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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 20-0531

ANTERO RESOURCES CORPORATION

Plaintiff below, Petitioner

v.

MATTHEW R. IRBY, ACTING WEST VIRGINIA STATE TAX COMMISSIONER, AND DAVID SPONAUGLE, ASSESSOR OF DODDRIDGE COUNTY, THE COUNTY COMMISSION OF DODDRIDGE COUNTY,

Respondents below, Respondents.

BRIEF OF THE WEST VIRGINIA STATE TAX COMMISSIONER

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INTRODUCTION

For the second time, Antero Resource Corporation (hereinafter, "Antero") is before this Court seeking to invalidate the West Virginia State Tax Commissioner's methodology for valuing wells it had in Doddridge County during the 2017 tax year. On the first appeal, Antero failed to convince this Court that the Tax Commissioner's exclusion of post-production expenses from the average industry operating expense calculation during the 2017 tax year was arbitrary, capricious, or unreasonable. *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 224, 832 S.E.2d 135, 149 (2019). It also argued—but failed to convince this Court—that the exclusion of these expenses assessed their property in violation of the statutory mandate of "true and actual" value assessments. *Id.* at 222, 832 S.E.2d at 148. This Court did conclude that the Tax Commissioner violated the West Virginia Constitution's "equal and uniform" and the United States and West Virginia Constitutions' equal protection provisions. But this was "not due to an over-valuation"—as Antero argued—but due to "the use of two differing formulas to calculate operating expenses." *Id.* at 220, 832 S.E.2d at 146. And this Court resolved the impermissible inequality by mandating that "deduction of the average annual industry operating expense" be calculated using "a singular monetary average," Syl. Pt. 12, *id.* at 213, 832 S.E.2d at 137, instead of using the 20% deduction Antero sought. *Id.* at 224 n.21, 832 S.E.2d at 150 n.21. It further concluded that if this monetary average was "applied evenly across the board" it "avoid[ed] [the] unconstitutionally impermissible application" Antero asserted in its first appeal. *Id.* at 225, 832 S.E.2d at 151.

Now—armed with refashioned statutory and constitutional theories—Antero has returned to argue that the Tax Commissioner's use of a prorated deduction for wells that produce both oil and gas is also impermissible and to try (yet again) to convince this Court that the exclusion of post-production expenses during the 2017 tax year was "arbitrary and capricious," *Brief of the Petitioner*, Appeal No. 20-0531, at 21, 25 (hereinafter, "Petr's Br. at __"), and "overvalued" their property in violation of statutory "true and actual" value mandates, *id.* at 10, the "state and federal equal protection principles", *id.* at 12, and the dormant Commerce Clause. *Id.*

But the prorated deduction for oil and gas wells has been a part of Antero's assessment from the beginning of this litigation. Clearly, Antero could have raised an objection to this deduction when it originally protested its assessment to the Board of Assessment Appeals or when it first appealed to Business Court. And if it had not waived such an objection by then, it could have raised its concerns when it first appeared before this Court. It failed to do so then and it cannot raise "that argument on a second appeal following remand." *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 S.2d 502, 505 (4th Cir. 1992). Its objections to the prorated deduction for oil and gas wells are waived. Likewise, its other statutory and constitutional arguments should be rejected. These arguments were not "passed upon by the court below" and do not "fairly arise upon the" the record on appeal. *In re Michael Ray T.*, 206 W. Va. 434, 444, 525 S.E.2d 315, 325 (1999). Additionally, they are either barred by the law of the case established in *Consol Energy* or have been waived because Antero could have raised them before and failed to do so. Antero's refashioned statutory and constitutional objections to its valuation should not be addressed or if addressed, should be rejected.

In *Consol Energy*, this Court directed the Business Court to "fix the assessment" of Antero's property "consistent with this opinion." *Consol Energy*, 242 W. Va. at 225, 832 S.E.2d at 151. On remand, the Business Court complied with this mandate. Its June 15, 2020, Order should be affirmed.

COUNTER-STATEMENT OF THE CASE

I. The Original 2017 Assessment and Business Court appeal.

The Tax Commissioner annually appraises natural resource properties—like oil and gas wells—at "sixty percent of [their] true and actual value" for ad valorem property tax purposes. W.

Va. Code § 11-6K-1(a). The methodology for determining value is established by legislative rule, W. Va. Code R. §§ 110-1J-1 *et seq*. (2005), which requires the well owners to report gross receipts from production. From this reporting, the Tax Commissioner applies a production decline rate and deducts the "average annual industry operating expenses" to establish a nets receipts value which is capitalized to determine taxable value. W. Va. Code R. § 110-1J-4.1. By rule, the Tax Commissioner shall "determine the average annual industry operating expenses per well," *id.* § 110-1J-4.3, and this determination is published each year in the State Register as an Administrative Notice.

For the 2017 tax year, Administrative Notice 2017-08 (Jan. 26, 2017) set the average annual industry operating expense deduction for "oil production" at "35% of gross receipts . . . not to exceed $5,750." Appendix Record 20-0531, at 2053 (hereinafter, "AR ___"). For gas production in Marcellus horizontal wells, it set the "maximum operating expense" deduction as "20% of the gross receipts . . . not to exceed $175,000." AR 2053. But where a "well is producing both oil and gas" the notice provided for a prorated operating expense deduction. AR 2054. For Marcellus horizontal wells, the prorated "maximum operating expense" deduction was "between $5,750 and $175,000 depending upon the percentage of gas versus oil receipts involved." AR 2054.

Antero operates a number of horizontal Marcellus Shale wells in Doddridge County, some of which produce both gas and oil. Petr's Br. at 6. For 2017, these wells were appraised under the Tax Commissioner's methodology and received the average industry operating expense deduction as set forth in Administrative Notice 2017-08. AR 66, 2053. Doddridge County then assessed Antero based on the appraisal, and Antero protested the assessment of 199 of its wells. AR 53, 943-49, 1707. At the time, the Tax Commissioner had calculated the combined appraised value of these 199 wells at $513,250,356. AR 2203. Antero's protest was unsuccessful at the county level.

AR 1576. So it appealed to circuit court on March 17, 2017, AR 926, and that appeal was referred to the Business Court Division. AR 1636.

At Business Court, Antero argued that the Tax Commissioner "overvalued Antero's producing natural gas . . . by imposing" a $175,000 cap on the operating expenses its wells could deduct, AR 1704, and by excluding gathering, compressing, processing, and transportation expenses from the average annual industry operating expense calculation. AR 1705. It also argued that the $175,000 cap on its operating expense deduction violated the equal and uniform, AR 1705, 1752-56, and equal protection requirements of the West Virginia Constitution, AR 1705, and the equal protection requirements of the United States Constitutions, AR 1705, because it resulted in "two systems" for assessing Marcellus horizontal wells. AR 1754, 1755. The *first,* permitted a deduction of 20% of gross receipts for smaller wells (those with gross receipts less than $875,000). AR 66. The *second*, permitted a $175,000 deduction for larger wells (those with gross receipts greater than $875,000). AR 66, 1754-55. But Antero did not challenge the Tax Commissioner's use of the prorated deduction for wells that produce both oil and gas. Nor did Antero argue that the exclusion of gathering, compression, processing, and transportation expenses violate due process, equal protection, or commerce clause principles. At the time, it only raised statutory and rule-based arguments related to these post-production expenses. AR 1705. The Business Court initially agreed with Antero and reduced the value of its wells to $421,687,034 based on a deduction of 20% of Antero's gross receipts "without the imposition of" the $175,000 "cap." AR 68.

II. The first appeal to this Court and its resolution of Antero's statutory and constitutional challenges.

Both the Tax Commissioner and Doddridge County appealed the Business Court's ruling to this Court seeking to restore the original assessment. AR 45. Before this Court, Antero reiterated its arguments below. It asserted that the imposition of the $175,000 cap was unsupported by the applicable statutes and legislative rules, AR 1988, violated the "equal and uniform" and equal protection clauses the West Virginia Constitution, AR 2003-04, and violated the equal protection clause of the United States Constitution. AR 2009-10. And like at Business Court, it argued that the Tax Commissioner "overvalued" its wells by excluding expenses for "gathering[,] compressing, processing[,] . . . and transportation" from the average industry operating expense deduction. AR 1979-80. But again, Antero did not challenge the Tax Commissioner's use of a prorated deduction for wells that produce both oil and gas. And Antero did not argue that excluding expenses for gathering, compression, processing, or transportation from the average annual industry operating expense deduction violated due process, equal protection, or commerce clause principles. Again, its arguments on this issue were statutory or rule-based. AR 1979-80.

This Court affirmed the Business Court "in part, reversed in part, and remanded for further proceedings consistent with [this Court's] opinion." *Consol Energy*, 242 W. Va. at 225, 832 S.E.2d at 151. Specifically, this Court found that the applicable legislative rule was silent regarding whether post-production expenses were deductible. As a result, it reversed the Business Court's conclusion that Antero's gathering, compression, processing, and transportation expenses "must necessarily be included in the . . . average operating expense calculation." *Id.* at 224, 832 S.E.2d at 149. Instead, it held that the Tax Commissioner's choice to exclude such expenses was not "arbitrary, capricious, or manifestly contrary" to the enabling legislative rules or his statutory obligation to assess natural resource properties at "true and actual value." *Consol Energy,* 242 W. Va. at 223-24, 832 S.E.2d at 148-49.

