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Doddridge County Circuit Clerk
Michele D. Britton

IN THE CIRCUIT COURT OF DODDRIDGE COUNTY, WEST VIRGINIA

ANTERO RESOURCES CORPORATION,

Petitioner,

v.

Civil Action No. ____________
The Honorable _____________

THE HONORABLE MATTHEW IRBY,
West Virginia State Tax Commissioner,

THE HONORABLE DAVID SPONAUGLE,
Assessor of Doddridge County, and

THE COUNTY COMMISSION OF DODDRIDGE COUNTY,
Sitting as a Board of Assessment Appeals,

Respondents.

PETITION OF PETITIONER ANTERO RESOURCES CORPORATION

I. INTRODUCTION

Antero Resources Corporation ("Antero") is a producer of natural gas in the state of West Virginia, with 414 Marcellus wells located in Doddridge County. Antero files this Petition seeking reversal of the erroneous decision of the Doddridge County Commission sitting as the Doddridge County Board of Assessment Appeals (the "Board").

By order dated October 5, 2021, and received in the mail by Antero's counsel on November 8, 2021, the Board upheld the West Virginia State Tax Department's (the "Tax Department," "Tax Commissioner," or "State") unfair and overstated valuation of Antero's producing oil and natural gas wells in Doddridge County. The incorrect valuation was obtained by relying on administrative guidance issued in October 2020 by the State for Tax Year 2021, which invalidly attempted to withdraw prior June 2020 guidance that correctly stated the appropriate valuation method. The method used by the State and county violated the West Virginia Administrative Procedures Act—in retaliation for Antero's submission of correct values under the June 2020 guidance and pending lawsuits challenging the State's valuations in other tax years—and unfairly targeted Antero for treatment different from local sellers in a way that discriminates against interstate commerce in violation of the Dormant Commerce Clause of the U.S. Constitution and the Equal Protection Clause.

Antero seeks correction of the Board's overvaluation of its producing oil and natural gas wells in accordance with West Virginia and federal law.

II. FACTUAL BACKGROUND

A. The State's Different Treatment of Operating Expenses for Sales in Interstate Commerce.

Antero owns 414 Marcellus wells in Doddridge County. [Certified Transcript of Oct. 5, 2021 Hearing before the Doddridge County Board of Assessment Appeals, p. 24 (hereinafter "Hr'g Tr.") and Hr'g Pet.'s Ex. 1, Tab 2, "Notice of Protest and Election," Feb. 19, 2021 (all exhibits referenced in this Petition will refer to exhibits submitted by Antero as Petitioner, unless otherwise indicated. *See* Exhibit A to this Petition.] Antero pays significant taxes to Doddridge County for its oil and gas wells.

Appalachia is an over-supplied basin relative to demand for natural gas. For that reason, Antero sells most of its natural gas products outside the state into interstate commerce. [Hr'g Tr. at p. 26–27.] Due to the volume of natural gas Antero produces, it is preferable to Antero to sell its natural gas products downstream of the wellhead so as to maximize its sale prices. It is not economically feasible for Antero to sell its natural gas products locally at the wellhead—in a "field line point of sale." If sold at the wellhead, the gas would flood the local basin pricing system and could collapse the local market. [*Id.* at 27.]

Because Antero delivers its natural gas products for sale out-of-state, a significant component of Antero's operating expenses is incurred post-production for gathering and compression, processing and fractionation, and transportation for sale in interstate commerce. All of these expenses were disallowed as deductions by the Tax Department. [Hr'g Tr. at pp. 31–32, Hr'g Pet.'s Ex. 1, Tab 2, Slide 10.]

By contrast, producers who sell locally at the wellhead are, in effect, allowed to deduct *all* costs. The Tax Department calculates the average operating expense deduction from market surveys that allow producers to claim to both pre-production and production costs. [Hr'g Tr. at p. 33.] But the Tax Department's survey information contains no line items for gathering, compression, processing, fractionation, and transportation; rather, it pertains almost solely to typical lease operating expenses and was based on prior surveys used for conventional wells. [Hr'g Tr. at pp. 32–33.]

In summary, while the State's methodology allows a local seller to deduct all operating expenses up to the point of sale, Antero is permitted to deduct only 8-9% of its total operating expenses to bring natural gas products to the point of sale in out-of-state markets. [Hr'g Tr. at p. 34, Hr'g Pet.'s Ex. 1, Tab 2, Slide 12.]

Because the State has decided to treat out-of-state sellers differently, Antero's wells are valued higher than comparable wells operated by its peers who sell locally. According to Elizabeth Burg with the Altus Group US Inc., who prepared Antero's property tax returns for Doddridge County in TY2021, Antero's wells are valued one and one half to three times *higher* for the assessed value of the well per MCF produced, compared to similar wells operated by Antero's competitors, simply because the products from Antero's wells are sold into interstate markets. [Hr'g Tr. at pp. 48–49, Hr'g Pet.'s Ex. 1, Tab 2, Slide 12.]

