 (last revised July 2008).[65] In that publication, Respondent includes the following items as taxable items for the natural resource production industry: blueprints or blueprinting equipment; engineering equipment and surveying equipment, maps, and other property used in exploration; office and clerical supplies and equipment; janitorial supplies; light bulbs and fixtures used in offices, repair shops, bath-houses,[66] or similar facilities; supplies used in bath-house; textbooks,

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[63] W. Va. Code § 11-15-2(b)(4)(B)(i)-(vi) and W. Va. C.S.R. § 110-15-2.27.2.1-6 (emphasis added).

[64] West Virginia State Tax Department Legal Log 13-355, "West Virginia consumers sales and service tax and use tax exemption provisions as they apply to natural gas operations and production and related activities," written by General Counsel for Revenue Operations Mark S. Morton and dated September 20, 2013 (emphasis included in original letter). Antero A.R. 0787–95.

[65] West Virginia State Tax Department Publication TSD-358, "Direct Use Concept" (rev. July 2008), *available at* https://tax.wv.gov/Documents/TSD/tsd358.pdf.

[66] Bath-house is not defined in the Code or regulations for sales tax purposes. Merriam-Webster's online dictionary defines "bathhouse" as "1: a building equipped for bathing and 2: a building containing

manuals, and reference material; research and development equipment used in developing new products or improving present products; personnel records, time logs; machinery, tools, parts, and materials used to repair equipment other than equipment directly used in the production of natural resources, and machinery, tools, parts and materials used to maintain office facilities, repair shops, bath-houses, or eating facilities.[67]

TSD-358 lists exempt items for natural resource production as: ***pollution control equipment used to eliminate, prevent, or reduce air, water, or noise pollution resulting directly from production activity***; tangible personal property or services used for production site security, such as security guard services or alarm systems; ***safety equipment or clothing such as safety shoes, safety goggles, safety gloves, fire extinguishers, or first aid kits, but only if used directly in the production process***; machinery, tools, repair parts, and materials used to repair and maintain equipment directly used in production; and machinery, tools, repair parts, and materials

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dressing rooms for bathers." *Merriam-Webster.com.* Merriam-Webster, n.d. Web. (Mar. 1, 2019). Antero's Direct Use Exemption claims are not related to bathhouses, which have been deemed to be for the "convenience" of workers at work sites, typically coal mines. Antero was not assessed sales and use tax for bath-house supplies, but for actual bathroom facilities that are located at the well site and used throughout workers' shifts. While Respondent has deemed supplies, light bulbs, fixtures and machinery, tools, parts and materials used in bathhouses or used to maintain bathhouses as not directly used for sales and use tax purposes, there is no similar guidance for bathrooms. This supports the crucial distinction between the two: bathhouses are typically used by coal miners for cleaning up after their shift has ended, and are offered for the convenience of the coal miners, while bathrooms are used throughout a worker's shift and are an integral and essential item for the workers involved in the exempt activity, be it manufacturing, natural resource production or any other exempt activity. Furthermore, note that the portion of the Assessment challenged by Antero is based on the rental of the bathroom facility itself, not the purchase of supplies used in the facility, or "janitorial or general cleaning activities" related to the bathroom facilities.

[67] Other provisions of the Legislative Rule deem "toilet supplies" as not directly used in various activities, including manufacturing, W. Va. C.S.R. § 110-15-123.4.2.1.i., transmission activities, W. Va. C.S.R. § 110-15-123.4.4.1.g. and transportation activities, W. Va. C.S.R. § 110-15-123.4.1.1.i. No such provision is included for natural resource production activities and, again, we note that Antero was not assessed for its purchase of toilet supplies, but for the rental of the actual port-a-potty facilities themselves.

used in reclamation activities associated with the production of natural resources. (Emphasis added to the various categories).

Specific examples of exempt items for natural gas and oil production listed in TSD-358, as reflected in the Legislative Rule,[68] include gas and oil drilling rigs and equipment and chemicals used in gas an oil well completion.

The TSD's list of taxable items and exempt items for natural resource production activities mirrors the provisions of the Legislative Rule.[69] As noted in footnote 47, the Legislative Rule has not been amended since its 1993 effective date. While the rule can be a somewhat helpful reference tool for taxpayers, its usefulness is greatly hindered by the fact that it has not been updated to reflect statutory changes or court decisions regarding sales and use tax that have been made in the last quarter century. Antero in this matter should have been able to refer to the Legislative Rule for guidance on whether it should have been paying sales or use tax on its purchases. Alas, the Legislative Rule in its current form is a labyrinth of provisions that may or may not still be valid. The usefulness of the Legislative Rule provisions regarding direct use in the natural resource production industry are particularly questionable, since those rules were promulgated at a time when all severance taxpayers were exempt on all purchases made for use in severance activities, whether used directly or indirectly in the production of natural resources, as long as the activities produced gross receipts subject to severance tax.[70] In other words, at the time the Legislative Rule was drafted, the distinction between "direct use" and "indirect use" for most natural resource producers was of little importance as long as the

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[68] *See* W. Va. C.S.R. § 110-15-123.4.3.7.d.

[69] W. Va. C.S.R. § 110-15-123.4.3.6.a.1-11 (taxable items); W. Va. C.S.R. § 110-15-123.4.3.7.a.1-5 (exempt items).

