INTERMEDIARY COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-111

STATOIL USA ONSHORE PROPERTIES, INC.,

Petitioner Below, Petitioner,

vs.

MATTHEW IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent.

PETITIONER'S REPLY

Alexander Macia, Esq. (WV Bar No. 6077)
Paul G. Papadopoulos, Esq. (WV Bar No. 5570)
Chelsea E. Thompson, Esq. (WV Bar No. 12565)
Spilman Thomas & Battle PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
304-340-3800
amacia@spilmanlaw.com
ppapadopoulos@spilmanlaw.com
cthompson@spilmanlaw.com
Counsel for Petitioner
Statoil Onshore Properties Inc., now known as Equinor USA Onshore Properties Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Legislative Rules

Cases

Administrative Decisions

West Virginia Rules of Appellate Procedure

I. SUMMARY OF ARGUMENT

Respondent's brief fails to alter the conclusion proven by Petitioner for a myriad of reasons. Critically, Respondent's overarching argument—that "gross proceeds" are tied to "market value" and not "money actually received from a sale"—rests on the wrong severance tax statute. Critically, Respondent relies primarily on West Virginia Code §11-13A-2(c)(6) for a broad, general definition of the "gross proceeds" of "natural resources." *See* Respondent's Brief p. 1-3, 7, 9-11. Respondent disregards, however, that just a few lines further down, at West Virginia Code §11-13A-2(c)(6)(G), the severance tax code contains a different definition of "gross proceeds" that specifically applies to "natural gas." Classic statutory construction requires courts to use the second, more specific definition. Petitioner analyzed the correct definition in its brief, but Respondent failed to mention, cite, or analyze the correct definition in any meaningful way. For this reason alone, Respondent's arguments against Petitioner's assignments of error are meritless.

Second, Respondent's attempts to invalidate the NGL Agreement fall flat—Respondent offers only legal conclusions devoid of any meaningful analysis, citation, or engagement with the contract's terms.

Third, Respondent claims, without legal support, that the statutory mandate to have consistent state and federal accounting methods merely refers to the "cash" or "accrual" method. This position is unsustainable in light of prior WVOTA decisions and a recent decision by the Supreme Court of Appeals of West Virginia, all of which have relied upon an identical statutory mandate in the healthcare tax code to go beyond "cash or accrual" to dictate how a taxpayer computes "gross proceeds."

Fourth, Respondent argues that WVOTA's disregard of a prior WVOTA decision made February 5, 2004 decision in Case No. 03-106SV ("2004 Decision") is proper because there is no

legal requirement to adopt factual findings, and the two were factually distinct. This completely ignores the fact that the WVOTA did not factually distinguish the 2004 Decision and the case at bar—instead, it clearly stated in the Final Decision that it did so because the 2004 Decision was "old" and resulted from stipulated facts instead of an evidentiary hearing. Respondent cannot supplant the WVOTA's reasons and offer new ones, particularly when Respondent's reasoning rests upon WVOTA's findings of fact that this appeal seeks to reverse.

Finally, Respondent urges the Court to provide it and the WVOTA with deference, but fails to acknowledge that such deference is never afforded, when there is no ambiguity in the regulations, to agency's litigation strategy, or to agency interpretations that contradict the express language of the statute and its own regulations.

II. OBJECTION TO RESPONDENT'S STATEMENT OF THE CASE

Petitioner objects that Respondent included mischaracterizations of law in its "Statement of the Case" including, but not limited to, its section titled "Severance Tax Calculation Methodology Under West Virginia Law." This section clearly contains legal argument regarding how severance tax is calculated, which is the crux of this matter. Accordingly, this section is only appropriate under the heading of "Legal Argument" (as it was in Petitioner's Brief) and Respondent cannot couch its legal argument as if it were fact. *See* Petitioner's Brief §V(C). Petitioner addresses the errors with Respondent's "Severance Tax Calculation Methodology Under West Virginia Law" and other legal arguments below.