This Court did conclude that the Tax Commissioner's "use of a percentage" for smaller wells and a monetary average for larger wells resulted in "two differing formulas to calculate operating expenses," *id.* at 220, 832 S.E.2d at 146, and thereby violated the West Virginia Constitution's "equal and uniform" and the United States and West Virginia Constitutions' equal protection provisions. Syl. Pt. 8, *id.* at 213, 832 S.E.2d at 137. But this Court resolved the impermissible inequality—not by requiring the use of a percentage-based deduction (as Antero had requested, AR 2008-09)—but by mandating that the "deduction of the average annual industry operating expense" be calculated "us[ing] a singular monetary average." Syl. Pt. 12, *id.* at 213, 832 S.E.2d at 137. It further concluded that if this monetary average was "applied evenly across the board" it "avoid[ed] [the] unconstitutionally impermissible application" Antero asserted in its first appeal. *Id.* at 225, 832 S.E.2d at 151. This Court then remanded the case to Business Court "to fix the assessment of" Antero's property "consistent with this opinion." *Id.* The mandate issued on September 13, 2019. AR 2036.

III. The Business Court's compliance with the mandate.

On remand, Antero provided the Tax Commissioner "a list of wells" for the 2017 tax year that were "subject to re-valuation." AR 2039; AR 2088, Aff'd of C.Hoover, ¶ 20; AR 2203. The list was comprised of the same 199 wells that Antero included in its original appeal. *Compare* AR 2090-97 *with* AR 947-49; *cf.* AR 2088, Aff'd of C.Hoover, ¶ 20. The list included eight smaller wells that would have received a 20% deduction when originally appraised. AR 2043, n.4. The Tax Commissioner revalued every well on Antero's list. AR 2088, Aff'd of C.Hoover, ¶¶ 22-23. "[W]ells that produced only natural gas" were revalued "utilizing a deduction of $175,000 per well," whereas "wells that produced only oil" were revalued using "a deduction of $5,570 per well." AR 2087, Aff'd of C.Hoover, ¶¶ 12-13. But because some of Antero's wells "produce[d] both oil and natural gas," the Tax Commissioner applied a prorated deduction applicable to oil *and* gas producing wells, AR 2087, Aff'd of C.Hoover, ¶¶ 14-15, which was established in Administrative Notice 2017-08. AR 2054. For Marcellus horizontal wells this prorated deduction "var[ied] between [the] $5,750" deduction for oil and the "$175,000" deduction for gas "depending upon the percentage of gas versus oil receipts involved." AR 2054; AR 2088, Aff'd of C.Hoover, ¶ 16. The revaluation resulted in a $6,035,111 reduction of the original $513,250,356 valuation to $507,215,246. AR 2088, Aff'd of C.Hoover, ¶¶ 22-23.

After receiving the Tax Commissioner's revaluation, Antero objected, for the first time, to the use of the prorated deduction for oil and gas producing wells. AR 2038-39. But it admitted to "not specifically rais[ing]" such objections before because it preferred the "higher" percentage-based operating expense deduction it sought in its first appeal. AR 2103 & nn.2-3. And for the first time, it contended that its wells should receive a combined deduction of $5,750 for oil plus a deduction of $175,000 for gas. AR 2039. Applying this combined deduction, Antero calculated the value of its wells at $489,492,958, AR 2040, and sought summary judgment in favor of this reduced valuation. AR 2043. But unlike the Tax Commissioner, Antero did not support its calculation with an affidavit. AR 2206. Nor did Antero rebut the Tax Commissioner's revaluation with sworn testimony.

On June 15, 2020, the Business Court rejected Antero's belated arguments and its motion for summary judgment. AR 2203-04. Instead, it adopted the Tax Commissioner's revaluation of $507,215,246. AR 2210-11. It found no dispute regarding "the list of which wells in Doddridge County should be re-valued," AR 2206, and that Antero's valuation differed from the Tax Commissioner's only with respect to the wells "which produce both oil and gas." AR 2206. And it concluded that the Tax Commissioner's treatment of these wells was "reasonable" and "appropriate." AR 2208. For wells that produced both oil and gas, it found that the Tax Commissioner "correctly used the monetary average of $175,000 for produced natural gas and $5,750 for produced oil" based on "how much oil the certain well produced versus how much natural gas it produced." AR 2208. Finally, it concluded that Antero was not entitled to a "higher deduction" simply because it had "wells that produced both oil and natural gas." AR 2209. Antero appealed the Business Court's order to this Court on July 17, 2020. AR 1.

IV. Antero's subsequent Preliminary Injunction and Rule 60(b) Motion.

But subsequent to its notice of appeal, Antero filed motions in the Circuit Court of Doddridge County, Business Court Division for relief under Rule 60(b) of the West Virginia Rules of Civil Procedure and for a preliminary injunction. Petr's Br. at 10-11; AR 1-2. Then, on October 15, 2020, it filed with this Court a *Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix* (hereinafter, "*Rule 7(g) Motion*") comprised of the records and briefs related to those subsequently-filed motions at Business Court. And in its *Petitioner's Brief* in this appeal, Antero included four assignments of error, Petr's Br. at 1, and five arguments, *id.* at 19-30, which relied on its *Supplemental Appendix*. In Assignments of Error 2 and 3, it argues that a notice issued by the Tax Commissioner in June of 2020 (hereinafter, the "*June 2020 Notice*"), must be applied retroactively and that the Tax Commissioner's failure to do so is arbitrary and capricious and in violation of the West Virginia Administrative Procedures Act, W. Va. Code §§ 29A-1-1 *et seq.* (hereinafter, the "APA"), and due process. Petr's Br. at 1. But it admits that the Tax Commissioner has since withdrawn the *June 2020 Notice*. Petr's Br. at 5-6 n.11. In Assignments of Error 4 and 5, it contends that the Tax Commissioner's exclusion of post-production expenses from the average annual industry operating expense deduction violated state and federal due process principles as well as dormant Commerce Clause principles. Petr's Br. at 1. Eleven days later, the Tax Commissioner objected to Antero's *Supplemental Appendix*. Then, on January 13, 2021, the Business Court denied Antero's Rule 60(b) and preliminary injunction motions for lack of jurisdiction. And on January 28, 2021, this Court refused Antero's *Rule 7(g) Motion* noting that the supplemental appendix documents "were not part of the record before the circuit court at the time of entry of the appealable order." *Corrected Order*, No. 20-0530 (W. Va. Jan. 28, 2021). In the same order, this Court also set the timeline for the remaining briefing for this appeal.

SUMMARY OF ARGUMENT

A. On remand, the Business Court properly revalued Antero's wells in accordance with *Consol Energy*'s mandate. There, this Court found that the Tax Commissioner violated constitutional equal and uniform and equal protection principles because he used a monetary average deduction and a percentage to calculate gas well's average industry operating expense deduction. Syl. Pt. 8, *Consol Energy*, 242 W. Va. at 213, 832 S.E.2d at 137. And it concluded that the Business Court's prior order "erroneously required the use of a percentage" deduction instead of the monetary average deduction mandated by applicable legislative rules. *Id.* at 225, 832 S.E.2d at 151. But on remand, the Business Court corrected this error and complied with this Court's directive to "fix the assessment" of Antero's property "consistent with" its opinion. *Consol Energy*, 242 W. Va. at 225, 832 S.E.2d at 151. The fixed assessment adopted by the Business Court revalued every well that Antero submitted to the Tax Commissioner for such purposes. And it performed this revaluation without using the percentage-based deduction that this Court previously found offensive to the Constitutions and applicable legislative rules. Rather, it applied a $5,570 monetary deduction to wells that produced only oil and a $175,000 deduction to wells that produced only gas. But where a well produced both oil and gas, the revaluation used a prorated deduction that Antero left unchallenged in *Consol Energy*. Under this deduction, producers—like Antero—were permitted to deduct between $5,750 and $175,000 depending on the percentage of gas versus oil produced. The Business Court complied with the mandate from *Consol Energy* and its June 15, 2020, Order should be affirmed.

B. Likewise, each of Antero's assignment of error should either not be considered or rejected. Antero argues that the use of a prorated deduction for oil and gas producing wells was an error and contrary to *Consol Energy*. But the Business Court also properly rejected this argument, and this Court should do the same. Such objections could have been raised when Antero protested its assessment to the Board of Assessment Appeals or first appealed its assessment to Business Court. But Antero failed to do so then. Arguably, such objections could also have been raised in *Consol Energy*. But again, Antero remained silent and "focus[ed]"—according to its own concession—on its economically preferable challenge to the $175,000 cap. AR 2103 & nn.2-3. It waited until this preferable theory was unsuccessful and the Tax Commissioner revalued its wells on remand to raise concerns with this prorated deduction. By then, it was too late. The mandate precluded the Business Court from considering any "other issues, or new matters" affecting Antero's revaluation. *Quicken Loans, Inc. v. Brown*, 236 W. Va. 12, 20, 777 S.E.2d 581, 589 (2014) (hereinafter, "*Quicken Loans II*"). And waiver rules preclude consideration of Antero's belated arguments here. These arguments could have been raised in the initial protest, the initial appeal to Business Court, or (if not already waived) in the initial appeal to this Court. They were not and cannot be raised now. The Business Court properly rejected Antero's belated objection to the prorated deduction for oil and gas producing wells and this Court should affirm that decision.