[70] *See* former W. Va. Code § 11-15-9(v) and current W. Va. C.S.R. § 110-15-123.4.3.4.

person's or entity's activities were subject to severance tax. The provisions of the Legislative Rule were intended to guide persons or entities engaged in the natural resource industry that were not subject to severance tax. It was not intended to guide natural resource producers, like Antero, that are subject to severance tax. Regardless of the deficiencies in the Legislative Rule, Antero has demonstrated that West Virginia's Direct Use Exemption provisions are sufficiently broad to apply to the majority of the rentals and purchases included in the Assessment, primarily the skid houses/crew quarters, port-a-potties, conex weatherized water and sewer boxes, potable water and septic system clean out, and trash bins and trailers rented or purchased from Wolf Pack.

Confusingly, the Circuit Court acknowledges that "[t]he legislative rule clearly states that the list of exempt purchases and the list of taxable purchases for all natural resource producers is not exhaustive,"[71] and then proceeds to argue that the statutory and Legislative Rule language does not "imply" that the living space area of the skid house/crew quarters are subject to the Direct Use Exemption and that the bathroom facilities are not "specifically listed" under W. Va. Code § 11-15-2(b)(4)(A) or included among the examples in the Legislative Rule that qualify for the Direct Use Exemption.

The Circuit Court also based its order on the contention that the WVOTA "mooted" the thirteen specific categories of purchases exempt under W. Va. Code § 11-15-2(b)(4)(A)(i)-(xiii) in what Antero regards as a misguided analysis that focused exclusively on the "catchall" provisions of W. Va. Code § 11-15-2(b)(4)(A)(xiv). The Circuit Court's point is well taken, and Antero agrees that the thirteen specific categories, and "catchall" fourteenth category, should all

[71] W. Va. C.S.R. § 110-15-123.4.3.6.a.1-11 includes a list of "only some examples of taxable items" and W. Va. C.S.R. § 110-15-123.4.3.7.a.1-5 includes a list of "only some examples of exempt items."

be considered in determining whether a purchase or rental[72] qualifies for the Direct Use Exemption. However, despite admonishing the WVOTA for failing to "properly [apply] Subparagraph (xiv) [of W. Va. Code § 11-15-2(b)(4)(A)] as intended by the Legislature, [WVOTA] chose to re-write the statute [and] used Subparagraph (xiv) to swallow and moot the previous thirteen subparagraphs," the Circuit Court only undertakes a superficial analysis of W. Va. Code § 11-15-2(b)(4)(A)(i)-(xiii). For example, regarding purchases and rentals relating to bathroom facilities, including port-a-potties, rentals of conex weatherized water and sewer boxes that are used to service the skid houses/crew quarters, purchases of potable water for the bathroom facilities, and purchases of services to clean the well site septic systems, the Circuit Court fails to discuss in detail any of the thirteen specific categories listed under W. Va. Code § 11-15-2(b)(4)(A), aside from mentioning, in passing on page 11 of its order, the existence of the fourteen distinct categories of exemption and summarily stating, on page 20 of the order, that the bathroom facilities fit into none of those categories.[73] While Antero acknowledges that W. Va. Code §§ 11-15-6(b) and 11-15A-18(c) presume that all sales and services are subject to tax until the contrary is clearly established, Antero has clearly established that the majority of the Assessment is invalid since the Direct Use Exemption applies to most of the purchases or rentals included in the Assessment. The Circuit Court apparently viewed this presumption as absolving it from analyzing the statutory provisions under which Antero claims an exemption.

Neither the West Virginia Code nor the Legislative Rule define "integral and essential" or "incidental, convenient or remote" for purposes of the Direct Use Exemption. As this Court

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[72] For purposes of West Virginia's sales and use tax, rentals are tantamount to purchases. W. Va. Code § 11-15-2(b)(17); W. Va. Code §11-15A-1(b)(9)-(10); W. Va. C.S.R. § 110-15-45; W. Va. C.S.R. § 110-15-2.79. Most of the items provided by Wolf Pack were rented by Antero.

[73] The Circuit Court's order summarily states that the bathroom facilities do not qualify as pollution control equipment, but without a discussion of W. Va. Code § 11-15-2(b)(4)(A)(xiii).

has noted, "[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used."[74] Based on the Merriam-Webster Dictionary's[75] definition of these terms, the "common, ordinary and accepted" meaning of "integral and essential" means "very important or necessary" and "incidental, convenient or remote" means "minor, suited to personal comfort or divergent."[76]

All of the items rented or purchased by Antero that are included in this appeal of the Assessment are "very or extremely important and necessary," *i.e.*, integral and essential, to allow Antero to properly operate a well site, and are "directly used" in the production of natural resources. Antero details below each particular provision of W. Va. Code § 11-15-2(b)(4)(A) that applies to each particular rental or purchase.

C. THE CIRCUIT COURT INCORRECTLY DETERMINED THAT RENTED SKID HOUSES/CREW QUARTERS WERE NOT DIRECTLY USED IN ANTERO'S NATURAL RESOURCE PRODUCTION ACTIVITIES BASED ON THE ERRONEOUS DETERMINATION THAT THE SKID HOUSES/CREWS QUARTERS WERE PROVIDED FOR THE COMFORT OR CONVENIENCE OF WELL SITE WORKERS

The Assessment included rentals from Wolf Pack of various items necessary to maintain skid houses/crew quarters for certain individuals at each drill site. These rentals include the skid houses/crew quarters themselves, and the generators, transformers and electrical and water hook

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[74] *State ex rel. Prosecuting Att'y of Kanawha Cty. v. Bayer Corp.*, 223 W. Va. 146, 672 S.E.2d 282 (2008), citing Syl. pt. 1, *Miners in Gen. Group v. Hix,* 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee–Norse Co. v. Rutledge,* 170 W. Va. 162, 291 S.E.2d 477 (1982).