III. ARGUMENT

Respondent's brief cannot change Petitioner's ultimate conclusion: WVOTA erred in reaching the Final Decision, and it must be reversed. This is because Respondent's brief failed to

address many of the points raised in Petitioner's brief, and those points are therefore conceded. Additionally, the arguments Respondent made in its brief are incorrect for the following reasons:

A. Respondent Failed to Respond to or Contradict Key Points in Petitioner's Brief

As an initial matter, Petitioner notes that Respondent's brief failed to respond to or contradict several key points raised in Petitioner's brief, thereby indicating Respondent does not contest those points. Specifically, Respondents failed to address Petitioner's arguments that:

- A sale of raw gas and transfer of title from Petitioner to MarkWest occurs when the raw gas first enters MarkWest's production facility (see Petitioner's Brief §V(E)(ii));
- The "product value" on the settlement statements reflect the price MarkWest receives when it sells separated and processed NGL products to third parties (see Petitioner's Brief §§V(D)(i-ii); V(E)(ii));
- The "net value" on the settlement statements is the only money Petitioner actually receives from MarkWest in the sale of the raw gas (see Petitioner's Brief §V(D)(i));
- The fees at issue arise from processing conducted by MarkWest after Petitioner has sold the raw gas and relinquished possession, custody, and control to Mark West (see Petitioner's Brief §V(E)(i));
- The fees at issue are recognized in the NGL Agreement to be incurred exclusively by Mark West (see Petitioner's Brief p. 4, 16-17);
- The fees at issue arise from processing occurring in systems owned exclusively by MarkWest (see Petitioner's Brief §V(E)(i));
- Respondent's use of "gross product" in settlement statements moves valuation of natural gas away from the well head (see Petitioner's Brief §V(D)(ii)); and
- A persuasive, prior WVOTA case cannot be disregarded simply because of its age or the fact that is resulted from stipulated facts (see Petitioner's Brief §V(E)(iii)).

Because Respondent's brief fails to address key issues raised in Petitioner's brief, it has failed to combat the assignments of error and WVOTA's Final Decision must be reversed. *See, Frankum v. Bos. Sci. Corp.*, No. 2:12-CV-00904, 2015 WL 1976952, at *14 (S.D.W. Va. May 1, 2015) (Judge states "The plaintiff fails to respond to this argument, and I presume that the

plaintiff concedes that [argument]. I decline to raise counterarguments on their behalf."); Fed. R. App. P. 10(d)("If the respondent's brief fails to respond to an assignment of error, the Intermediate Court or Supreme Court will assume that the respondent agrees with the petitioner's point of view of the issue.").

B. Respondent's Position Conflicts With Clear Severance Tax Code Provisions

In numerous respects, Respondent's argument and brief conflict with clear and express provisions of severance tax law pertaining to natural gas.

i. Respondent Incorrectly Relies Upon A General Definition Of "Gross Proceeds" Instead Of The Specific One For Natural Gas

The severance tax at issue constitutes "five percent of the gross value of the natural gas or oil produced by the producer as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided in this article." W.Va. Code § 11-13A-3a(b). Respondent's brief focuses largely on the definition of "gross value" of "natural resources" found in West Virginia Code § 11-13A-2(c)(6)(A)-(D). This definition is offered to support Respondent's main argument that "gross value" in this matter means "market value" and must account for "post production processing" costs. The problem, however, is that Respondent only cited and analyzed the first half of that code section. West Virginia Code §11-13A-2(c)(6) includes more subparagraphs beyond (A) through (D), which Respondent somehow omitted. Specifically, West Virginia Code § 11-13A-2(c)(6)(G) reads:

> (G) For natural gas, gross value is the value of the natural gas at the wellhead immediately preceding transportation and transmission.
>
> W. Va. Code § 11-13A-2(c)(6)(G)

Thus, had Respondent read this code section in its entirety, it would have seen that subparagraph (G) contained a definition of "gross value" specifically applicable to "natural gas."