C. Antero's remaining assignments of error fair no better. Here, Antero has raised several additional statutory and constitutional arguments for reversal. Specifically, it contends that the Tax Commissioner's exclusion of post-production expense—although sanctioned in *Consol Energy*—violates various statutory and constitutional principles including due process, equal protection, and the dormant Commerce Clause. But each of these assignments of error should either not be considered or if considered, be rejected. None of the arguments Antero now raises were considered or decided in the Business Court order it appealed. Nor do they appear in the record on appeal. Additionally, each of these assignments of error was either resolved by *Consol Energy* (because they were raised and rejected), or waived because Antero failed to raise them before. The Business Court's June 15, 2020, Order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The methodology for valuing oil and gas wells is of fundamental public importance and significantly impacts the tax revenue of the counties where oil and gas producing wells are located. However, oral argument is unnecessary here because the issues raised by Antero were either resolved by the first appeal of this case, previously waived, or are not on the record before this Court. Nevertheless, the Tax Commissioner stands ready to appear and defend his position if this Court considers oral argument desirable.

STANDARD OF REVIEW

The standards for the second appeal of this matter are well defined. When this Court renders a decision and remands to the circuit court for additional proceedings, the "mandate controls the framework that the circuit court must use in effecting the remand." *Quicken Loans, Inc. v. Brown*, 236 W. Va. 12, 19, 777 S.E.2d 581, 589 (2014) (hereinafter, "*Quicken Loans II*") (quoting *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 809, 591 S.E.2d 728, 735). Where that mandate was limited, it "preclude[s]" the circuit court "from considering other issues, or new matters, affecting the cause." *Quicken Loans II*, 236 W. Va. at 20, 777 S.E.2d at 589. A circuit court's "interpretation of the mandate" is subject to *de novo* review, Syl Pt. 4, *Frazier & Oxley*, 214 W. Va. 805, 591 S.E.2d at 731, but any decision reached in the prior appeal "is conclusive on parties, privies and courts, including this Court, upon a second appeal and . . . is regarded as the law of the case." *Id.* at 808, 591 S.E.2d at 734. There is also "a presumption that valuations for taxation purposes fixed by an assessor are correct" and any taxpayer challenging such assessments bears the burden "to demonstrate by clear and convincing evidence that the tax assessment is erroneous." Syl. Pt. 2, *W. Pocahontas Props., Ltd. v. Cnty. Comm'n of Wetzel Cnty.*, 189 W. Va. 322, 322, 431 S.E.2d 661, 661 (1993). This Court also "examine[s] a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 827 S.E.2d 417, 424 (2019).

ARGUMENT

I. THE BUSINESS COURT CARRIED OUT THE MANDATE FROM *CONSOL ENERGY*.

The revaluation adopted by the Business Court on remand complied with this Court's mandate because it used a monetary average deduction instead of the percentage deduction *Consol Energy* invalidated. Antero's only challenge to the order on appeal is that the Business Court improperly applied a prorated deduction for wells that produced oil and gas. Petr's Br. at 1. But it cannot prevail on this assignment. This prorated deduction was not addressed or prohibited by *Consol Energy* because Antero failed to timely object to its application. It cannot do so now. Consistent with the mandate, the Business Court rejected Antero's belated objection to the Tax Commissioner's use of a prorated monetary deduction for Antero's oil and gas producing wells. Antero's attempt to raise the same belated objection here should likewise be rejected.

a. The revaluation complied with the mandate of *Consol Energy*.

In the first appeal, this Court concluded that the Tax Commissioner's use of a $175,000 monetary cap on the average industry operating expense deduction and an alternative percentage deduction of 20% of gross receipts violated the West Virginia and United States Constitutions. Syl. Pt. 8, *Consol Energy*, 242 W. Va. at 213, 832 S.E.2d at 137. And it concluded that the Business Court "erroneously required [the] use of a percentage" instead of the "singular monetary average deduction" required by applicable legislative rules. Syl. Pt. 12, *id.* So, it remanded the case to the

Business Court "to fix the assessment of" Antero's property "consistent with this opinion." *Id.* at 225, 832 S.E.2d at 151.

On remand, the Business Court carried out the mandate from *Consol Energy*. It fixed the assessment of Antero's wells based on the Tax Commissioner's revaluation. AR 2210. That revaluation used an undisputed list of wells that Antero provided to the Tax Commissioner. AR 2206, AR 2039. For wells that "produced oil," the revaluation applied a monetary average deduction of $5,570, instead of the 30% deduction the Business Court previously adopted. AR 2206. Likewise, for wells that "produced [only] natural gas," it applied the $175,000 monetary average deduction instead of the 20% deduction. AR 2206.

But the Business Court recognized that a number of Antero's wells also presented a "special circumstance" because they produced "both oil and gas." AR 2209. It noted that *Consol Energy* "did not address" the methodology for valuing such wells. AR 2208. For these wells, the Tax Commissioner used a deduction that "var[ied] between $5,750 and $175,000 depending on the percentage of oil receipts versus gas receipts." AR 2207, AR 2088, Aff'd of C.Hoover, ¶ 16. The Business Court concluded that this methodology "correctly used the monetary average of $175,000 for produced natural gas and $5,570 for produced oil." AR 2208. And that it properly "took into account how much oil the certain well produced versus how much natural gas it produced." AR 2208. It also found that this prorated deduction was a "fair" and "reasonable" method for applying the relevant monetary deductions to the "special circumstance" where a well produced both oil and gas. AR 2208-09.

The revaluation resulted in a $6,035,111 reduction of the original appraisal. AR 2088, Aff'd of C.Hoover, ¶¶ 22-23. Antero's wells were originally valued at $513,250,356, and on remand, they were revalued at $507,215,246. AR 2088, Aff'd of C.Hoover, ¶¶ 22-23. This result makes sense. The majority of the wells Antero originally protested in Doddridge County were large wells that had gross receipts in excess of $875,000. *Cf.* AR 947-49. Unlike prior years, in 2017 Antero also protested a number of smaller wells (those with gross receipts less than $875,000). AR 947-49, 2043 n.4 (noting that eight of its 199 wells would have originally received the 20% deduction). But by Antero's own estimation, its wells "common[ly]" "produce more than $5 million in annual gross receipts." AR 1710. In the original assessment, these large wells would have already received either the $175,000 deduction for Marcellus horizontal wells that produced only gas, AR 66, 2053, or the prorated deduction for well that produced both oil and gas. AR 2054. Only the smaller wells would have originally received the 20% deduction. AR 66, *cf.* AR 2043 n.4. So, when this Court directed the Business Court to "fix the assessment" of Antero's property without using the 20% deduction it has "erroneously required" previously, *Consol Energy*, 242 W. Va. at 225, 832 S.E.2d at 151, it only affected the valuation of the smaller wells and not those that had already received either the $175,000 deduction or the prorated deduction for oil and gas producing wells. The Tax Commissioner revalued Antero's undisputed list of wells, AR 2206, utilizing the appropriate monetary averages, AR 2053-54, and without using the 20% deduction this Court previously found erroneous. And the Business Court adopted the Tax Commissioner's revaluation. Its June 15, 2020, Order should be affirmed.

b. The mandate did not prohibit the use of a prorated monetary deduction for oil and gas producing wells.

But in Assignment of Error 1, Antero contends that the Business Court plainly disregarded this Court's directive to fix its assessment using "a singular monetary average deduction." Petr's Br. at 1, 15-16. It points to this Court's finding that the applicable legislative rules did not "provide for a 'sliding scale' or pro rata operating expense deduction." Petr's Br. at 16 (quoting *Consol Energy*, 242 W. Va. at 225, 832 S.E.2d at 151). And it contends that the use of a "prorated" average for oil and gas producing wells "is just another variant of the same sliding-scale" this Court already rejected. Petr's Br. at 15.

But this contention stretches *Consol Energy* beyond the circumstances it embraces. Admittedly, when this Court remands a case, "the circuit court must proceed in accordance with the mandate and the law of the case established on appeal." Syl. Pt. 3, *Frazier & Oxley*, 214 W. Va. at 805, 591 S.E.2d at 731. And when a circuit court "fails or refuses to obey or give effect to the mandate of this Court," it exceeds its legitimate authority. *Cf.* Syl. Pt. 5, *id.* But in implementing the mandate, a circuit court is also charged to "tak[e] into account" this Court's opinion "and the circumstances it embraces." Syl. Pt. 3, *id.*

The Business Court fulfilled these obligations on remand. It recognized that *Consol Energy* did not embrace the circumstances of wells that produce both oil and gas. AR 2208 (finding that *Consol Energy* "did not address wells that produce both oil and gas."). Rather, throughout the opinion, this Court discussed the methodology for valuing "vertical *gas wells* and . . . horizontal, Marcellus shale *gas wells*." *E.g.*, *Consol Energy*, 242 W. Va. at 214, 832 S.E.2d at 141 (emphasis added); *see also id.* at 219 & n.14, 832 S.E.2d at 145 & n.14 (discussing different operating expense deductions for conventional and horizontal gas wells). And throughout, this Court's analyses and conclusions were specifically tied to those circumstances. Its conclusion that the "average industry operating expense" deduction "requires the use of a singular monetary average" was no exception. *Cf. id.* at 224, 832 S.E.2d at 150 (referencing the "fixed [$5,000] dollar amount" applicable to conventional gas wells).