[75] *Merriam-Webster.com.* Merriam-Webster, n.d. Web. (Mar. 1, 2019) ("Integral"), (Mar. 1, 2019) ("Essential"), (Mar. 1, 2019) ("Incidental"), (Mar. 1, 2019) ("Convenient") and (Mar. 1, 2019) ("Remote").

[76] *See Mt. State Bit Serv., Inc.*, 217 W. Va. at 146, 617 S.E.2d at 496. ("But for the blasting operations performed by Taxpayer, the coal could not easily be removed from the overburden and placed into production."). The "but for" test applied by the Supreme Court in *Mt. State Bit Serv., Inc.*, is a manifestation of the "integral and essential" elements of the definition of "directly used or consumed" under W. Va. Code § 11-15-2(b)(4)(A).

ups necessary to make each skid house/crew quarters usable and habitable. Respondent reviewed the floor plans for the skid houses/crew quarters and determined that 32.4324% of square footage for each skid house/crew quarters is office space.[77] Because certain workers for Antero use this office space to analyze data in order to "steer the well" and complete other necessary drilling functions, Respondent treated the office space area as directly used in the production of natural resources. The 32.4324% direct use percentage was also applied to the generators, transformers and electrical and water hook ups necessary to run each skid house/crew quarters (but not the conex weatherized water and sewer boxes that are used for the skid house/crew quarters). However, Respondent treated the remaining 67.5676% living quarters of each skid house/crew quarters, along with the generators, transformers and electrical and water hook ups used for the facilities, as subject to sales and use tax, based on the belief that the living quarters area was incidental, convenient or remote to the natural resource production activities. The living quarters includes bedrooms, bathrooms, a kitchen and dining area and a living room.

Maintaining skid houses/crew quarters at each well site is an integral and essential part of the production activity, and it is necessary, per best industry practices, to have the skid houses/crew quarters on each well site for the following individuals:[78]

- "Company man" – an independent contractor paid by Antero to ensure that all of the workers on site are performing their respective duties in accordance with the law and Antero's expectations. From January 2011 to November 2012, this individual, who represents Antero in making all on-site drilling and operational decisions, remained on the well site around the clock and slept in the skid houses/crew quarters. From

[77] The Circuit Court concedes that the language in W. Va. Code § 11-15-2(b)(4)(A)(v) [incorrectly cited in the order as § 11-15-2(B)(4)(v)] results in the "office space" portion of the crew quarters being exempt.
[78] A tool pusher must be on site around the clock. Only one tool pusher is on site at a time. The tool pusher keeps the equipment on the drilling rig running by constantly monitoring drilling operations, moving tools around, replacing parts and keeping things in working order. However, the tool pusher provides his or her own skid house/crew quarters, which is not rented by or provided by Antero. Antero A.R. 0277–78.

November 2012 through December 2013, Antero used two company men for each well site, with each company man working twelve hour shifts and then leaving the well site, and, during this time frame, the company men did not use the skid houses/crew quarters for sleeping, bathing, food preparation[79] or other everyday activities.

- "Directional drillers" – independent contractors who spend much of their time at the well site "steering the well" and completing other necessary drilling functions from the skid houses/crew quarters; but also use dedicated space within the skid houses/crew quarters to sleep, bathe, and perform other everyday activities. Because drilling operations are around the clock, Antero keeps two directional drillers on-site at all times. Generally, four directional drillers are dedicated to each well site, and each works two weeks on and two weeks off. When off, they leave the well site and return home. When on, they trade shifts between day and night, but do not leave the well site.

For both the company man (for the period from January 2011 and November 2012) and the directional drillers, the crew houses are not provided as a "convenience." Rather, the skid houses/crew quarters are made available to allow for around the clock operations and to ensure that the company man and directional drillers can do their jobs in the safest manner possible.[80]

In short, the skid houses/crew quarters, including the "living space" area, are an integral and essential part of Antero's production activities at each well site.[81] These facilities, and the

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[79] Food preparation in the crew quarters is minimal, as Antero has food brought in for the well site workers using food trucks. The Circuit Court's contention that the use of food trucks indicates that perhaps "the drill sites may not be as remote as it would appear at first glance" is without merit. Rather than have dozens of workers at the site drive a significant distance in order to eat, Antero opts to have the food brought to these remote sites.

[80] The Circuit Court's order focuses on the WVOTA's language regarding the "contractual requirement" of Antero to provide skid houses/crew quarters. Antero has never argued that a mere contractual requirement elevates a rental or purchase to "integral and essential" status and, indeed, did not appeal certain purchases or rentals included in the Assessment to which it had contractually agreed. Rather, Antero has consistently maintained that it entered into contracts to rent the skid houses/crew quarters because the facilities are integral and essential to the proper operation of the well sites.