B. Antero's 2021 Valuations Based on the June 2020 Guidance.

On June 30, 2020, the Tax Commissioner acknowledged the disparate treatment of producers like Antero who incur significant costs for post-production expenses that were, unlike expenses for local sellers, not allowed to be deducted. In its "Important Notice to Producers of Natural Gas and Oil for Property Tax Year 2021" (hereinafter, the "June 2020 Guidance") the Tax Commissioner explained that "[t]o avoid having your well **overvalued for property tax purposes**, it important that you appropriately **adjust actual gross proceeds of sale to properly reflect the gross receipts you would have received had the sales transaction been a field line point of sale**." [Hr'g Pet.'s Ex. 1, Tab 3 (emphasis added).]

The Tax Commissioner had taken the opposite position *for years*, consistently opposing Antero's tax appeals that implored the State that the very methodology contained in the June 2020 Guidance was the only fair way to assess the "true and actual value" of its wells. Thus, the Tax Commissioner finally acknowledged that the previous approach "overvalued" Antero's wells by failing to allow deductions of post-production operating expenses.

C. The Tax Department's October 2020 Withdrawal of June 2020 Guidance.

In reliance on the Tax Commissioner's June 2020 Guidance, Antero submitted its valuations utilizing the newly requisite "field line point of sale" adjustment to its gross receipts. Using this approach, if Antero's values had been allowed, Antero would have owed $7.3 million in taxes instead of $15 million. [Hr'g Tr. at p. 46.]

Instead, after reviewing Antero's submissions, the Tax Department rejected Antero's values and then, on October 9, 2020, promptly issued *new guidance* retroactively *withdrawing* its June 2020 Guidance for TY2021 (hereinafter, the "October 2020 Withdrawal"). [*See* Hr'g Pet.'s Ex. 1, Tab 3.] The Tax Commissioner explained that he was withdrawing the June 2020 Guidance because it would “substantially and materially affect private and public interests including those of the oil and gas producers, the counties, and the State as a whole.” [*Id.*]

D. The Impact of the Tax Department’s October 2020 Withdrawal of June 2020 Guidance.

As a result of the State’s actions, Antero’s wells were overvalued and Antero was assessed with approximately $15.1 million in tax liability for TY2021. If Antero were allowed to deduct its post-production operating expenses—either as a “below the line” deduction for operating expenses or as an “above the line deduction” from gross receipts, as discussed below—Antero would have owed only $7.3 million in taxes. [Hr’g Tr. at p. 46.] Thus, the improper valuations resulted in a $7.8 million overcharge in Doddridge County for TY2021. [Hr’g Tr. at pp. 34, 47.]

While Antero was allowed only $125,000 per well for operating expense deductions in TY2021, its actual operating expenses per well for Doddridge County in TY2021 were approximately $1,330,000, or $1,610,000 per well statewide. [Hr’g Tr. at Hr’g Pet.’s Ex. 1, Tab 2, Slide 11.]

E. Antero’s Protest to the Doddridge County Board of Assessment Appeals.

Antero timely filed a “Notice of Protest and Election to have matter heard by the Board of Assessment Appeals” on February 19, 2021 pursuant to W. Va. Code §§ 11-3-23a, 11-3-24 and 11-3-24b. [Hr’g Pet.’s Ex. 1, Tab 1.] Antero argued that (1) the assessment of the properties at issue is not based on the fair market value of the properties; (2) the State’s *ad valorem* tax regime disallowing deductions for actual expenses serves to benefit in-state natural gas sellers at the expense of out-of-state natural gas sellers and thus violates Dormant Commerce Clause principles; (3) the State’s *ad valorem* tax regime disallowing deductions for actual expenses overvalues, for tax purposes, the wells of out-of-state sellers while undervaluing the comparable wells of in-state sellers and thus violates state and federal equal protection principles; and (4) the State’s refusal to apply to pending tax disputes, and purported October 2020 Withdrawal of, its June 2020 Guidance allowing these deductions constitutes arbitrary and capricious agency decision-making that violates the State Administrative Procedures Act and state and federal due process principles.

The appeal was brought on for hearing before the Doddridge County Commission sitting as a Board of Assessment Appeals on October 5, 2021. Antero presented testimony from Antero Vice President Kevin Ellis and the Altus Group US Inc.'s Elizabeth Burg, who provided accounting services and support for presenting Antero's proposed valuations, as described above.

By Order dated October 5, 2021, but metered for mailing to Antero on November 3, 2021, the Board determined to make no adjustment to the State Tax Department's valuation of Antero's gas wells for the 2021 tax year. (*See* Ex. A to Antero's Petition). [*See* Exhibit B, Oct. 5, 2021 Order.]