Antero, however, contends that there was "no basis" for the Business Court's distinction between those wells that produce oil or gas and those that produce both oil and gas. Petr's Br. at 16. According to Antero, the legislative rule applies to "[o]il *and/or* natural gas producing property." Petr's Br. at 16 (emphasis in original) (quoting W. Va. Code R. § 110-1J-4.1). But this misses the point. Of course, the legislative rule provides a methodology for calculating the value of either oil wells, gas wells, or oil and gas producing wells. W. Va. Code R. § 110-1J-4.1. And the average industry operating expense deduction is a component of the valuation of each type of well. *Id.* § 110-1J-4.3. What the Business Court correctly recognized is that *Consol Energy* only addressed the methodology and deduction for gas wells. *See, e.g.*, *Consol Energy*, 242 W. Va. at 214, 19 & n.14, 832 S.E.2d at 141, 145 & n.14. Likewise, the "percentage" deduction that this Court found "erroneous[]" was the 20% gas well deduction originally utilized by the Business Court. *Id.* at 225, 832 S.E.2d at 151 (reversing Business Court Order that requiring use of 20% deduction, AR 68). Nowhere in the opinion does this Court address the operating expense deduction applicable to wells that produce both oil and gas. So, when the Business Court applied the mandate, it appropriately took "into account" "the circumstance" *Consol Energy* "embraced," Syl. Pt. 3, *Frazier & Oxley*, 214 W. Va. at 805, 591 S.E.2d at 731, and it understood *Consol Energy* to prohibit the 20% gas well deduction and not the prorated deduction applicable to oil and gas producing wells. AR 2207-08. *Consol Energy* simply did not address or prohibit this prorated deduction for oil and gas producing wells.

c. Antero's belated objection to the deduction for oil and gas wells is precluded by the mandate, waived, and without merit.

The circumstances of the mandate were not the result of this Court's oversight. Rather, it did not address the deduction for oil and gas producing wells in the first appeal because Antero failed to raise any objections to this prorated deduction until remand. As Antero admits, "[t]he focus of [its] argument" on appeal was "the use of an operating expense 'maximum amount' or 'cap,' rather than on the application of a weighting mythology for wells that produce both oil and natural gas." AR 2103. Administrative Notice 2017-08 has always provided for a prorated deduction for Antero's oil and gas producing wells. AR 2054. But Antero's concerns with this prorated deduction were not raised with the Tax Commissioner until 2018. Petr's Br. at 16. And they were not raised in court until February 20, 2020, when Antero filed its motion for summary judgment on remand. AR 2037. Nor was Antero's delay the result of inadvertence. It was deliberate and strategic. In fact, Antero has acknowledged that a different producer, who was represented by the same counsel, AR 2144, AR 2159, "initially raised the weighting issue in its appeal" to circuit court, AR 2103 n.3, in March of 2018. AR 2128. Likewise, Antero acknowledges that it chose not to "raise the issue of 'weighting'" because it preferred to pursue a percentage-based method for calculating its operating expense deduction. AR 2103 & nn.2-3.

At the time, Antero cited "mootness" to justify its decision not to raise the "weighting issue" earlier. AR 2103 & n.3. It argued that the prorated deduction for oil and gas production "would have been of little consequence" if it successfully convinced this Court to uphold the 20% deduction previously used by the Business Court. AR 2103 & n.3. But a party asserting mootness has a "heavy burden of persua[sion]." *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 156, 697 S.E.2d 740, 748 (2010). And Antero has failed to meet that burden here. The prorated deduction for oil and gas wells was always a component of Antero's 2017 assessment. AR 2054. When Antero first protested its assessment at the county level, this deduction was clearly not moot. AR 943-49. Likewise, when it was unsuccessful there, AR 1576, and appealed to circuit court, AR 926, the prorated deduction was clearly a live issue that had consequences for its assessment. Even if those consequences were diminished by Antero's initial success at Business Court, AR 68, it has not demonstrated that it had no "legally cognizable interest" in also challenging the prorated deduction on the initial appeal before this Court. *Cf. Mazzone*, 226 W. Va. at 156, 697 S.E.2d at 748. Antero simply chose to "focus [its] arguments" on an issue that—by its own estimation—could have reduced its valuation by over $91 million, *compare* AR 2203 (original $513 million assessment) *with* AR 1759 (Antero's requested $421 million assessment based on 20% deduction), rather than an issue that could have changed its valuation by no more than $18 million. *Compare* AR 2210 (revalued $507 million assessment) *with* AR 2040 (Antero's requested $489 million valuation on remand). This focus is understandable, but it plainly demonstrates the strategic nature of Antero's decision.

A. By the time Antero raised its objections to the prorated oil and gas deduction, it was too late because this Court's limited remand "precluded" the Business Court from "considering other issues, or new matter"—like Antero's belated objections—"affecting the cause." *Quicken Loans II*, 236 W. Va. at 20, 777 S.E.2d at 589. A remand may "be either general or limited in scope." Syl. Pt. 2, *Frazier & Oxley*, 214 W. Va. at 805, 591 S.E.2d at 731. But where it is "for a specific act," *Quicken Loans II*, 236 W. Va. at 20, 777 S.E.2d at 589, or "explicitly outline[s] the issues" the circuit court may address, it constitutes a limited remand. Syl. Pt. 2, *Frazier & Oxley*, 214 W. Va. at 805, 591 S.E.2d at 731.

The remand from *Consol Energy* was clearly limited. It directed the Business Court to perform a specific act—namely, "to fix the assessment of" Antero's "property. *Consol Energy*, 242 W.Va. at 225, 832 S.E.2d at 151. And it explicitly outlined the only issue that remained open in this case—specifically, what value should be assigned to Antero's gas producing wells using a monetary-based deduction instead of the 20% deduction the Business Court "erroneously required" previously. *Id.* No additional issues were left open on remand. And in such circumstances, the remand "creates a narrow framework within which the circuit court must operate." Syl. Pt. 2, *Frazier & Oxley*, 214 W. Va. at 805, 591 S.E.2d at 731. The mandate then prohibits the circuit court from "re-hear[ing] . . . any matter . . . decided" by the appellate court.

Quicken Loans II, 236 W. Va. at 19, 777 S.E.2d at 588 (quoting Syl. Pt. 1, *Johnson v. Gould*, 62 W. Va. 599, 59 S.E. 611 (1911)). And it "preclude[s]" the circuit court "from considering *other issues, or new matters* affecting the cause." *Quicken Loans II*, 236 W. Va. at 20, 777 S.E.2d at 589 (emphasis added).

Antero's objection to the prorated oil and gas well deduction is plainly an "other issue[], or new matter[]" that was unaddressed in *Consol Energy*. The mandate prohibited consideration of this belatedly-raised issue.

B. Likewise, Antero has waived consideration of this new issue in this second appeal. It is a "longstanding legal maxim" that the "law aids those who are diligent, not those who sleep upon their rights," and that "silence may operate as a waiver of objections to error and irregularities." *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 601, 694 S.E.2d 815, 934 (2010) (internal quotations omitted). These principles "prevent[] a party from making a tactical decision to refrain from objecting and subsequently, should the case turn sour, assigning error." *Id.* Waiver is typically invoked at circuit court, but it "has equal force and application at the appellate level." *Id.* It requires "a party to present all known arguments or claims to an appellate court before its decision is rendered." *Id.* at 599, 694 S.E.2d at 932. And "where an argument could have been raised on an initial appeal" and was not, a litigant cannot raise "that argument on a second appeal following remand." *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 S.2d 502, 505 (4th Cir. 1992).[1]

[1] While federal courts consistently conclude that "an appellant" "waive[s] issues" that "it could have raised in its own first appeal," at times, this rule is relaxed for an appellee on a first appeal. *See, e.g.*, *Laitram Corp., v. NEC Corp.*, 115 F.3d 947, 954 (Fed. Cir. 1997). In contrast, this Court has deemed arguments not raised in cross-assignment of error waived. *See, e.g.*, *U.S. Exploration, LLC v. Griffin Producing Co.*, __ W. Va. ___, 844 S.E.2d 89, 93 n.3 (2020). But here, any difference between the waiver rules for appellants and appellees is immaterial because Antero was the initial appellant at Business Court, AR 926, 1636, it could have raised an objection to the prorated oil and gas deduction at that time, and it failed to do so.