[81] While Respondent has not offered guidance specifically relating to the living area of modular buildings, it has determined that certain modular office units used by a construction contractor that was engaged in constructing an electric power generation facility are deemed directly used if "(1) The modular buildings are leased to the construction contractor or a subcontractor or a subcontractor or the construction manager; (2) The modular buildings are used exclusively as the temporary on site offices of the construction contractor or a subcontractor or the construction manager; (3) The modular buildings are physically located on the job site; (4) The modular buildings are only on the job site during construction; (5) The modular buildings will be removed from the job site and returned to the ownership, possession

generators, transformers, electrical and water hook ups necessary to operate and maintain them are used exclusively by individuals who are essential to the drilling activities and that are required, or in the case of the company men, were required until November 2012, to remain at the drill site around the clock. While these individuals spend the majority of their time at the drill site performing necessary drilling functions, it is necessary for them to have a facility on site where they can sleep, bathe, and perform other everyday tasks. The rental of skid houses/crew quarters space to house essential personnel who are required to remain at the well site around the clock over extended periods of time does not fall squarely into any of the uses of property or services that are deemed to not constitute direct use or consumption in the activity of production of natural resources, including property or services that are for "the personal comfort of personnel" or "incidental or convenient" to the production of natural resources.[82] The skid houses/crew quarters are not provided for the "personal comfort" or "convenience" of these personnel; rather, the facilities are necessary to allow these individuals to remain at the drill site in order to satisfactorily perform the duties expected by Antero. Antero's witness, Alvyn

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and control of the lessor of the buildings upon completion of the construction project; and (6) The construction contractor, subcontractor or construction manager does not retain possession, title or use of the modular buildings subsequent to completion of the construction project." Legal Log 08-198, "West Virginia Tax Department Administrative Notice 2007-19 and Form WV/CST-286 the Special Contractors Exempt Purchases Certificate," written by General Counsel for Revenue Operations Mark S. Morton, and undated, Antero A.R. 0775–76, and Legal Log 09-072, "Sales Tax Ruling – Mobile Office/Storage Contractor Rentals," written by Mark S. Morton and dated July 2, 2009, Antero A.R. 0777–79; *see also* Legal Log 08-151,"Rental of modular office units removed following construction of an electric generating facility is exempt from the sales tax, but the purchaser must pay the tax or provide their direct pay permit number," written by Legal Division Attorney Matthew R. Irby and dated June 2, 2009, Antero A.R. 0772–74. The same analysis should be applied to Antero's rented skid houses/crew quarters, including the "living space," for the reasons detailed in this brief.

[82] *See* W. Va. Code § 11-15-2(b)(4)(B)(i)-(vi) and W. Va. C.S.R. § 110-15-2.27.2.1-6. The Circuit Court's reference to W. Va. C.S.R. §§ 110-15-123.4.1, 4.1.1.k, 4.1.1.l and 4.1.1.m (linens, beds, dishwasher, stoves and other kitchen items) is to the Direct Use Exemption for transportation activity, and is not applicable to the natural resource production industry or any other industries subject to the Direct Use Exemption.

Schopp, Chief Administrative Officer, Regional Senior Vice President and Treasurer for Antero, testified that the skid houses are "worse than your worst hotel. This is a very loud operation. This is not a hotel setup. It's a singlewide trailer that has sleeping quarters, a small kitchenette and an office space in it, and they're there for safety reasons."

It is telling that the two directional drillers who are "off" are required to leave the well site and do not stay in the skid houses/crew quarters, and that this was the case for the Company Men from November 2012 through 2013. If the skid houses/crew quarters were actually provided for the "personal comfort" or "convenience" of the individuals who use them, the directional drillers and company men would be permitted to stay in the skid houses/crew quarters during their off weeks. But that is not the case, and this supports Antero's argument that the rental of the skid houses/crew quarters, and the generators, transformers, electrical and water hook ups necessary to operate and maintain them are an "integral and essential" part of the natural resource production activities and are thus "directly used" in the production of natural resources and exempt from sales and use tax.[83]

D. THE CIRCUIT COURT INCORRECTLY DETERMINED THAT RENTED BATHROOM FACILITIES WERE NOT DIRECTLY USED IN ANTERO'S NATURAL RESOURCE PRODUCTION ACTIVITIES BASED ON A PERVAVISE MISAPPLICATION OF THE WEST VIRGINIA CODE AND WEST VIRGINIA CODE OF STATE RULES

The Assessment included rentals from Wolf Pack of various items necessary to maintain legally required bathroom facilities at each well site. This included rentals of port-a-potties, rentals of conex weatherized water and sewer boxes that are used to service the skid houses/crew quarters, purchases of potable water for the bathroom facilities, and purchases of services to clean the well site septic systems.

[83] *See* W. Va. Code § 11-15-9(b)(2).

Under OSHA regulations, toilet facilities must be provided in all places of employment.[84] Six toilet facilities must be provided if the number of employees is between 111 and 150, with one additional facility required for each additional 40 employees over 150.

Additionally, OSHA regulations require that potable water be provided at worksites for drinking, washing of person, cooking, washing of foods, washing of cooking or eating utensils, washing of food preparation or processing premises, or *personal services rooms,*[85] *which include rooms dedicated to toilet use.*[86] The cited OSHA regulations both fall under Subpart J of the regulations – General Environmental Controls. Notably, the West Virginia Code and the Legislative Rule specifically treat pollution control and environmental protection[87] activities as being "directly used" in natural resource production. Pollution control means "any service, system, method, construction, device or appliance appurtenant thereto used or intended for the primary purpose of eliminating, preventing, or reducing air, noise or ***water pollution***, or for the primary purpose of treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which, if released without such treatment, pretreatment, modification or disposal, might be harmful, detrimental or offensive to the public and the public interest."[88] Environmental quality or protection activity means "services, devices (including identifiable parts of devices), systems or facilities used or intended for use primarily for the protection of the public and the public interest through the ***control, reduction or elimination of*** air, ***water*** or noise