Antero timely petitions this Court for relief from the Board's erroneous determination within thirty (30) days of the service of the Order, which was postmarked on November 4, 2021. (*See* W. Va. Code § 11-3-25(a) (2014).[1])

III. ANALYSIS

A. Applicable Legal Standards.

All property in the State of West Virginia is required to "be assessed annually at its true and actual value . . . ." W. Va. Code § 11-3-1. The Tax Commissioner is charged with determining the "fair market value of all natural resource property in the State" and then providing the values to county assessors to use in assessing the property. W. Va. Code § 11-1C-10(d).

[1] West Virginia Code Chapter 11, Article 3, Section 25 was repealed by the West Virginia Legislature in the First Special Session of 2021. The repeal is effective July 1, 2022. *See* Acts of the Legislature of West Virginia, c. 261. Therefore, the 2014 revision to Section 25 governs this appeal.

Pursuant to its responsibility to value producing mineral property and reserves, the Tax Commissioner promulgated Title 110, Series 1J of the West Virginia Code of State Rules, which explains the mechanisms to be utilized in valuing taxable property.

To determine the fair market value of producing oil and natural gas property, the Tax Department applies "a yield capitalization model to the net receipts (gross receipts less royalties paid less operating expenses) for the working interest . . . ." W. Va. Code St. R. § 110-1J-4.1. The methodology set forth in section 110-1J-4.1 is reflected in the Tax Department's Administrative Notice 2021-02, in which the Tax Commissioner states that the Tax Department primarily relies upon the income approach in valuing producing oil and gas property. The Tax Department files variables for the formula applying the yield capitalization model to net receipts and filed variables for TY2021 on August 31, 2020. *See* Administrative Notice 2021-06, Hr'g State's Exhibit A.

The Tax Department should consider actual operating expenses to offset the presumed valuation of expenses for each well. According to the Tax Department's legislative rule, the Tax Commissioner considers "operating expenses" to be "the ordinary expenses which are directly related to the maintenance of production of natural gas and/or oil. These expenses do not include extraordinary expenses, depreciation, ad valorem taxes, capital expenditures, or expenditures related to vehicles or other tangible personal property not permanently used in the production of natural gas or oil." Section 3.16 of Series 1J, Title 110 State Tax Department Legislative Rule for Valuation of Producing and Reserve Oil & Natural Gas for Ad Valorem Property Tax Purposes. Based on the testimony of Antero's expert, Altus, and the documents submitted to the Tax Department and the Board, the operating expenses submitted by Antero are those contemplated in Section 3.16.

Antero's burden before the Board was to show by clear and convincing evidence that the Tax Department's valuation (and, hence, the County's assessment) of its gas well operating expenses was erroneous. Syl. Pts. 5–6, *Stone Brooke Ltd. P'ship v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009). On appeal to this Court, the Court relies on the record developed before the Board and determines whether the challenged property valuation is supported by substantial evidence.[2] *See* W. Va. Code § 58-3-4; Syl. Pts. 1–2, *Stone Brooke Ltd. P'ship, supra*. However, the Court has jurisdiction to decide legal questions that "involve the violation of a statute governing the assessment of property, or a violation of a constitutional provision, or in which a question of constitutionality of a statute . . . ." Syl. Pt. 2, *id.*

In this case, the Tax Department failed to consider the actual operating expenses supplied by Antero in both informal and formal testimony. Accordingly, Antero now petitions this Court to find that the Board incorrectly made no changes to the Tax Department's valuation even though the Tax Department wrongly rejected Antero's valuations, which were based on the June 2020 Guidance, and instead relied on the October 2020 Withdrawal which was *ultra vires*, resulting in violations of statutes governing the assessment of property and constitutional provisions as explained below.

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[2] Furthermore, "pursuant to *In Re Pocahontas Land Co.*, 172 W. Va. 53, 61, 303 S.E.2d 691, 699 (1983), once a taxpayer makes a showing that tax appraisals are erroneous, the Assessor is then bound by law to rebut the taxpayer's evidence." *Mountain Am., LLC v. Huffman*, 224 W. Va. 669, 786 n.23, 687 S.E.2d 768, 785 n.23 (2009). While the Court in *In Re Pocahontas Land Co.* suggested that a county assessor could meet that burden by introducing the State's valuation, in this case, Antero showed that the State's valuation itself is incorrect, so it is incumbent on the State to rebut Antero's evidence.

B. The State's Refusal to Apply Its June 2020 Guidance to Its Assessment of Antero's Taxes for TY2021 Violates the APA in Multiple Respects.

The APA requires courts to "reverse, vacate or modify" an "administrative … decision" that violates "constitutional" provisions, "statutory" provisions, or is "arbitrary or capricious."[3] The Board's refusal to permit Antero to deduct its post-production expenses from its gross receipts for TY2021 violates the APA in at least three ways.