The central issue here is, which definition of "gross value" is correct? Respondent urges the Court to accept a definition of "gross value" applicable to the broader term "natural resources"[1] instead of the definition of "gross value" applicable to the narrower term of "natural gas." This is impermissible. It is undisputed that this matter involves only the severance of natural gas and no other type of natural resource, and the general rules of statutory construction require a specific statute to be given precedence over a general statute relating to the same subject matter. Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 332, 325 S.E.2d 120, 121 (1984); *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 351, 624 S.E.2d 783, 788 (2005) ("When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference generally is accorded to the specific statute."); *Bowers v. Wurzburg*, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999) ("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails."); *Daily Gazette Co., Inc. v. Caryl*, 181 W.Va. 42, 45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute[.]"). Thus, preference is given to the more specific definition of "gross value" for natural gas found in West Virginia Code § 11-13A-2(c)(6)(G), and that statute controls.[2]

[1] "Natural resources" is defined to include "all forms of minerals including, but not limited to, rock, stone, limestone, coal, shale, gravel, sand, clay, natural gas, oil and natural gas liquids which are contained in or on the soils or waters of this state and includes standing timber. For the purposes of the severance tax levied in this article, salt produced solely for human consumption as food is not classified as a mineral subject to this tax." W.Va. Code §11-13A-2(c)(8). As this case involves only natural gas, "natural resources" is a broader, more general term.

[2] This is not the only example of this. Respondent also relies heavily on West Virginia Code Regulation §110-13-2.7 for the idea that gross value continues from the well-head through "the point where production ends." *See* Respondent Brief p. 12. Again, this favors a general statute for "natural resources" over one specific to natural gas found at West Virginia Code Regulation §110-13A-2a.10.1 titled "Natural Gas" that reads: "for natural gas, gross value is the value of the natural gas at the well head immediately preceding transportation and transmission." (emphasis added). There is, again, no language applicable to natural gas relating to market value, post-production fees, or "where production ends." Instead, it once again ties natural gas valuation to the well head. Respondent's argument regarding "the point where production ends" is also incorrect because it clashes with other provisions specific to natural gas, which separate gross value from production. *See infra* footnote 3.

This conclusion is also confirmed by the express wording of West Virginia Code § 11-13A-2(c)(6) itself. The general definition of "gross value" for "natural resources" in that section ends with this directive: "For all natural resources, "gross value" is to be reported as follows:" before listing out subparagraphs (A) through (H), which describe how "gross value" is to be reported in a variety of situations—one of which (G) is for natural gas. W.Va. Code § 11-13A-2(c)(6)(A)-(H); *see also U.S. Steel Min. Co., LLC v. Helton*, 219 W. Va. 1, fn. 7 at 22, 631 S.E.2d 559, 580 (2005) (analyzing West Virginia Code § 11-13A-2(c)(6) and its subparagraphs in coal case). Thus, even the general definition cited by Respondent directs taxpayers to use the more specific West Virginia Code § 11-13A-2(c)(6)(G) as the reporting definition for natural gas.

For these reasons, the provisions of West Virginia Code § 11-13A-2(c)(6)(G) determines what constitutes the "gross value" of natural gas to be "the value of the natural gas at the wellhead immediately preceding transportation and transmission." A full analysis of the definition of "gross value" and "gross proceeds" applicable to natural gas have been provided in Petitioner's brief. *See, e.g.*, Petitioner's Brief §V(D). In sum, Respondent, rests its entire argument on the wrong definition and statute[3] and, in doing so, it fails to meaningfully combat any points made by Petitioner, and Petitioner's assignments of error stand.

[3] Petitioner must note that Respondent's argument not only relies on the wrong statutory definition, but also contradicts other clear provisions of severance tax law. For example, the regulations provide further support for the statutory requirement that natural gas is valued at the wellhead by defining "severing" or "severed" so that it "shall not include . . . any separation process for natural gas or oil commonly employed to obtain marketable natural resources products after the gas or oil is produced at the well-head." W. Va. Code R. § 110-13A-2.17.2. This definition, upon which the entire tax is predicated, specifically holds that "severance" of natural gas occurs at the well head and excludes processing conducted after the natural gas leaves that geographic and temporal point of the well head. This is reaffirmed by West Virginia Code § 11-13A-4(c), which provides that "[t]he privileges of severing and producing oil and natural gas shall not include any conversion or refining process." Similarly, the statutory definition of "processing" states that, for natural gas, it "shall not include any conversion or refining process." W. Va. Code § 11-13A-2(c)(9); W. Va. Code R. §110-13A-2.12.2 (same). Taken together, this language separates the severance of natural gas by a producer (as Petitioner did) from later processing of the natural gas into more valuable, component products (as MarkWest did in its own facilities after purchasing the raw gas). Despite all of this language, which uniformly keeps severance tax at the well head and away from subsequent processing, Respondent still attempts to value Petitioner's natural gas as the "product value" on the settlement sheets, claiming the "product value" is the natural gas' "market