[84] 29 C.F.R. § 1910.141(c)(1)(i).
[85] 29 C.F.R. § 1910.141(a)(2).
[86] 29 C.F.R. § 1910.141(b)(1)(i).
[87] W. Va. C.S.R. § 110-15-2.27.1.13; *see also* W. Va. Code § 11-15-9(b)(4)(A)(xiii) and W. Va. C.S.R. § 110-15-123.4.3.7.a.1.
[88] W. Va. C.S.R. § 110-15-2.27.1.13.a (emphasis added).

pollution immediately caused by and directly related to the activity of . . . natural resource production."[89]

While the sales and use tax statutes and the Legislative Rule do not specifically list particular items that are considered to be used for pollution control or environmental protection, the DEP's Division of Waste and Water Management and Division of Air Quality annually provide a listing of pollution abatement control equipment to the Property Tax Division of Respondent. The Property Tax Division provides this listing to all county assessors in order for it to be used in determining whether equipment is eligible for salvage value treatment for property tax provisions, per the provisions of Chapter 11, Article 6A of the West Virginia Code. The most recent list of salvage value eligible pollution abatement equipment that was available prior to the WVOTA hearing was provided to county assessors on August 21, 2015, pursuant to a letter from Jeff Amburgey, Director of the Property Tax Division for the West Virginia State Tax Department.[90] Among the items specifically identified by the DEP as being used for pollution control includes:

- Groundwater Treatment Systems. ***Collection and processing equipment for*** converting contaminated groundwater into environmentally safe water or ***reducing the contamination level in the groundwater***.
- Hazardous Spill Prevention Equipment. ***Any equipment used primarily to keep hazardous materials from being exposed to the environment***, such as floats, collars, tubing, etc.

(Emphasis added).

The discharge or deposit of sewage in a manner that contaminates ground or surface water constitutes "water pollution" to the extent the waters are made detrimental to the public

[89] W. Va. C.S.R. § 110-15-2.27.1.13.b (emphasis added).
[90] Antero A.R. 0496–0505.

and the public interest.[91] The port-a-potties, conex weatherized water and sewer boxes, potable water and septic cleaning undoubtedly prevent contamination of ground or surface water with sewage at the well sites.

Additionally, Respondent's sole witness, in responding to questions pertaining specifically to the rental of port-a-potties and other items to make bathroom facilities available to well site workers, was asked whether West Virginia law requires "pollution" under the Direct Use Exemption to come from the actual drilling of the well, or whether "pollution," for Direct Use Exemption purposes, may also be caused by the workers that are on site for the natural resource production activities. Respondent's witness admitted that neither the West Virginia Code nor the Legislative Rule restricts "pollution" to the actual drilling activity, but nonetheless argued for an overly restrictive interpretation of direct use versus indirect use. It is well settled that "[a] statute, or administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."[92] But that is precisely what Respondent is attempting to do through its impermissibly restrictive interpretation of what constitutes "pollution" for purposes of the Direct Use Exemption.

Furthermore, as the West Virginia Supreme Court of Appeals has held, "[a] cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."[93] In *Feroleto Steel*, the assessor of Brooke County and Respondent advocated for a broad reading of the "Freeport Amendment,"[94] which provides a

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[91] W. Va. C.S.R. § 110-15-2.27.1.13.d.
[92] Syl. Pt. 3, *Syncor Int'l Corp. v. Palmer, III*, 208 W. Va. 658, 542 S.E.2d 479 (2001) (quoting Syl. pt. 1, *Consumer Advoc. Div'n v. Pub. Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989))
[93] *Feroleto Steel Co. v. Oughton*, 230 W. Va. 5, 736 S.E.2d 5 (2012) (Quoting Syl. pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999)).
[94] W. Va. Const. art. X, § 1c.

property tax exemption for tangible personal property moving in interstate commerce through or over the territory of West Virginia. Tangible personal property shall not be deprived of the "Freeport Amendment" property tax exemption because while in a warehouse awaiting delivery to another state it is "assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled, or repackaged for delivery out of state, unless such activity results in a new or different product, article, substance or commodity, or one of different utility."[95] Respondent, acting upon a recommendation of the assessor, broadly construed the language regarding the creation of a different product, article, substance or commodity, or one of a different utility, to disallow an exemption that Feroleto Steel claimed for large steel coils that were cut into small coils prior to shipment. As noted in the majority opinion in favor of Feroleto Steel:

> The question arises that if the cutting of the steel coils in the instant case results in a product of new or different utility, under what circumstances would cutting property not so result? In other words, while the operative language clearly provides that personal property shall not be deprived of the ad valorem tax exemption solely because the taxpayer cuts the property while the property is in the taxpayer's warehouse, the respondents' broad construction of the applicable law threatens to render this provision of no effect.[96]

In the instant matter, Respondent's *narrow* construction of pollution control or environmental protection in the context of the Direct Use Exemption for natural resource production activities renders certain language in the West Virginia Code and the Legislative Rule of no effect. As noted above, pollution control or environmental quality of protection activity directly relating to natural resource production activity qualifies for the Direct Use Exemption.[97]

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[95] *Id.*; *see also* W. Va. Code §§ 11-5-13 and 11-5-13A(a) for codified language supporting the "Freeport Amendment."
[96] *Feroleto Steel*, 230 W. Va. at 9, 736 S.E.2d at 9.
[97] W. Va. Code § 11-15-2(b)(4)(A)(xiii).