First, the *ad valorem* tax violates "statutory" provisions pursuant to W. Va. Code § 29A-5-4(g)(1). West Virginia statutory law requires gas wells to be taxed according to their "true and actual value." *Id.* §§ 11-6K-1(a), 11-6K-2(5). The *ad valorem* tax "grossly" overstates the value of Antero's gas wells far beyond their statutorily required "true and actual value." The tax is thus invalid under the APA.

Second, Respondents' *ad valorem* tax is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion" pursuant to W. Va. Code § 29A-5-4(g)(6). The State conceded as much when it issued the June 2020 Guidance, clarifying that West Virginia's regulations *do* allow deductions for well owners' actual post-production expenses—an about-face from their prior, persistent litigation position and a concession that its approach has been wrong all along. Hr'g Pet.'s Ex. 1, Tab 3. This clarification establishes that there is no rational basis to support the disallowance of such deductions, thus rendering the tax "arbitrary or capricious."

Indeed, the June 2020 Guidance was a valid "interpretive rule" entitled to the force of law. The APA distinguishes between "legislative rules" and "interpretive rules."[4] "Legislative [agency]

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[3] *Kanawha Eagle Coal, LLC v. Tax Comm'r*, 216 W. Va. 616, 619 n.10, 609 S.E.2d 877, 880 n.10 (2004) (quoting W. Va. Code § 29A-5-4(g)).

[4] *Compare* W. Va. Code § 29A-1-2(e) *with* W. Va. Code § 29A-1-2(c).

rules are those affecting private rights, privileges or interests, in what amounts to a legislative act" and must therefore "be authorized by the West Virginia Legislature."[5] In other words, because "legislative rules" have the power to diminish substantive rights or augment substantive liabilities, the legislative-authorization process is difficult by design: The agency must "appl[y] to the Legislature for permission . . . to promulgate [the legislative] rule" after filing a "notice of proposed rulemaking,"[6] which requires the agency to hear "public comment" on the proposed rule.[7]

But "interpretive" agency rules are critically different. As the West Virginia Supreme Court has made clear, "[i]nterpretive rules … merely clarify an existing statute or regulation,"[8] as they "provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it."[9] "Because they only clarify existing law, interpretive rules need not go through the [difficult] legislative authorization process."[10]

Applying those principles here, the June 2020 Guidance is valid as an "interpretive rule." The Tax Department undisputedly did not submit the June 2020 Guidance for the "legislative authorization process" after a notice-and-comment period.[11] Instead, the Tax Department simply

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[5] *Appalachian Power Co. v. W. Va. Tax Dep't*, 195 W. Va. 573, 583, 66 S.E.2d 424, 434 (1995).

[6] W. Va. Code § 29A-3-9.

[7] W. Va. Code § 29A-3-5; *see also Chico Dairy Co. v. W. Va. Human Rights Comm'n*, 181 W. Va. 238, 242, 382 S.E.2d 75, 81 (1989) (holding that a legislative rule not "submitted to, reviewed by and approved by the legislative rule-making review committee and the legislature" was "of no effect under the State [APA]" (emphasis added)); *Summers v. W. Va. Consol. Pub. Ret. Bd.*, 217 W. Va. 399, 405, 618 S.E.2d 408, 414 (2005) ("Because legislative [agency] rules have the force and effect of statutes, the presumption of prospective application [and against retroactivity] applies equally to such rules.").

[8] *Appalachian Power*, 195 W. Va. at 583, 66 S.E.2d at 434.

[9] W. Va. Code § 29A-1-2(c); *accord Bailey v. Sullivan*, 885 F.2d 52, 62 (3rd Cir. 1989) ("If the rule in question merely clarifies or explains existing law or regulations, it will be deemed interpretive").

[10] *Appalachian Power*, 195 W. Va. at 583, 466 S.E.2d at 434.

[11] *Id.*; *see also* W. Va. Code § 29A-3-9 (requiring the Legislature's "permission . . . to promulgate [a legislative] rule").

published the Guidance as an "Important Notice."[12] That ends the inquiry: The rule is interpretive, not legislative, considering the Tax Department's own selected process here. Moreover, the June 2020 Guidance is also an "interpretive rule" under the APA because it "merely clarif[ies] … existing statute[s]" and "regulation[s],"[13] and does not "diminish[] substantive rights" or "augment[] substantive liabilities."[14] Nothing in West Virginia statutory law has changed; it still requires "natural resources property" (including natural gas wells) to be taxed according to its "true and actual value,"[15] and nothing in the legislative rules concerning *ad valorem* taxation of natural gas wells has changed.[16]

In any event, the June 2020 Guidance contains all the hallmarks of an interpretive rule that clarifies existing law. Indeed, the June 2020 Guidance quotes in full the relevant legislative rule that it is clarifying, which has remained on the books unchanged for years.[17] The Guidance also attaches a Tax Department graphic—available "[f]or many years"—"illustrating the field line point of sale concept" that the Guidance has now clarified as applicable when gas is "not sold in a field line sales transaction."[18] The Guidance clarifies that it is "important" for well producers to "appropriately adjust actual gross proceeds of sale to properly reflect the gross receipts [they] would have received had the sales transaction been a field line point of sale," lest their wells be

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[12] Hr'g Pet.'s Ex. 1, Tab 3, at 1.