Antero plainly could have raised its objections to the prorated deduction for oil and gas production before remand. Again, this deduction was explicitly set forth in Administrative Notice 2017-08, which was issued on January 27, 2017. AR 2054. Antero could have objected to this part of its valuation when it protested it original assessment to the Board of Assessment Appeals. AR 943-46. But it did not. *Id.* Like other producers, it could have objected to this part of its valuation when it originally appealed to circuit court. AR 2144, AR 2159. But it chose not to do so. And if this argument had not been waived by then, it could have raised a cross-assignment of error on this issue during the first appeal. But instead, it chose to "focus [its] argument" on the Tax Commissioner's "use of an operating expense 'maximum amount' or 'cap,'' instead of the prorated deduction "for wells that produce both oil and natural gas." AR 2103. In the first appeal, Antero did not convince this Court that "leaving the residual [20%] percentage operating expense deduction" was appropriate. *Consol Energy*, 242 W. Va. at 224, 832 S.E.2d at 150. It cannot now "return to [this Court] to advance different, previously available theories." *Omni Outdoor Advertising*, 974 F.2d at 505. Its objections to the prorated deduction for oil and gas production have been waived.

C. Even if Antero had not waived its objection to the prorated oil and gas deduction, its arguments are without merit. The legislative rule plainly provides for the valuation of oil and gas producing wells. W. Va. Code R. § 110-1J-4.1 (referencing "oil and/or natural gas producing property"). And it directs the Tax Commissioner to "determine the average annual industry operating expense[]" deduction for such wells. W. Va. Code R. § 110-1J-4.3. Consistent with *Consol Energy*, the Tax Commissioner utilizes the $5,750 monetary deduction for oil wells and the $175,000 monetary deduction for gas wells in his determination of the deduction applicable to wells that produce both oil and gas. *Cf.* Syl. Pt. 12, *Consol Energy*, 242 W. Va. at 213, 832 S.E.2d at 137. And he applies each monetary deduction based on the percentage of oil or gas each well produces. As the Business Court concluded, the prorated deduction "reasonabl[y]," "equitably" and "fair[ly]" applies the monetary average deductions for oil and gas to wells that produce both. AR. 2208-09. The prorated deduction is based on a reasonable construction of the Tax Commissioner's legislative rules and is not arbitrary or capricious. It is entitled to deference. *Cf. Consol Energy*, 242 W. Va. at 223, 832 S.E.2d at 149.

II. ANTERO'S REMAINING ASSIGNMENTS OF ERROR ARE EITHER NOT ON THE RECORD, BARRED BY THE LAW OF THE CASE, OR WAIVED.

Antero's remaining four assignments of error suffer from similar defects. In Assignments of Error 2 and 3, it argues that the *June 2020 Notice*, must be applied retroactively and that the Tax Commissioner's failure to do so is arbitrary and capricious and in violation of the APA and due process. Petr's Br. at 1. In Assignments of Error 4 and 5, it contends that the Tax Commissioner's exclusion of post-production expenses from the average annual industry operating expense deduction violated state and federal due process principles as well as dormant Commerce Clause principles. Petr's Br. at 1. But each of these assignments of error should be rejected because they are either not on the record on appeal, barred by the law of the case, or waived. Each assignment of error is also facially flawed.

a. Antero's remaining assignments of error are not on the record from which the appeal has been taken.

Assignments of Error 2, 3, 4, and 5 should not be considered in this appeal because they were not addressed in the Business Court's June 15, 2020, Order and they do not fairly arise from the record on appeal. This Court has already rejected Antero's *Supplemental Appendix* which contained "documents that were not part of the record before the circuit court at the time of entry of the appealable order." *Corrected Order*, No 20-0531 (Jan. 28, 2021). It should likewise reject Antero's remaining assignments of error.

This Court has consistently held that it "will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syl. Pt. 7, *In re Michael Ray T.*, 206 W. Va. 434, 436, 525 S.E.2d 315, 317 (1999). It also has limited authority "to resolve assignments of nonjurisdictional error" that do not "fairly aris[e] upon the portions of the record designated for appellate review." *Id.* at 444, 525 S.E.2d at 325. These rules are "rooted in the concept of judicial economy, fairness, expediency, respect, and practical wisdom." *State v. Greene*, 196 W. Va. 500, 505, 473 S.E.2d 921, 926 (1996) (Cleckley, J., concurring). They ensure that "the facts underlying" each issue have been properly developed "so that a disposition can be made on appeal." *Whitlow v. Bd. of Ed. of Kanawha Cnty.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993). These rules also provide this Court "the benefit of" the circuit court's "wisdom." *Id.*

None of Antero's remaining assignments of error were "considered [or] decided" in the order Antero appealed. The order on appeal was entered by the Business Court on June 15, 2020. AR 2204. After appealing this order, Antero filed motions at the Business Court for relief under Rule 60(b) of the West Virginia Rules of Civil Procedure and for a preliminary injunction. Petr's Br. at 10-11. Then in its *Petitioner's Brief*, it included four assignments of error related to those subsequent motions. Obviously, none of these assignments of error were addressed in the Business Court's June 15, 2020, order. AR 2195-2204. They should not be decided here. Syl. Pt. 7, *In re Michael Ray T.*, 206 W. Va. at 436, 525 S.E.2d at 317. Antero's attempt to raise these issues for the first time on appeal would deprive this Court of the "the benefit" of the Business Court's "refine[ment], develop[ment], . . . adjudicat[ion]," and "wisdom." *Cf. Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18. These assignments of error should be rejected.

True, Antero Assignments of Error 3, 4, and 5, include constitutional claims. Petr's Br. at 1. And this Court, at times, exercises its "discretion" to address a "constitutional issue that was not properly preserved at the trial court level" if the issue "is the controlling issue in the resolution of the case." Syl. Pt. 2, *Louk v. Cormier*, 218 W. Va. 81, 84, 622 S.E.2d 788, 791 (2005); *but see Duquesne Light Co. v. State Tax Dep't.*, 174 W. Va. 506, 511, 327 S.E.2d 688, 689 (1984) ("declin[ing] to address" equal protection and equal and uniform claims "because they were not passed upon by the circuit court."); *Gomez v. State Athletic Comm'n*, No. 16-0103, 2016 WL 5348350, *2 (Sept. 23, 2016) (memorandum decision) (finding "no justification" to address constitutional claims raised for the first time on appeal where a litigant had the option "to refile his action" and properly raise such claims). But Antero's constitutional claims do not fall within "the narrow context in which this Court" exercises this discretion.[2]

First, the exercise of this discretion may be appropriate where a litigant raises a new constitutional claim in its first appeal. *See, e.g.*, *Louk*, 218 W. Va. at 86, 622 S.E.2d 788, 791 (2005). But Antero is here on a second appeal following remand. And in this second appeal, the law of the case and waiver rules both preclude considerations of everything "decided by necessary implication," *Frazier & Oxley*, 214 W. Va. at 808 n.8, 591 S.E.2d at 734 n. 8 (quoting *Laitram Corp.*, 115 F.3d at 951)), and any issue that could have been raised on the first appeal. *Cf. Omni Outdoor*, 974 F.2d at 505 ("It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who has argued and lost." (quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981))). "[A]nd the fact that the issue

[2] And of course, this narrow exception has no application to Assignment of Error 2 and the APA-based portions of Assignment of Error 3 because these claims are statutory and not "constitutional in nature." *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 408 (2009).

raises constitutional concerns does not save the waiver." *Perrine*, 225 W. Va. at 601, 694 S.E.2d at 934 (quoting *Noonan v. Staples*, 561 F.3d 4, 6 (1st Cir. 2009)).

Second, this Court typically considers newly raised constitutional claims only where it is "confronted with very limited and essentially *undisputed facts*," *Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18 (emphasis added), and where the issue "is purely legal in nature and lends itself to satisfactory resolution on the existing record without further development of the facts." *Greene*, 196 W. Va. at 505, 473 S.E.2d at 926 (Cleckley, J., concurring). But here, Antero's constitutional claims are clearly fact dependent and cannot be resolved on the existing record. Instead, its claims are based on various exhibits attached to its *Rule 7(g) Motion* and included in its *Supplemental Appendix*. For example, in Assignment of Error 3, Antero claims that the Tax Commissioner has "violate[d] due process." Petr's Br. at 1. But this allegation is based on the subsequently issued *June 2020 Notice*. Petr's Br. at 1 & 25-26. And neither that notice nor the facts underlying the Tax Commissioner's, issuance, application, or withdrawal of that notice appear in the record on appeal. AR 1-2; Petr's Br. at 5-6 n.11.[3] Likewise, in Assignment of Error 5, Antero argues that the Tax Commissioner's methodology violates the dormant Commerce Clause. Petr's Br. at 1. But Antero bases this allegation on the transcripts from various 2019 county Board of Equalization and Review and Board of Assessment Appeals hearings. Petr's Br. at 4, n.8, at 24 n.87, at 28 n.107. And again, these transcripts do not appear in the appendix record on appeal, AR 1-2, and these

[3] According to Antero, the "information" in its now-rejected *Supplemental Appendix* was "critical" to this Court understanding of the *June 2020 Notice*. Petr's Br. at 11. Inconsistently, it also contends that even without the *Supplemental Appendix*, this Court could consider its arguments by taking judicial notice of the *June 2020 Notice* and its subsequent withdrawal. Petr's Br. at 5-6 n.11, *id.* at 18 n.50. But even if the *June 2020 Notice* and its withdrawal could be judicially noticed, the facts underlying the notice are not "undisputed" and would not appear in the record. *Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18. Moreover, this Court would still lack the "benefit" of the Business Court's prior "refine[ment], develop[ment], . . . adjudicat[ion] . . . [and] wisdom." *Id.* Judicial notice would not be sufficient to enable this Court to address the statutory or constitutional assignments of error related to the *June 2020 Notice*.

constitutional allegations do not lend themselves "to satisfactory resolution on the existing record." *Greene*, 196 W. Va. at 505, 473 S.E.2d at 926 (Cleckley, J., concurring).