The definitions of pollution control and environmental quality protection activity or facility[98] state that services or devices used or intended primarily for "water pollution" qualify for the natural resource production activity Direct Use Exemption. "Water pollution" control means the "discharge or deposit of ***sewage***, industrial wastes, or other wastes of such condition, in such manner, or in such quantity as to cause ground or surface water to be contaminated, unclean, or impure to such an extent to make said waters detrimental to the public and the public interest."[99] Respondent's narrow construction of the aforementioned provisions renders the water pollution language, in the context of sewage discharge at natural resource production sites, virtually ineffective, given that the primary way that sewage would be discharged in a quantity to cause ground or surface water contamination at a wellsite would be via the workers at the site. Respondent has acknowledged that the presence of bathroom facilities at Antero's well sites prevented the discharge of sewage at the sites, but refuses to apply the Direct Use Exemption because the bathroom facilities are too "remote" from the production activity itself. This restrictive interpretation is supported by neither the West Virginia Code nor the Legislative Rule. *See Wooddell v. Dailey*, 160 W. Va. 65, 68, 230 S.E.2d 466, 469 (1976) ("Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language[.]") and Syl. pt. 6, *Davis Mem'l Hosp. v. West Virginia State Tax Comm'r*, cited *supra*, at 679, 684 ("A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." (Citation omitted)).

Respondent's restrictive interpretation of statutory and regulatory language to deny the natural resource production Direct Use Exemption for the rentals and purchases required to make

[98] W. Va. C.S.R. § 110-15-2.27.1.13.a-b.
[99] W. Va. C.S.R. § 110-15-2.27.1.13.d. (emphasis added).

available and maintain bathroom facilities is puzzling. As discussed above, these facilities are required by federal law[100] and qualify as "pollution control" and "environmental quality or protection" equipment under West Virginia law by controlling any groundwater or surface water pollution that would result from the release or spillage of sewage at the site. It would be impossible to operate any well site without making bathroom facilities available for the various individuals at the well site, most of which are so remote as to make it virtually impossible for workers at the site to leave the site to use bathroom facilities elsewhere. Clearly, the bathroom facilities that Antero rents for its well sites fall under the Direct Use Exemption category of "pollution control or environmental protection."

The extent of the Circuit Court's analysis of the pollution control provision under W. Va. Code § 11-15-2(b)(4)(A)(xiii) is a conclusory statement rather than actual analysis. The Circuit Court determined that the "clear import" of the definition of "production of natural resources" under W. Va. Code § 11-15-2(b)(2)(14) is that the "definition relates to waste disposal or environmental activities associated with the activity of drilling the well and reclamation activities[.]" However, the Circuit Court fails to cite any language in the definition of "production of natural resources" that demonstrates such "clear import." The Circuit Court follows its lack of analysis of W. Va. Code § 11-15-2(b)(4)(A)(xiii) with misguided analysis of W. Va. C.S.R. § 110-15-2.27.1.13.a-b, stating that "in order to qualify as 'pollution control' under the legislative rule, the action must be taken '. . . primarily for the protection of the public

[100] The Circuit Court notes that the question of direct use is a matter for the West Virginia Legislature to decide, not OSHA. Antero agrees, and has demonstrated that the legislature has applied the Direct Use Exemption to the bathroom facilities through various provisions, including the pollution control and safety language under W. Va. Code § 11-15-2(b)(4)(A)(xiii), and the "integral and essential" catchall provision under W. Va. Code § 11-15-2(b)(4)(A)(xiv).

and the public interest . . . .'"[101] The Circuit Court then opines that "Antero's primary purpose is to facilitate the production of natural gas[.]" To borrow a term from the Circuit Court, this interpretation would "moot" the pollution control and environmental quality and protection language under the West Virginia Code and Legislative Rule. Obviously, the primary purpose of any of the industries subject to the Direct Use Exemption—be it manufacturing, transportation, transmission, production of natural resources or the other designated industries—is the particular business activity in which it is engaged. The Circuit Court's order suggests that the primary purpose of a Direct Use Exemption designated activity must be "pollution control." In actuality, the Legislative Rule stands for the proposition that "primary purpose" of the pollution control or environmental quality or protection activity must be for the protection of the public or public interest, not that the primary purpose of the entity's activities be pollution control or environmental protection.

Furthermore, the bathroom facilities that Antero makes available at its well sites are not offered as a "convenience" for these workers but, rather, are made available for the safety of the personnel at the well site.[102] In fact, Respondent has advised a natural resources producer on the issue of whether portable toilets used at a natural resource production site are subject to the Direct Use Exemption.[103] In reply to an inquiry from a coal producer in regards to a myriad of issues pertaining to the Direct Use Exemption, Respondent addressed each issue individually. Of interest for purposes of the instant matter is the following guidance:

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[101] The Circuit Court's order actually references the Legislative Rule provision relating to "environmental quality or protection activity or facility," W. Va. C.S.R. § 110-15-2.27.1.13.b, not the pollution control language under W. Va. C.S.R. § 110-15-2.27.1.13.a.

[102] Antero A.R. 0285.

[103] Legal Log 01-003, "Sales/Use Tax – A Discussion of the Application of Sales Tax to Certain Activities of a Natural Resources Producer," written by John E. Montgomery, Managing Attorney for the Legal Division and dated January 25, 2001. Antero A.R. 0753–58.

[Q] 3. Are janitorial services, either from a business or individual subject to sales tax?

[A] Janitorial services and supplies are not considered to be directly used in the natural resource production activity.

[Q] 4. Are portable toilet rentals subject to tax if provided to employees that work directly in the manufacturing process? [Note that the entity requesting the guidance used the term "manufacturing process." It is clear from the title of the letter and its contents that the guidance was provided to a natural resource producer.]