[13] *Appalachian Power*, 195 W. Va. at 583, 466 S.E.2d at 434.

[14] *Martinez*, 239 W. Va. at 618, 803 S.E.2d at 588.

[15] W. Va. Code §§ 11-6K-1(a), 11-6K-2(5).

[16] *See* W. Va. Code St. R. §§ 110-1J-1 to 110-1J-4.

[17] Hr'g Pet.'s Ex. 1, Tab 3, at 1 ("'Gross receipts' means total income received from production on any well, at the field line point of sale, during a calendar year before subtraction of any royalties and/or expenses." (quoting W. Va. Code St. R. § 110-1J-3.8)); *see also* W. Va. Code St. R. § 110-1J-4.1.

[18] Hr'g Pet.'s Ex. 1, Tab 3, at 1.

"overvalued for property tax purposes."[19] Accordingly, because the June 2020 Guidance is an interpretive rule that must be applied to pending tax disputes under settled administrative law, the Tax Department's complete failure to explain its conclusion to the contrary renders the agency's conduct arbitrary and capricious and thus void under the APA.[20]

Finally, as discussed below, the Respondents' *ad valorem* tax violates "constitutional" provisions, including the federal and state Due Process Clauses, federal Equal Protection Clause, state Equal and Uniform Taxation Clause, and federal dormant Commerce Clause.[21] The tax therefore also violates the APA.

C. The State's October 2020 Attempt to Withdraw the June 2020 Guidance Was Arbitrary, Capricious, and *Ultra Vires*.

First, the State's October 2020 Withdrawal is a concession that Antero's arguments as to the import of the June 2020 Guidance are correct. The October 2020 Withdrawal states that "[n]either legislative rule-making nor statutory procedures were utilized to issue the [June 2020 Guidance]." Hr'g Pet.'s Ex. 1, Tab 3. Thus, the June 2020 Guidance was an interpretive rule which is retroactive and not susceptible to withdrawal.

Second, the State independently violated the APA by issuing the October 2020 Withdrawal. Therefore, the Withdrawal has no effect, and the State must apply the still-valid June 2020 Guidance to Antero's pending tax disputes. "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change," meaning agencies "must examine the relevant data and articulate a satisfactory explanation for [their] action *including a rational connection between the facts found and the choice made*." *Motor Vehicles Mfrs. Ass'n v. State*

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[19] *Id.*

[20] *See* W. Va. Code § 29A-5-4(g)(6).

[21] W. Va. Code § 29A-5-4(g)(1).

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (emphasis added). "About-faces" in policy that are not "reasoned" are arbitrary, capricious, and invalid. *Osei v. INS*, 305 F.3d 1205, 1210 (10th Cir. 2002); *see State ex rel. Hoover v. Berger*, 199 W. Va. 12, 19, 483 S.E.2d 12, 19 (1996) ("[A]n agency will not be permitted to [flit] serendipitously from case to case, 'like a bee buzzing from flower to flower, making up its rules and policies as it goes along.'").

The State "failed to give any persuasive justification for the abrupt change in [its] position"—and amid pending litigation concerning that same position no less. *Ramirez v. U.S. Customs & Border Prot.*, 477 F. Supp. 2d 150, 157 (D.D.C. 2007). The sole reason that the State has offered to support its October 2020 Withdrawal of the June 2020 Guidance is that the June 2020 Guidance effectuated a "substantive change[]" in the applicable statutes and legislative rules without being "implemented by legislative rule or by statute." Hr'g Pet.'s Ex. 1, Tab 3. But the legal premise of this reasoning is "so implausible" it violates the APA. *State Farm*, 463 U.S. at 43; *see also Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 704–705 (4th Cir. 2019) (holding that an agency's "decision to rescind" rules "was arbitrary and capricious" where the agency "failed to give a reasoned explanation for the change in policy" and concluding that prior policy was allegedly "unlawful").

The State is plainly wrong that the June 2020 Guidance effectuated a "substantive change[]" in the relevant statutes and legislative rules. Nothing in West Virginia's statutory law has changed; it still requires "natural resources property" (including natural gas wells) to be taxed according to its "true and actual value."[22] And nothing in the legislative rules concerning *ad valorem* taxation of natural gas wells has changed either.[23] Indeed, those legislative rules still

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[22] W. Va. Code §§ 11-6K-1(a), -2(5).