This Court has already rejected Antero's *Rule 7(g) Motion* and *Supplemental Appendix* which contained documents that were "not part of the record before the circuit court at the time of entry of the appealable order." *Corrected Order* (W. Va. Jan. 28, 2021). It should likewise reject each of these remaining assignments of error which were not considered in the Business Court's June 15, 2020, order and which do not "fairly aris[e] upon the portions of the record designated for appellate review." *In re Michael Ray T.*, 206 W. Va. at 444, 525 S.E.2d at 325.[4]

b. Antero's arguments regarding the *June 2020 Notice* as well as its related APA and due process arguments are not before this Court and are without merit.

Assignments of Error 2 and 3 relate to a *June 2020 Notice* which Antero admits was issued by the Tax Commissioner after the June 15, 2020, Order on appeal, Petr's Br. at 5, 10-11, 18, and which postdated the original assessment and evidentiary hearing in this matter by more than three years. AR 1576. Antero also admits that the *June 2020 Notice* has been withdrawn. Petr's Br. at 5-6 n.11. Any issues about this notice are not relevant to the 2017 tax year and clearly, were not considered or addressed in that order and do not appear on the record on appeal. Resp. Br. pt. II.a., *supra*. Antero's argument regarding this notice also do not fit within the "narrow context" in which this Court will exercise its discretion to address issues not addressed below. *Louk*, 218 W. Va. at 86, 622 S.E.2d at 793. Accordingly, this Court should not address these assignments of error. Syl. Pt. 7, *In re Michael Ray T.*, 206 W. Va. at 436, 525 S.E.2d at 317. But even if this barrier was overcome, Antero's assignments of error related to this notice are flawed on their face.

[4] Because Assignments of Error 2, 3, 4, and 5 do not appear on the record they cannot be fully addressed. But hereinafter, the Tax Commissioner shall "specifically respond to each assignment of error, to the fullest extent possible." W. Va. R. App. Pro. 10(d).

Antero argues that the *June 2020 Notice* "is an 'interpretive rule' under the State APA, Petr's Br. at 19, and that it is "inconsistent with" and "change[d]" the Tax Commissioner's prior position that post-production expenses should be excluded from the operating expense deduction. Petr's Br. at 5, 10, 18. Antero also argues that the notice "contains all the hallmarks of an interpretive rule," Petr's Br. at 20, Petr's Br. at 5-6 n.11 (arguing that the *June 2020 Notice* is an "interpretive rule" under the State APA because it "clarifies existing law."), even though it admits that the notice did not go through a "notice-and-comment period" but was "simply published." Petr's Br. at 19. It also argues that this notice "must be applied retroactively to pending disputes" "under settled administrative law." Petr's Br. at 1. And that the Tax Commissioner's failure to do so is arbitrary and capricious, Petr's Br. at 21, and violates the APA and due process. Petr's Br. at 23-25.

A. But Antero's argument regarding the *June 2020 Notice* are self-defeating. The APA requires that any changes to an agency's standards, statements of policy, or interpretations (such as those "change[s]" Antero says the *June 2020 Notice* implemented, Petr's Br. at 5, 10, 18), be effected through rulemaking. *Cf.* W. Va. Code § 29A-1-2(j). It also requires that all rules follow specific procedures designed to invite meaningful public involvement. Logically, these procedures are more robust where a rule purports to "grant[] or den[y] a specific benefit" or be "determinative on any issue affecting . . . rights, privileges or interests." *Id.* § 29A-1-2(e). But even interpretive rules that merely "provide information or guidance" regarding an agency policy or opinions, W. Va. Code § 29A-1-2(c), must be promulgated in accordance with mandatory procedures; *see, e.g.*, *id.* § 29A-3-4, which includes "notice of its action" in the "State Register," *id.* § 29A-3-4(a), and a period for public comment. *Id.* § 29A-3-5.

And Antero admits that the *June 2020 Notice* did not follow these mandatory procedures: it was "simply published" without a "notice-and-comment period." Petr's Br. at 19. The consequences of this admission are clear: any rule that fails to comply with appropriate rulemaking procedures is "void and ineffective." *Coordinating Council for Indep. Living, Inc. v. Palmer*, 209 W. Va. 274, 284, 546 S.E.2d 454, 464 (2001). And it "remains a nullity." Syl. Pt. 6, *id.* at 276, 546 S.E.2d at 456. Therefore, by Antero's own admissions, the *June 2020 Notice* is ineffective and void. And by its own admissions, the *June 2020 Notice* was subsequently withdrawn. Petr's Br. at 5-6 n.11. This notice cannot have any effect on Antero's 2017 property tax valuations.

B. Even if the invalidity of the *June 2020 Notice* was not apparent, it cannot be applied retroactively—as Antero contends—because the APA only permits prospective rules. By definition, a "rule" under the APA "includes every rule, standard or statement of policy or interpretation of general application and *future effect*." W. Va. Code § 29A-1-2(j) (emphasis added). This definition applies equally to legislative rules and interpretive rules. *Id.* And this Court has noted that the State APA only authorizes an agency to "revise or adopt interpretive rules prospectively." *Cf. Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 583 n.8, 466 S.E.2d 424, 434 n.8 (1995).

Federal precedent similarly prohibits retroactive agency rulemaking. Like the State APA, federal law defines an agency rule as "an agency statement of general or particular applicability and *future effect*." 5 U.S.C. § 551(4) (emphasis added). Applying this definition, federal courts have consistently concluded that "the APA requires that . . . rules be given future effect only," *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987), affirmed in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and that "retroactive rulemaking" is "forbid[den]" under the federal APA. *Bowen*, 488 U.S. at 208. In fact, Justice Scalia concluded in

Bowen's concurrence that "[t]he only plausible reading of the" words "*future effect*" in 5 U.S.C. § 551(4) was that Congress meant "that rules have legal consequences only for the future." *Bowen,* 488 U.S. at 216 (J.Scalia, concurring) (emphasis in original).

Likewise, the United States Court of Appeal for the District of Columbia has consistently concluded that "rules" adopted under the Federal APA are "prospective in application only," *Retail, Wholesale & Dep't Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 388 (D.C. Cir. 1972), and that "interpretive rules, no less than legislative rules, are subject to [the] ban on retroactivity." *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994). A new federal rule may be applied to pending disputes where it "simply clarifies" or merely "restates" the agency's longstanding position. *Clay v. Johnson*, 264 F.3d 744, 749 (7th Cir. 2001). But such circumstances do not arise where a rule "attaches new legal consequences to" prior events, *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 860 (D.C. Cir. 2002), "changes the law," or is "patently *inconsistent* with" an agency's prior interpretation. *Id.* (emphasis added). There, federal agencies "may not promulgate retroactive rules absent express congressional authority." *Nat'l Min.*, 292 F.3d at 859. The text of the Federal APA is clear: both legislative and interpretive rules "must be of '*future effect*.'" *Health Ins.*, 23 F.3d at 423 (citing *Bowen*, 488 U.S. at 216 (J.Scalia, concurring)) (emphasis added).

The same reasoning applies here. The *June 2020 Notice* cannot be applied to pending disputes because—by Antero's own account—the notice is "*inconsistent* with" the Tax Commissioner's "position over the past five years" that post-production expenses were not deductible. Petr's Br. at 10 (emphasis added); *cf. Consol Energy*, 242 W. Va. at 223, 832 S.E.2d at 149 (affirming that position of the Tax Commissioner). A change of this position cannot be effectuated retroactively "absent express [Legislative] authority." *Nat'l Min.*, 292 F.3d at 859. And here, the Legislature has only authorized the Tax Commissioner to promulgate rules that have "future effect." W. Va. Code § 29A-1-2(j). Like in the Federal APA, "[t]he only plausible reading of the" words "*future effect*" in W. Va. Code § 29A-1-2(j) is that the Legislature meant "that rules have legal consequences only for the future." *Cf. Bowen*, 488 U.S. at 216 (J.Scalia, concurring) (emphasis in original). And "interpretive rules, no less than legislative rules, are subject to [the statutory] ban on retroactivity." *Cf. Health Ins.*, 23 F.3d at 423. Even if the *June 2020 Notice* was validly promulgated and is enforceable (it is not), all State APA rules must only have "future effect." W. Va. Code § 29A-1-2(j). Antero's arguments regarding retroactively are patently flawed.