[A] The availability of portable toilets is considered to be a safety item. As a result, the rentals of the portable toilets are considered to be exempt as the toilets are directly used in the [natural resource] production activity.

(Emphasis added).

Note that Respondent draws a distinction between janitorial services, which are among the items and services deemed not directly used,[104] and the portable toilets themselves, which are deemed a "safety item" and considered directly used in the natural resource production activity.[105] As noted in footnote 80, the Assessment is based on the rental of the bathroom facility itself, not the purchase of supplies used in the facility, or "janitorial or general cleaning activities" related to the bathroom facilities. The Circuit Court's order fails to discuss the "personnel, plant, product or community safety" language under the West Virginia Code[106] and the Legislative Rule,[107] and limits its discussion of the position taken by Respondent in the past that rentals of portable toilets at natural resource production sites are a "safety item" subject to

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[104] W. Va. Code § 11-15-2(b)(4)(B)(i)-(vi) and W. Va. C.S.R. § 110-15-2.27.2.1-6

[105] W. Va. Code § 11-15-2(b)(4)(A)(xiii); W. Va. C.S.R. § 110-15-2.27.1.14, and W. Va. C.S.R. § 110-15-123.4.3.7.a.3.

[106] W. Va. Code § 11-15-2(b)(4)(A)(xiii).

[107] W. Va. C.S.R. § 110-15-2.27.1.14 and W. Va. C.S.R. § 110-15-123.4.3.7.a.3.

the Direct Use Exemption to a single footnote. The Circuit Court notes in footnote 4 of its Order that "Legal Log 01-003 has no precedential value for Antero. [And that] the conclusion of Legal Log 01-003 directly contradicts the legislative rule which classifies toilet supplies as being subject to consumer sales tax[.]" As Antero has demonstrated, there is a stark difference between toilet supplies (which are not involved in this appeal) and rental of an entire bathroom facility. Regardless of the precedential significance of the Legal Log Letter, Respondent had it right in 2001: Portable toilets are safety items and exempt as directly used in the natural resource production activity.

The Circuit Court acknowledges that "there is an obvious need" for bathroom facilities at remote job locations where natural resources are produced, but proceeds to claim that bathroom facilities are for the "personal comfort" of employees (despite no testimony at the hearing to that effect). The Circuit Court offers no plausible explanation as to how federally required port-a-potties at remote drill sites, when such port-a-potties are exposed to extreme weather conditions during Antero's around the clock operations, can be considered to be for the "personal comfort" of well site workers.[108]

The Circuit Court also focuses on the fact that "none of the examples in the legislative rule authorize an exemption for restrooms, bathrooms, Porta-Potties, septic systems or other sanitary purchases." However, the Circuit Court fails to address the fact that the uses of property

[108] The Circuit Court's contention that applying the Direct Use Exemption to Antero somehow discriminates against "indoor" direct use industries is simply false. "Indoor" industries, such as manufacturing, communications, electric power generators and public utility businesses do not incur the substantial ongoing costs for bathroom facility rentals that are incurred by the natural resource production industry or other "outdoor" industries. It is safe to assume that the "indoor" industry entities have their indoor bathrooms constructed by third party contractors. The contracting services purchased by the "indoor" industry entities, and that result in capital improvements to those facilities, are not subject to sales and use tax, per W. Va. Code §§ 11-15-8A and 11-15-2(b)(3)(C).

or services constituting direct use, under both W. Va. Code § 11-15-2(b)(4)(A) and W. Va. C.S.R. § 110-15-123.3.1, is defined broadly, with few specific mentions of actual items that qualify under the specifically listed categories. As noted under W. Va. C.S.R. § 110-15-123.4.3.7, which lists specific items that qualify for the Direct Use Exemption for natural resource producers, the list "provides only some examples of exempt items and is not intended to be all inclusive." Thus, the analysis is not whether an item is specifically mentioned under the Code or Legislative Rule, but whether an item falls under one of the categories that constitute direct use. The West Virginia Code, per W. Va. Code § 11-15-2(b)(4)(B), and the Legislative Rule, per W. Va. C.S.R. § 110-15-123.3.2, go into more detail listing specific items not considered to be directly used, than listing particular items that are considered to be directly used.[109]

Regardless of whether the Direct Use Exemption is based on the provisions relating to pollution control or environmental quality or protection activity, personnel, plant, product or community safety or the "integral and essential"[110] provision, the rental of the bathroom facilities are directly used in the production of natural resources and are exempt from sales and use tax.

E. THE CIRCUIT COURT INCORRECTLY DETERMINED THAT RENTED TRASH BINS AND TRAILERS WERE NOT DIRECTLY USED IN ANTERO'S NATURAL RESOURCE PRODUCTION ACTIVITIES BASED ON THE MISCONCEPTION THAT ECONOMIC WASTE WAS NOT THE PRIMARY TYPE OF WASTE DISPOSED OF IN THE TRAILERS AND BINS

The Assessment included rentals from Wolf Pack of trash bins and trailers necessary to dispose of trash that is created at the well site. Under OSHA regulations pertaining to waste disposal, all sweepings, solid or liquid wastes, refuse, and garbage must be removed in order to

[109] The only specific examples listed for natural gas and oil production are gas and oil drilling rigs and equipment and chemicals used in gas and oil well completion. W. Va. C.S.R. §§ 110-15-123.4.3.7.d.1–2.
[110] *See* W. Va. Code § 11-15-2(b)(4)(A)(xiv) and W. Va. C.S.R. § 110-15-2.27.1.15.