[23] *See* W. Va. Code St. R. §§ 110-1J-1 to 110-1J-4.

define “[o]perating expenses” as “only those ordinary expenses which are directly related to the maintenance and production of natural gas and/or oil.”[24] The June 2020 Guidance even quotes in full the relevant legislative rule that it is clarifying, which has been on the books and unchanged for years.[25] The June 2020 Guidance therefore does not effect a “substantive change[]” to either a statute or legislative rule.

Instead, the June 2020 Guidance merely changes a prior agency interpretation of these statutes and legislative rules. In fact, the State openly admits this at page one of the October 2020 Withdrawal: “The [June 2020 Guidance] constitutes a material and substantive change of the application of the Tax Department’s legislative rules” by the State, and “[t]he Tax Department’s [June 2020 Guidance] materially changed the longstanding and reasonable construction” of these statutes and legislative rules by the State.[26] Indeed, it is critical to bear in mind that the State’s allegedly “longstanding” prior “construction”—that post-production expense deductions are not allowed—was advanced only as a litigation position in *Steager v. Consol Energy, Inc.* (“*Consol*”) and never in a “legislative rule.”[27] Accordingly, the State’s assertions that it needed a “legislative rule” to change its mere litigation position and interpretation of existing statutes and legislative rules through the June 2020 Guidance is “so implausible” that it is arbitrary and capricious.[28]

Moreover, the State’s assertion in the October 2020 Withdrawal that the June 2020 Guidance effected a “substantive change” in the statutes and legislative rules that could be

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[24] *Id.* § 110-1J-3.16.

[25] Hr’g Pet.’s Ex. 1, Tab 3, at 1 (“‘Gross receipts’ means total income received from production on any well, at the field line point of sale, during a calendar year before subtraction of any royalties and/or expenses.” (quoting W. Va. Code St. R. § 110-1J-3.8)).

[26] Hr’g Pet.’s Ex. 1, Tab 3, at 7.

[27] 242 W. Va. 209, 216, 222, 832 S.E.2d 135, 142, 148 (2019).

[28] *State Farm*, 463 U.S. at 43.

accomplished only through a "legislative rule" and not an "interpretive rule" is flatly contrary to *Consol*. *Consol* held that West Virginia tax law is silent and ambiguous on the question whether deductions for actual post-production expenses are permitted.[29] The Supreme Court thus issued the narrow ruling that, because the State's interpretation was "not facially inconsistent" with, and "f[ell] within the range of permissible construction[s]" of, the controlling statutes and legislative rules, the Court would defer to that interpretation.[30] In doing so, it left the door open for the State to change its interpretation of these statutes and rules through further interpretive guidance.[31] This is precisely what the State did by issuing the June 2020 Guidance, and thereby agreeing with Antero that deductions for post-production expenses are permissible under the statutes and legislative rules after all, and that the prior disallowance of those deductions unlawfully "overvalued" wells for tax purposes.[32]

The State has sought to avoid this reality by claiming that the October 2020 Withdrawal was justified because the June 2020 Guidance displaced a "longstanding and reasonable" construction of the law, and therefore should have been subject to the "mandatory procedures" of the APA. But even setting aside the fact, discussed above, that *Consol* provided the State with *discretion* to determine a tax formula—and thus, by definition, did *not* find there to be any "longstanding and reasonable" construction of the law that could be impacted by the June 2020 Guidance—the legislative-rule provision at issue in *Consol* is *different* from the legislative-rule provision that the June 2020 Guidance clarifies. Whereas *Consol* analyzed the State's

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[29] *Consol*, 242 W. Va. at 221-24, 832 S.E.2d at 147-50.

[30] *Id.*

[31] *See, e.g.*, *id.*, 242 W. Va. at 223, 832 S.E.2d at 149 ("Whether this Court would construe the regulation similarly is frankly beside the point[.]").

[32] Hr'g Pet.'s Ex. 1, Tab 3, at 1.

interpretation of the words "operating expenses" found in W. Va. Code St. R. § 110-1J-3.16,[33] the June 2020 Guidance clarifies a different provision, W. Va. Code St. R. § 110-IJ-3.8, the rule defining "[g]ross receipts . . . at the field line point of sale."[34] In other words, the supposed "longstanding and reasonable construction" upon which the State's APA arguments all hinge is of *an entirely different provision than the one addressed by the June 2020 Guidance*.

That Guidance effectively explains that, for "above-the-line" calculations of "gross receipts," the amounts should be adjusted to account for expenses incurred when gas "is not sold in a field line sales transaction."[35] That is critically different from the "below the line" operating expense deduction rules previously at issue in *Consol*.