ii. Respondent's Argument About Market Value and Post Production Costs Is Inconsistent With Its Cited Legal Authority

In its brief, Respondent largely argues that the "product value" on the settlement sheets should be the "gross value" of Petitioner's natural gas for severance tax purposes because "gross value" best reflects the natural gas' "market value" and accounts for "post production" costs. However, Respondent does not recognize that its position conflicts with the legal authority cited in its brief. Respondent states that "market value," and *not* payment actually received, is the basis for the severance tax, before citing West Virginia Code 11-13A-2(c)(6)(A). *See* Respondent's Brief p. 11 (emphasis added). As Respondent states in its brief:

> The basis of the tax is the "market value" of the resource, not the amount received by the producer in any transaction. Accordingly, the following rules apply when determining the gross value:
>
> (A) For natural resources severed or processed (or both severed and processed) and sold during a reporting period, gross value is the gross proceeds received or receivable by the taxpayer.

See Respondent's Brief p. 2 (emphasis added)

This juxtaposition highlights how Respondent's position is not supported by the law. Clearly, Respondent's position that the "basis of the tax" equals "market value" and not "the amount received by the producer" is immediately contradicted by their own legal citation, which unambiguously holds that the tax for natural resources is based upon the "gross proceeds received or receivable by the taxpayer" in a sale. Respondent does not address the contradiction between

value." As clearly explained by Petitioner and supported by contractual language and testimony, however, the "product value" is the money MarkWest receives in a secondary sale for the NGLsand MarkWest's processing of the raw gas into NGLs occurs in MarkWest's own facilities far—both geographically and temporally—from Petitioner's severance of natural gas at the well head. Respondent's argument, therefore, is contrary to many different the directives and definitions in the severance tax code and the Respondent's own legislative rules, and has no merit.

its position and the code provision it immediately cites. This is not an isolated instance, as, in other parts of its brief, Respondent cites other statutes and regulations that reaffirm that tax is imposed only on the money "actually received" by the taxpayer in a sale. *See, e.g.*, Respondent's Brief p. 2, 10, 11 (citing W.Va. Code §11-13A-2(b)(5) (""Gross proceeds" means the value, whether in money or other property, actually proceeding from the sale") *and* W.Va. Code R. § 110-13A-2a ("amount received or receivable by taxpayer")); *see also* Respondent's Brief p. 17 ("the only value to be considered is the price of the product when it is actually sold on the market"). In this vein, Respondent also fails to address the undisputed fact that Petitioner only receives money from MarkWest equal to the "net value" on settlement statements as part of its sale of the raw gas.

Taken together, Respondent's argument regarding "market value" and "post-production" costs is contrary to the severance tax statutes and regulations that state natural gas' "gross value" is the money "actually" received by the taxpayer in a sale of the natural gas.

C. Respondent Attempts To Muddy the NGL Agreement With Unsupported Conclusions Lacking Any Meaningful Analysis

In several places, Respondent attempts to invalidate the NGL Agreement between Petitioner and MarkWest, claiming Petitioner has "stretch[ed] the agreement further than it allows" or failed to provide sufficient evidence of what the settlement statements mean. *See* Respondent's Brief p. 13, 17. However, nowhere in its brief does Respondent actually analyze the contract. Respondent instead offers conclusions about the contract without any meaningful analysis, citation, or engagement with its terms. *See contra* Petitioner's Brief at Sections I(A), V(D), V(E).