C. Antero's substantive[5] due process allegations fair no better. According to Antero, the Tax Commissioner's refusal to apply the *June 2020 Notice* retroactively violates due process. Petr's Br. at 1, 24-25. Under substantive due process, tax regulations—like any economic regulation—are subject to a "high level of deference." *Verizon*, 214 W. Va. at 121, 586 S.E.2d at 196. Substantive due process "protects against government power arbitrarily and oppressively exercised." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). But its concerns are only triggered where a State official "act[s] in an arbitrary and irrational way." *Verizon*, 214 W. Va. at 121, 586 S.E.2d at 196. And "only the most egregious official conduct" which "shocks the conscience" is considered "arbitrary in the constitutional sense." *Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)).

Clearly, the Tax Commissioner's continued exclusion of post-production expenses is not arbitrary or capricious in any sense—much less in the "egregious" and conscience shocking

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[5] Antero does not expressly differentiate between the procedural and substantive components of due process. Petr's Br. at 25. Each places a different burden on state action. *See, e.g., W. Va. Lottery v. A-1 Amusement*, 240 W. Va. 89, 102, 807 S.E.2d 760, 773 (2017) (outlining separate standards for each). But because courts typically consider substantive due process claims under an "arbitrary and capricious" standard, Antero's allegations should be treated as substantive and not procedural. *Verizon W. Va., Inc. v. W. Va. Bureau of Emp't Programs*, 214 W. Va. 95, 116 n.35 586 S.E.2d 170, 191 n.35 (2003)

manner required for a substantive due process violation. Rather, as this Court held in the first appeal, his decision to do so "is a reasonable construction" of his regulatory authority and not "arbitrary, capricious, or manifestly contrary to the enabling taxation statute." *Consol Energy*, 242 W. Va. at 223, 832 S.E.2d at 149. Antero has presented no reason to deviate from this conclusion.

Nor is it "arbitrary and capricious" in any sense (much less in an "egregious" and conscience shocking sense) for the Tax Commissioner to not apply the *June 2020 Notice* retroactively. "Retroactivity is not favored in the law." *Bowen*, 488 U.S. at 471. And "retroactive" acts must "meet a burden" under due process "not faced by [those] that [have] only future effects." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). This is why even statutes are "presumed to operate prospectively," *Public Citizens, Inc. v. First Nat'l Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996), and will only apply retroactively if it "appears, by clear, strong and imperative words or by necessary implication" that the statute is "intended to" have "retroactive force and effect." Syl. Pt. 3, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 83, 576 S.E.2d 807, 810 (2002). Likewise, "administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen*, 488 U.S. at 208. And here, the APA only permits the Tax Commissioner to promulgate rules that have "future effect." W. Va. Code § 29A-1-2(j). The *June 2020 Notice* has also been withdrawn. Petr's Br. at 5-6. n.11. Antero's substantive due process rights were plainly not violated if—as Antero contends, Petr's Br. at 1—the Tax Commissioner's refused to apply the withdrawn *June 2020 Notice* retroactively. The presumptions against retroactivity and the requirements of the APA would dictate that refusal.

c. Antero's attempt to re-litigate the exclusion of its post-production expenses is barred by the law of the case.

Assignments of Error 2, 3, 4, and 5 are also barred by the law of the case. Throughout these assignments of error, Antero argues that the Tax Commissioner must include its post-production expenses in the average industry operating expense calculation otherwise he is acting arbitrarily, capriciously, and in violation of statutory and constitutional mandates. Petr's Br. at 1, 11-12, 23-24. But Antero already attempted—and failed—to convince this Court that its post-production expenses must be included in the deduction. *Consol Energy*, 242 W. Va. at 224, 832 S.E.2d at 149. At the county level, Antero's experts had testified that the exclusion of these expenses "overvalu[ed]" "their gas wells" in comparison with non-Marcellus wells. *Id.* at 216, 832 S.E2d at 142. And on appeal, Antero argued that the Tax Commissioner's exclusion of its post-production expenses violated applicable regulations and the statutory requirements for "true and actual" value assessments. *Id.* at 222, 832 S.E.2d at 148. But this Court concluded that the Tax Commissioner's exclusion of "gathering, compressing, processing, and transportation expenses" during this tax year was "a reasonable construction of the regulation and not facially inconsistent with the enabling statute." *Id.* at 223, 832 S.E.2d at 149. Excluding these expense was also not "arbitrary, capricious, or manifestly contrary to the enabling tax statute." *Id.*

The law of the case bars Antero's attempt to re-litigate this issue in this second appeal. The doctrine of the law of the case "generally prohibits reconsideration of issues" explicitly "decided in a prior appeal in the same case." *Frazier & Oxley*, 214 W. Va. at 808, 591 S.E.2d at 732, or issues "decided by necessary implication." *Fogel*, 668 F.2d at 108. Such decisions "continue to govern the same issues in subsequent stages in the same case," *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009), and are "conclusive on parties, privies, and courts, including this Court, upon a second appeal." *Frazier & Oxley*, 214 W. Va. at 808, 591 S.E.2d at 732 (quoting Syl. Pt. 1, *Mullins v. Green*, 145 W. Va. 469, 469, 115 S.E.2d 320, 321 (1960)). The doctrine is "grounded in important considerations" including the "stability" and "predictability" of judicial "decision making process," *Frazier & Oxley*, 214 W. Va. at 808, 591 S.E.2d at 734 (quoting *United States* *v. Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir. 1991)). Clearly, those consideration would be "impeded if a litigant who fails to prove" its "claim is granted repeated opportunities" to do so. *Cf. In re Name Change of Jenna A.J.*, 234 W. Va. 271, 274, 765 S.E.2d 160, 163 (2014).

Antero has presented no basis for overturning the law of this case. And it should not be given a second opportunity to argue that the Tax Commissioner's exclusion of post-production expenses is "arbitrary and capricious," Petr's Br. at 21, 24, or "overvalued" their property in violation of statutory "true and actual" value mandates, *id.* at 11-12, the "state and federal equal protection principles." *Id.* at 12. This Court has previously considered and addressed such arguments. It concluded that the exclusion of post-production expenses was not "arbitrary [or] capricious" and that it was not "manifestly contrary to" the Tax Commissioner's statutory authority. *Consol Energy*, 242 W. Va. at 223, 832 S.E.2d at 149. Likewise, this Court already concluded that the "use of a monetary average" "applied evenly across the board" avoids the overvaluation, *id.* at 220, 832 S.E.2d at 146, and "unconstitutionally impermissible application" Antero raised in its first appeal, *id.* at 225, 832 S.E.2d at 151, even though the Tax Commissioner excluded Antero's post-production expenses from the calculation of that deduction. *Id.* at 223, 832 S.E.2d at 149. Antero's attempt to revisit and re-litigate the exclusion of its post-production expenses is barred by the law of the case and should be rejected.

d. Antero's equal protection and commerce clause arguments are waived and without merit.

Even if Antero's equal protection and commerce clause arguments could be satisfactorily resolved on the existing record (they cannot) or were not previously resolved by implication in *Consol Energy*, Antero's has waived them for this second appeal.

Litigants are required "to present all known arguments or claims to an appellate court before its decision is rendered." *Perrine*, 225 W. Va. at 599, 694 S.E.2d at 932 (quoting *N. Ind.*

Commuter Transp. Dist. n. Chicago SouthShore & S. Bend R.R., 685 N.E.2d 680, 687 (Ind. 1997)). And "where an argument could have been raised on an initial appeal" and was not, "it is inappropriate to consider [it] on a second appeal following remand." *N.W. Ind. Telephone Co., v. F.C.C.*, 872 F.2d 465, 470 (D.C. Cir. 1989). "[A]rguments not timely presented are deemed waived." *Perrine*, 225 W. Va. at 601, 694 S.E.2d at 934. This "rule has equal force and application at the appellate" and trial "level[s]." *Id.* And "the fact that [an] issue raises constitutional concerns does not save the waiver." *Id.*, *see also Nw. Ind. Telephone*, 872 F.2d at 470 (deeming "constitutionally grounded arguments" waived on a second appeal following remand). This rule "prevents a party from appealing in a piecemeal manner" and "promotes the finality of appellate court's decisions." *Perrine*, 225 W. Va. at 599, 694 S.E.2d at 932 (quoting *Kenter v. Gulf Ins. Co.*, 689 P.2d 955, 957 (Or. 1984)). It also prevents the unfairness to "an adversary" who would otherwise "have to defend the same lawsuit on appeal over and over." *Omni Outdoor*, 974 F.2d at 505.

On its second appeal, Antero argues that the Tax Commissioner's exclusion of post-production expenses violates state and federal equal protection principles and the dormant Commerce Clause because Antero sell gas "primarily to buyers outside West Virginia" and "incur[s] significantly higher" post-production expenses than competitors who sell their gas primarily in-state. Petr's Br. at 26-27. It argues that excluding these expenses from the operating expense deduction "significantly and artificially inflate[s]" its taxable property "in relation to local competitors'" property in violation of equal protection. Petr's Br. at 26. And it claims that this subjects Antero to the risk of multiple taxation in violation of the dormant Commerce Clause because the revenue it generates from out-of-state gas sales is subject to other state's tax systems. Petr's Br. at 28.