Because the June 2020 Guidance does not purport to change any prior interpretation of the term "gross receipts," but merely clarifies the way that term should have been interpreted "[f]or many years" and instructs taxpayers accordingly,[36] it constitutes "mere instructions" that are not subject to the APA "mandatory procedures" on which the State now relies so heavily,[37] and must apply, since it simply reaffirms how "gross receipts" should have been understood all along.[38] Simply put, the State's reasoning that it needed a "legislative rule" to change its prior interpretation

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[33] *Consol*, 242 W. Va. at 221-24, 832 S.E.2d at 147-50.

[34] *See* Hr'g Pet.'s Ex. 1, Tab 3, at 1.

[35] *Id.*

[36] *Id.*

[37] *See* W. Va. Code § 29A-1-2(j) (excluding "mere instructions" from the definition of "rule").

[38] *See, e.g.*, *Clay v. Johnson*, 264 F.3d 744, 749 (7th Cir. 2001) (stating that an agency "rule simply clarifying an unsettled or confusing area of the law … does not change the law, but restates what the law according to the agency is and has always been," so a "clarifying rule … can be applied to the case at hand just as a judicial determination construing a statute can be applied to the case at hand").

of existing law through the June 2020 Guidance is "so implausible" that it is arbitrary and capricious.[39]

Third, the State's assertion in the October 2020 Withdrawal that the June 2020 Guidance is a "substantive" change requiring a "legislative rule" is contrary to the State's actions in other tax years. For years, the State took the position that its old interpretation of existing statutes and legislative rules disallowing deductions for actual post-production expenses did not require statutory amendments or new legislative rules. Yet now, the State says its new interpretation allowing deductions for actual post-production expenses from gross receipts (the June 2020 Guidance) does require statutory amendments or new legislative rules. The State cannot have it both ways. *See, e.g.*, *Banbury Holdings, LLC v. May*, 242 W. Va. 634, 639-40, 837 S.E.2d 695, 700-01 (2019) (applying judicial estoppel to "preclude a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation"). The October 2020 Withdrawal should be declared arbitrary and capricious for this reason alone.

Moreover, the State failed to comply with what it called these "mandatory [APA] procedures" in issuing the October 2020 Withdrawal. Taking the State's own words from tax year 2019 briefing:

- The October 2020 Withdrawal was not "promulgated with the Cabinet Secretary of the Department of Revenue's 'written consent'" as required by West Virginia Code § 5F-2-2(a)(13), as only Commissioner Steager signed the Withdrawal.[40]

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[39] *State Farm*, 463 U.S. at 43.

[40] Br. of Resp'ts Matthew R. Irby, W. Va. State Tax Comm'r & David Sponaugle, Assessor of Doddridgte Cty., No. 19-AA-1, at 16 (Cir. Ct. of Doddridge Cty. Sept. 24, 2021), attached as Exhibit C [hereinafter Tax Dep't Brief]; Hr'g Pet.'s Ex. 1, Tab 3, at 6.

- “Mr. Steager did not file a notice of rulemaking or the text of the” October 2020 Withdrawal “in the State Register,” as required by West Virginia Code § 29A-3-5.[41]

- The Tax Commissioner did not “give the public an opportunity for prior comment” as required by West Virginia Code § 29A-3-5.[42]

- Nor did the Tax Commissioner “‘respond to [the] public comment[s]’ it received and then re-file the proposed rule in the State Register” as required.[43]

- And finally, he did not apply “to the Legislature for permission to promulgate the proposed legislative rule” as required by W. Va. Code § 29A-3-13.[44]

Thus, even under the State’s own logic, the October 2020 Withdrawal “is plainly void and ineffective,” and the “effect of invalidating an agency rule is to reinstate the rule previously in force,” the June 2020 Guidance.[45]

Finally, the October 2020 Withdrawal should be declared arbitrary and capricious because the State “entirely failed to consider reliance interests” in issuing the Withdrawal. *J.O.P. v. U.S. Dep’t of Homeland Sec.*, 409 F. Supp. 3d 367, 378-79 (D. Md. 2019). “When an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). Yet the October 2020 Withdrawal does not even mention these reliance interests—let alone offer a “reasoned explanation” for why the policy change is nonetheless proper.

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[41] Tax Dep’t Br. at 16.

[42] *Id.*

[43] *Id.* at 14 (citing W. Va. Code § 29A-3-5).

[44] *Id.* at 14, 16.

[45] *Id.* at 18; *Organized Vill.*, 795 F.3d at 970; *see also, e.g., Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983).

D. The Board's Decision Violates Due Process.

Both the federal and state Constitutions prohibit deprivations of property without "due process of law." U.S. Const. amend. XIV, § 1; W. Va. Const. art III, § 10. "[A]rbitrary and irrational" state action "violate[s] the federal and state constitutional guarantees of due process," *Thomas v. Rutledge*, 167 W. Va. 487, 493, 280 S.E.2d 123, 128 (1981), and due process "guarantees against arbitrary [government action], demanding that it shall not be unreasonable, arbitrary or capricious and that the requirements therein shall have a real and substantial relation to the purpose of the [action]." *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 699, 237 S.E.2d 504, 509 (1977).