Without any meaningful analysis, Respondent's arguments against the NGL Agreement—or Petitioner's analysis of the same—fall flat. For example, Respondent attempts to cast doubt or confusion simply because the terms in the NGL Agreement describing MarkWest's payment to Petitioner for raw gas (i.e., "net sales price" at D.R.0166-68) do not match, word for word, the

terms on the settlement statements (i.e., "product value," "fees & adjudgments," and "net value" at D.R.0231-37). *See, e.g.,* Respondent's Brief p. 13. This argument is untenable.

Section 5(c)(i) of the NGL Agreement lays out how much[4] MarkWest will pay Petitioner for the raw gas: an amount equal to the "net sales price"—which is the weighted average price MarkWest receives for selling the finished and separated NGL products to a third party—minus the negotiated fees incurred by MarkWest. D.R.0166-68. The settlement statements perform this same calculation, with a beginning "product value" broken down by finished and separated NGL product (i.e. ethane, propane, butane), a subtraction of "fees & adjustments" that mirror the fee language found in the NGL Agreement (i.e. marketing fees, fractionation fees, and Teppco fees) and a final "net value." *See, e.g.,* D.R.0231-34 (settlement statements); D.R.0162-64 (NGL Agreement fees). It is undisputed that Petitioner only receives the "net value" in payment from MarkWest. D.R.0031 at ¶14; *see also* D.R.0436-40 (testimony regarding payment and verification of payment from MarkWest to Petitioner). Thus, even if the NGL Agreement's defined terms do not identically match those on the settlement statements, the parties and Court may easily determine (a) how the settlement statements calculate payment from MarkWest to Petitioner for raw gas pursuant to the NGL Agreement's terms, and (b) what each of the terms on the settlement statement mean. In fact, the WVOTA was able to correctly determine that, on the settlement statements, the "net value is the product value minus the fees and adjustments," which follows the NGL Agreement's formula. *Compare* D.R.0030-31 at ¶12 (Final Decision) *with* D.R.0161-64

[4] Petitioner also refutes Respondent's incorrect statement that the "product value" on the settlement statements is "the first time that any money is placed on the gas and is set when the gas sold commercially on the market." *See* Respondent's Brief p. 12. To be clear, MarkWest and Petitioner negotiated a sale of the raw gas with the amount paid set forth in a formula. D.R.0166-8. Thus, the raw gas was already sold commercially once from Petitioner to MarkWest for valid consideration equal to the "net value" listed on settlement statements before MarkWest sold NGL products (which it produced from the raw gas) ***again*** to a third party for the different, higher "product value" listed in the settlement statements. D.R.0030-1 ¶¶9, 12. The fact that Petitioner and MarkWest negotiated payment to be a formula instead of a static price does not negate the sale, or mean no "price" was set. The use of a formula, tied either to sale price or a price index, is common in the industry.

(NGL Agreement). Thus, Respondent's argument that the NGL Agreement is confusing or lacks the necessary information is baseless.[5]

Finally, Petitioner must also refute Respondent's claim that Petitioner "has not provided a price for the gas when it is severed or transferred to MarkWest," what the "value of the product was at the time of the transfer of the product from [Petitioner] to MarkWest," or a "price which would represent the price of the product at the well head when the product was severed." *See* Respondent's Brief p. 11, 16-17. It is undisputed that the "net value" on the settlement statements is the only amount of money Petitioner actually received from MarkWest for the sale of raw gas. D.R.0031 at ¶14. Respondent therefore need look no further than the "net value" for the "price for the gas when it is severed or transferred to MarkWest" and the "value of the product was at the time of the transfer of the product from [Petitioner] to MarkWest." Additionally, Petitioner has always argued that the "net value" is the "gross value" of natural gas at the well head upon which it may be taxed. *See, e.g*. D.R.0033 (ALJ noted in Final Decision that "at hearing and in post hearing briefs, the Petitioner consistently argued that the "net value" amount on the settlement sheets it receives from the purchaser/processor is really its "gross proceeds derived from the sale" upon which it may be taxed.). Importantly, Petitioner repeated this argument at length in its own brief, and detailed the computation of its payment pursuant to the NGL Agreement. *See* Petitioner's Brief Section V(D). At all times, Petitioner has put forth the "net value" as the applicable price and gross value of its natural gas. As a result, Respondent's claims that Petitioner