avoid creating a menace to health and as often as necessary to maintain the place of employment in a sanitary condition.[111]

The trash bins and trailers rented by Antero from Wolf Pack are used throughout the drill site for the disposal of trash generated by workers at the site, including mud products and drilling part packaging. Antero's witness, Alvyn Schopp, testified that at least 90% of the waste disposed of in the trash bins and trailers rented from Wolf Pack are used for "commercial waste." As noted by Mr. Schopp, "no one's going to buy a rollout [trash bin or trailer] so somebody can throw their pop can into that rollout. I mean, if we're filling up rollouts, it's not with pop cans and somebody's drink or water bottles. It's because it's commercial waste running through that process."[112] At the WVOTA hearing, Respondent did not dispute Antero's contention that at least 90% of the waste created at the site is commercial waste.[113] The Circuit Court's order cites to the tepid assertions of Respondent's sole witness, Evelyn Furbee, that "it was our understanding that it was the types of waste that Mr. Schopp testified to, as far as being just the regular waste from the trailers, as well as something that could have been packaging" and "[w]e were under the impression there's no mud products in those bins[.]"[114] Notably, the Circuit Court's order does not bother to address Mr. Schopp's testimony, which is based on extensive knowledge of Antero's operations, rather than on the single site visit upon which Ms. Furbee based her determination. The Circuit Court's order claims that "Ms. Furbee's testimony was clear; no waste from the drilling of the well was disposed of in the dumpsters and trash trailers at the job site. The only waste put into the receptacles was from the living areas, kitchenettes, and

[111] 29 C.F.R. § 1910.141(a)(4)(ii).
[112] Antero A.R. 0287.
[113] Antero A.R. 0287.
[114] Antero A.R. 0321–22.

bedrooms of the Crew Quarters which were not directly used in the production of natural resources." In fact, a close review indicates that Ms. Furbee was not even asked a question on direct examination about the trash bins and trailers, and that she offered no direct testimony to dispute Mr. Schopp's testimony that 90% of the waste created at the site and placed in the trash bins and trailers resulted from drilling activity. Additionally, the cross-examination of Mr. Schopp did not include any questions regarding the type of waste created at the well site.

The West Virginia Code treats tangible personal property used in the storage, removal, or transportation of ***economic waste*** as "directly used" in the natural resource production activity, and the Legislative Rule specifically cites as an example "trash bins used to store waste directly resulting from" a direct use activity.[115] While the term "economic waste" is not defined in either W. Va. Code §§ 11-15-1, *et seq.* or W. Va. C.S.R. §§ 110-15-1, *et seq.*, Mr. Schopp's direct, unrebutted testimony demonstrates that at least 90% of the waste placed into the rented trash bins and trailers was commercial waste, *i.e.*, economic waste. Furthermore, as demonstrated in the discussion of the skid houses/crew quarters, an extremely limited number of workers (company men, directional drillers and tool pushers) at the well site have access to these modular buildings. Any suggestion that large trash bins and trailers were rented to collect and dispose of the limited amount of trash associated with the skid houses/crew quarters is simply inaccurate.

As with the bathroom facilities, it is puzzling that Respondent would treat the rentals and purchases of trash bins and trailers as not being directly used in the production of natural resources, when such items are essential for the disposal of economic waste created at the well site. These trailers and bins are required by federal law, and it would be impossible to operate

[115] W. Va. Code § 11-15-2(b)(4)(A)(xii); *see also* W. Va. C.S.R. §§ 110-15-2.27.1.7 and 110-15-123.3.1.12.

any well site without making the bins and trailers available for trash disposal at the well site. Furthermore, with respect to oil and gas, the definition of "production of natural resources" specifically includes ***any reclamation, waste disposal or associated environmental activities***.[116] Clearly, the legislature contemplated that waste disposal in conjunction with drilling activities falls under the ambit of "production of natural resources" for purposes of the Direct Use Exemption. Additionally, the DEP's Division of Waste and Water Management and Division of Air Quality annual list of pollution abatement control equipment, discussed above, includes "Waste Transportation Facilities/Equipment. Rail, truck, car, ***containers***, barges ***and other equipment dedicated for use in relocating waste***." The trash bins and trailers rented from Wolf Pack are unquestionably used to dispose of economic waste created in conjunction with the natural resource production activities and to relocate waste to control pollution. Accordingly, the Direct Use Exemption applies to rentals of these items.

Similarly, while the Legal Log letters provided by Respondent do not include any discussion regarding the application of the Direct Use Exemption to trash bins and trailers rented or purchased and used at natural resource production sites, the trash bins and trailers are "safety items," just as Respondent determined that portable toilets are "safety items."

Again, regardless of whether the Direct Use Exemption for trash bins and trailers is based on the provisions relating to the storage, removal, or transportation of economic waste; reclamation, waste disposal or associated environmental activities; personnel, plant, product or community safety; or the "integral and essential" provisions, the rental of the trash bins and

[116] W. Va. Code § 11-15-2(b)(14)(B), W. Va. C.S.R. § 110-15-2.64 and W. Va. C.S.R. § 110-15-123.4.3 (emphasis added).

trailers are directly used in the production of natural resources and are exempt from sales and use tax.

V. CONCLUSION

Accordingly, Antero respectfully requests that the Court reverse the Circuit Court of Kanawha County Circuit Court's *Final Order Granting the West Virginia State Tax Department's Petition for Appeal.*

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