Respondents have clarified in the June 2020 Guidance that deductions for actual post-production expenses are allowed after all under West Virginia law and that Respondents' prior litigation position improperly "overvalued" gas wells, Hr'g Pet.'s Ex. 1, Tab 3. Yet Respondents have insisted, without any justification, that their improper, discriminatory tax approach will be applied at least until tax year 2022. Such "arbitrary and irrational" action violates due process. *Cf. Thomas*, 167 W. Va. at 493, 280 S.E.2d at 128.

E. The Board's Decision Violates Equal Protection.

The Board's decision also violates the federal Equal Protection Clause and the state Equal and Uniform Taxation Clause. Both Clauses bar state action that "selects [particular persons] out for discriminatory treatment by subjecting [them] to taxes not imposed on others of the same class." *Allegheny Pittsburgh Coal Co. v. Webster Cty. Comm'n*, 488 U.S. 336, 342-46 (1989); *see Capitol Cablevision Corp. v. Hardesty*, 168 W. Va. 631, 638, 285 S.E.2d 412, 419 (1981).

Respondents' *ad valorem* tax "practice" violates these principles because it results in "gross disparities in the assessed value of generally comparable property." *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 338. Antero sells the same product as its local competitors: natural gas produced in West Virginia. Yet solely because Antero chooses to sell its gas out of state, Respondents arbitrarily single out Antero for higher *ad valorem* tax treatment by disallowing the deduction of operating expenses that would be incurred only by producers that sell out of state. The record shows that Antero's wells are assessed a higher tax value per MCF than production from similar wells, and this is solely due to "gross disparities in the assessed value of generally comparable property" and thus denies Antero "equal protection of the law." *Id.* at 346.

F. The Board's Decision Violates the Dormant Commerce Clause.

Finally, the Board's refusal to permit Antero to deduct post-production expenses violates the dormant Commerce Clause. The Clause's "dormant" aspect "restricts state protectionism" caused by "state taxation." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019); *Md. Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015); *see also, e.g.*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) ("In its negative aspect, the Commerce Clause prohibits economic protection-ism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."). Respondents' *ad valorem* tax framework violates these principles by (1) discriminating against interstate commerce and (2) subjecting Antero to the risk of multiple taxation.

First, the tax plainly "discriminate[s] against interstate commerce."[46] States cannot "tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State" or "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Wynne*, 135 S. Ct. at 1794; *see also Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 197 (1995). Companies selling gas primarily to

[46] *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018).

buyers outside West Virginia, like Antero, incur significantly higher post-production expenses than companies selling primarily to buyers in West Virginia.

Second, this regime unlawfully exposes Antero to the "risk of a multiple [tax] burden." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939); *see also Wynne*, 135 S. Ct. at 1794-95, 1801-02, 1804 ("Maryland's tax scheme [was] inherently discriminatory" against interstate commerce in allowing double taxation and "operate[d] as a tariff," in violation of the Commerce Clause). The *ad valorem* tax is income-based, W. Va. Code St. R. § 110-1J-3.8, but "foreign corporation[s]" like Antero must also pay "corporate net income tax." W. Va. Code § 11-24-4(a).

IV. CONCLUSION

WHEREFORE, Antero Resources Corporation respectfully requests that the Court:

(i) Find that the Doddridge County Board of Assessment Appeals incorrectly upheld the valuation of Antero's Doddridge County gas wells by the West Virginia Department of Revenue, State Tax Department, Property Tax Division for TY2021;

(ii) Correct the valuation of Antero's Doddridge County gas wells for TY2021 at $540,714,000, and re-assess Antero's property taxes for TY2021 at $7.3 million, based on the application of the June 2020 Guidance allowing the deduction of post-production operating expenses from gross receipts as though the revenues were calculated at a field line point of sale;

(iii) Order the re-assessment of Antero's Doddridge County gas wells for TY2021 based on the corrected valuations; and

(iv) Order such other relief as the Court deems appropriate.

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IN THE CIRCUIT COURT OF DODDRIDGE COUNTY, WEST VIRGINIA

ANTERO RESOURCES CORPORATION,

Petitioner,

v.

Civil Action No. ____________
The Honorable _____________

THE HONORABLE MATTHEW IRBY,
West Virginia State Tax Commissioner,

THE HONORABLE DAVID SPONAUGLE,
Assessor of Doddridge County, and

THE COUNTY COMMISSION OF DODDRIDGE COUNTY,
Sitting as a Board of Assessment Appeals,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **"Petition of Petitioner Antero Resources Corporation"** was served on counsel listed below by U.S. mail in a properly addressed envelope, postage pre-paid, this 3rd day of December, 2021, to the following:

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