Of course, Antero does not support these contentions with any citations to the record on appeal, Petr's Br. at 26-28, *but see* Petr's Br. at 27 (quoting without citation to a July 29, 2016, letter appearing at AR 1088-91), but instead, relies on the *Supplemental Appendix* previously rejected by this Court. *See, e.g.*, Petr's Br. at 24, n.87, at 28 n.107. But if it is assumed that Antero's specific equal protection and dormant Commerce Clause arguments could be satisfactorily resolved on the record (they cannot), *see* Resp. Br. pt. II.a,, *supra*, there is no reason why Antero could not have raised them before. In the first appeal, Antero argued that the average industry operating expense deduction, as calculated, did not include "expenses incurred in getting shale gas and its products to market," *Consol Energy*, at 216, 832 S.E.2d at 142, that these expenses were "significant[ly] higher for [its] Marcellus wells", *id.*, and that excluding these expenses "overvalu[ed]" its "gas wells" in comparison with non-Marcellus wells. *Id.* Likewise, prior to its first appeal, Antero must have been aware that other states could tax the revenue generated from its wells. Petr's Br. at 28. It simply failed to fashion such concerns into the specific equal protection and dormant Commerce Clause arguments it raises here.

And because these specific constitutional arguments "could have been raised on an initial appeal" and were not, "it is inappropriate to consider [them] on a second appeal following remand." *N.W. Ind. Telephone Co., v. F.C.C.*, 872 F.2d 465, 470 (D.C. Cir. 1989). Nor should the Tax Commissioner and Doddridge County "have to defend" Antero's "same lawsuit on appeal over and over." *Omni Outdoor*, 974 F.2d at 505. Antero's equal protection and dormant commerce clause arguments have been waived.

A. Antero's equal protection arguments are also contrary to settled equal protection principles. Here, Antero argues that the exclusion of post-production expenses violates equal protection because it "artificially inflate[s]" Antero's property "in relation to local competitors'" property. Petr's Br. at 28. But the equal protection clauses of the United States and West Virginia Constitutions are "especially deferential" where "complex tax" systems—like the one at issue here—are concerned. *Murray Energy*, 241 W. Va. at 644, 827 S.E.2d at 433 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)). Within these systems, the use of averages "mathematically under- and over-represent certain values" but this does not "create a taxation equality problem for which the Constitution demands a remedy." *Murray Energy*, 241 W. Va. at 644, 827 S.E.2d at 433. Rather, as long as tax statutes are "rationally related to a legitimate state interest." *Appalachian Power*, 195 W.Va. at 594, 466 S.E.2d at 445, and treat "all persons within" a class "equally," Syl. Pt. 9, *Murray*, 241 W. Va. at 632, 827 S.E.2d at 420, they satisfy equal protection requirements. And tax statues are considered "rational" for equal protection purposes as long as the classifications they create are "neither capricious nor arbitrary." *Murray Energy*, 241 W. Va. at 645, 827 S.E.2d at 433.

Applied here, the exclusion of post-production expenses plainly satisfied equal protection. "[A]ll persons within" the class of oil and gas producer are treated "equally," Syl. Pt. 9, *Murray Energy*, 241 W. Va. at 632, 827 S.E.2d at 420. Like Antero, none of them are permitted to deduct their post-production expenses. Nor do the applicable legislative rules create classifications based on in-state or out-of-state sales—as Antero contend. Petr's Br. at 26. Instead, they classify deductible expenses based on their relationship to production. W. Va. Code R. § 110-1J-3.16 (defining "operating expenses" as those "directly related to the maintenance and production of natural gas and/or oil"). And this Court has already concluded that the Tax Commissioner's exclusion of post-production expenses from the operating expense deduction is not "arbitrary [or] capricious." *Consol Energy*, 242 W. Va. at 233, 832 S.E.2d at 149. Even if considered, Antero's equal protection argument is without merit.

B. Likewise, Antero's dormant commerce clause argument is contrary to precedent. Antero contends that the exclusion of post-production expenses "also violates dormant Commerce Clause principles" because, according to Antero, it "discriminates against interstate commerce. Petr's Br. at 27.

The Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, has long been interpreted "as an implicit restraint on state [tax] authority." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). And a state may run afoul of this restraint if it "discriminates" against interstate commerce "facially, in its practical effect, or in its purpose." *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996). Here, a tax is considered discriminatory if it imposes a heavier burden on "a transaction or incident . . . when it crosses state lines than when it occurs entirely within the State." *Oregon Waste Sys., v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). But taxes that apply "evenhandedly with only 'incidental' effects on interstate commerce" typically survive dormant Commerce Clause review unless they impose a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Id.*

Applied here, the Tax Commissioner's exclusion of post-production expenses is "evenhanded" and plainly "does not facially discriminate against interstate or out-of-state activities enterprises." *Am. Trucking Ass'n, v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 434 (2005). It does not "treat[]" producers "differently depending on whether" they conduct business "in the State or out of it." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984). Nor is there any evidence on the record of the discriminatory purpose or effect Antero alleges. Petr's Br. at 27-28. Producers' property is simply not taxed "more heavily when it crosses state lines." *Oregon Waste*, 511 U.S. at 99. No producer is permitted to deduct their post-production expenses. *Cf. Consol Energy*, 242

W. Va. at 216, 832 S.E.2d at 142. And the distinction between deductible and non-deductible expenses is not based on in-state or out-of-state activities. Rather, whether an expense is deductible or not depends on its relationship "to the maintenance and production" of natural gas and oil. W. Va. Code R. § 110-1J-3.16. Ordinary expenses that are "directly related" to maintenance and production are deductible—those that are not "directly related" are not deductible. *Id.* In this system, "cross[ing] state lines" is irrelevant: post-production expenses are excluded whether they are incurred in West Virginia or in any other state. Antero's allegations of discrimination under the dormant Commerce Clause are unsupported on the record and contrary to the law.

C. Antero also says that the exclusion of post-production expenses subjects it to "the risk of multiple taxation" in violation of the dormant Commerce Clause. Petr's Br. at 27. But the risk of "multiple taxation" only arises where commerce "is subject to more than one tax on its full value." *Japan Line, Ltd. v. Los Angeles Cnty.*, 441 U.S. 434, 446 (1979). And in the ad valorem context, "multiple taxation is possible only if some [other] jurisdiction . . . may constitutionally impose an ad valorem tax" on the same property. *Central R. Co. of Pa. v. Pennsylvania*, 370 U.S. 607, 612 (1962). Such risks may arise where a state taxes the value of interstate rail cars, *e.g.*, *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18, 27 (1891), vessels, *Ott v. Mississippi Val. Barge Line Co.*, 336 U.S. 169, 174 (1949), or aircrafts, *Braniff Airways v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 598 (1954), that travel in interstate commerce and where taxable value "may appropriately be attributable to each of the various state in which" this property travels. *Ott*, 336 U.S. at 174. But here, the property being taxed are oil and gas wells located entirely in Doddridge County. AR 943-49. And though the formula utilizes net receipts as a factor, W. Va. Code R. § 110-1J-4, its goal is to determine the "true and actual value" of the property located in that county. W. Va. Code § 11-6K-1. And as this Court has already determined, the exclusion of post-production expenses is not "manifestly contrary" to that statutory goal. *Consol Energy*, 242 W. Va. at 223, 832 S.E.2d at 149.

Nor does the risk of multiple taxation arise because Antero may have to pay "corporate income and/or gross receipts taxes to another state." Petr's Br. at 28. All states have "a significant interest in exacting" their "fair share" "from interstate commerce." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981). Because of this, interstate entities are often subject to "a confluence of taxes." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 192 (1995). But this is merely the "accidental incident of interstate commerce being subject to two different taxing jurisdictions" and not "a structural evil" that offend the dormant Commerce Clause. *Id.* Antero's dormant Commerce Clause arguments are without merit.

CONCLUSION

For the foregoing reasons, the Tax Commissioner respectfully requests that this Court affirm the Business Court's June 15, 2020, Order which fixed the assessment of Antero's property according to the mandate of *Consol Energy*. The Tax Commissioner also respectfully respects that Antero's second, third, fourth, and fifth assignments of error be rejected because they are either not on the record on appeal, barred by the law of the case, or waived.

Respectfully submitted,

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 20-0531

ANTERO RESOURCES CORPORATION

Plaintiff below, Petitioner

v.

MATTHEW R. IRBY, ACTING WEST VIRGINIA STATE TAX COMMISSIONER, AND DAVID SPONAUGLE, ASSESSOR OF DODDRIDGE COUNTY, THE COUNTY COMMISSION OF DODDRIDGE COUNTY,

Respondents below, Respondents.

CERTIFICATE OF SERVICE

I, L. Wayne Williams, Assistant Attorney General, do hereby certify a true copy of the ***Brief of the West Virginia State Tax Commissioner*** was served upon Counsel for the Petitioner and Counsel for Respondent Doddridge County Commission via United States Postal Service, first class, postage prepaid, thereof this 1st day of March, 2021, addressed as follows:

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