[5] The same is true of Respondent's argument that "the [NGL] Agreement does not state that the product value is not to be used to calculate the gross value for severance tax purposes." *See* Respondent's Brief p. 13. This is problematic because: (a) parties cannot contract around the definitions of "gross value" in the statute and regulations, or set their own tax basis in a contract; (b) nothing in the statute or regulations requires a taxpayer to identify, in its sale contract, what the "gross value" will be for tax purposes; and (c) the Court and the parties are more than capable of determining what taxable "gross value" is even if the same term is not used in a contract.

has failed to produce evidence of value in the sale to MarkWest or value at the well head are demonstrably false.

D. The Severance Tax Statute's Mandate For Consistent Accounting Is More Than "Cash or Accrual"

Respondent attempts to avoid the statutory mandate, which statesthat state and federal severance tax accounting methods be consistent, by arguing: (a) that the statute merely references "cash or accrual" methods, and (b) the *Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Virginia,* 224 W. Va. 591, 598, 687 S.E.2d 374, 381 (2009) case cited by Petitioner is distinguishable because it is a different type of healthcare tax involving Medicaid. *See* Respondent's Brief §I(E). Neither is persuasive.

The severance tax statute at issue states, in relevant part: "A taxpayer's method of accounting under this article shall be the same as the taxpayer's method of accounting for federal income tax purposes." W. Va. Code §11-13A-7(c)(1). Respondent argues, without citation, that this mandate merely refers to a taxpayer using "cash" or "accrual" methods of accounting. *See* Respondent's Brief p. 18-19. This is contrary to their statements at hearing. At one point, of his own accord, Administrative Law Judge asked Respondent's opinion "about how controlling the statute is if the [P]etitioner reports for federal purposes gross proceeds of a million dollars, can the Tax Commissioner then under 11-13a-7 say, well, no we think it is a million-five?" D.R.0351-52. At that time, Respondent did not argue—as it does now in its brief—that the statutory provision was limited to "cash" or "accrual." *Id.* Instead, Respondent agreed with the Administrative Law Judge's interpretation that West Virginia Code 11-13a-7 included consistency in computation of gross proceeds. *Id*. In fact, counsel for Respondent said that knowing what figures or "number" that Petitioner reported as its gross proceeds for federal tax purposes "would help us a great deal in ending the debate." *Id*.

Additionally, the legal authority does not support current Respondent's position. Clearly, in *CAMC,* when the Supreme Court of Appeals of West Virginia analyzed identical language regarding accounting methods in the healthcare tax code, it did not limit its inquiry to whether the tax payer was using "cash" or "accrual" method. *CAMC*, 224 W. Va. at 598, 687 S.E.2d at 381. The Supreme Court of Appeals analyzed the overall accounting methods of the hospital and held that the hospital's method of computing costs and "gross receipts" must be consistent in both state and federal tax filings. *CAMC*, 224 W. Va. at 597-98, 687 S.E.2d at 380-81 (finding WVOTA compelled CAMC to "deviate from the accounting method it uses for federal tax purposes. This is clear given that for federal tax purposes, CAMC did not include accounting entries associated with the self-insurance benefits in its gross receipts, while the ALJ required those same entries, which reflect non-cash items, to be included in gross receipts for the health care provider tax."). In the 2004 Decision, an ALJ at WVOTA similarly considered whether calculation of a taxpayer's "gross value" or "gross proceeds" for purposes of severance taxes were consistent in state and federal tax filings, which is above and beyond "cash" or "accrual" methods. D.R.00250. Other administrative tax decisions, dating back to 1998, have done the same under identical language mandating accounting consistency in other healthcare tax codes. *See, e.g.*, State of West Virginia, 1998 WL 1048435, at *1 (W. Va. Tax Dec. 96-155 ME Aug. 13, 1998) (holding that if a nursing home facility accrues its "gross receipts" net of contractual allowances for federal income tax purposes, then it may use the same "gross receipts" net of contracted allowances to determine the health care provider tax). Thus, decisions by both WVOTA and the Supreme Court of Appeals have treated the accounting mandate language as being broader than the "cash" or "accrual" methods, in direct contradiction of Respondent's argument.

Moreover, Respondent attempts to distinguish *CAMC* from the case at bar because it is a healthcare tax dealing with Medicaid. This is not a relevant or material difference, however. The statutory language does not detail ***how*** the taxes are to be computed, only that the calculation or method of calculation ***shall*** be the same for both federal and state tax filings. Furthermore, (a) the statutory language regarding accounting methods is identical in both severance and healthcare tax codes, and (b) even if the precise calculation were relevant, both severance and healthcare tax are a percentage of a gross figure. *Compare* W.Va. Code § 11-13A-3a(b) (severance tax is 5% of gross proceeds) *and* W.Va. Code § 11–27–4 to –19 (imposition of different healthcare taxes as varying percentages of gross receipts); *see also CAMC*, 224 W. Va. at 595, 687 S.E.2d at 378 (explaining imposition of healthcare taxes). Importantly, Respondent provides no reasonable justification why the accounting method mandate is limited to "cash or accrual" in the severance tax code, but identical language in the healthcare code is not so limited, as demonstrated by *CAMC*.

Thus, *CAMC* remains persuasive authority that West Virginia Code § 11-13A-7 forbids WVOTA and Respondent from compelling Petitioner to deviate in its accounting method of computing "gross value" for state severance tax filings from its undisputed accounting method for the same for federal tax filings. *See, e.g.*, D.R.0139-41 (June 23, 2021 letter confirming Petitioner uses "net value" on settlement statements as basis for "gross proceeds" in federal tax filings).

E. Respondent's Proffered Justifications for Ignoring the 2004 Decision Are Not Those Put Forth By WVOTA

Respondent argues at length that WVOTA properly deviated from the 2004 Decision because there were factual differences, but this is meritless for two reasons: (a) the WVOTA in its Final Decision did not differentiate the 2004 Decision based upon its facts, and (b) this Court is not bound by the factual findings in the Final Decision to the extent they are not supported by substantial evidence, and mixed questions of law and fact, like pure questions of law or those

involving statutory interpretations, are most often reviewed *de novo*. *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573 at fn. 5, 582, 466 S.E.2d 424, 433 (1995).

As to the first, the Final Decision was clear: it deviated from the 2004 Decision because "of its age" and the fact that it used stipulated facts instead of an evidentiary hearing. D.R.0040-41. At no point did the Final Decision differentiate the 2004 Decision on the facts. *Id.* Respondent cannot usurp the WVOTA's reasoning on appeal, and substitute in its own basis for deviation. This is particularly true when the WVOTA has already spoken. Thus, Respondent's argument about distinguishable facts[6] does not adhere to the Final Decision and cannot stand.

As to the second, this Court is not bound by the Final Decision's findings of fact to the extent they are contrary to substantial evidence or based on a mistake of law. *Lilly v. Stump*, 217 W. Va. 313, 317, 617 S.E.2d 860, 864 (2005). Petitioner has argued here and in its brief that many of WVOTA's findings of fact and/or factual analysis are contrary to substantial evidence put forth at the evidentiary hearing. Additionally, any mixed questions of fact/law, particularly those pertaining to statutory interpretation, are reviewed *de novo*.

F. Petitioner Is Not Seeking Two Transmission and Transportation Allowances As Respondent Claims

To be abundantly clear, contrary to Respondent's claim, Petitioner is not seeking two different forms of transmission and transportation allowances. It has argued, and continues to argue, that Respondent incorrectly assessed Petitioner with a transmission and transportation allowance under West Virginia Code of State Rules §110-13A-4.8.1 (actual expenses) (hereinafter "Regulation 4.8.1"), when the costs/expenses at issue on the settlement statements were attributable to MarkWest, the purchaser, and not Petitioner, the producer. *See* Petitioner's Brief

[6] It must also be noted that most of the "findings of fact" noted by Respondent in their brief are not found in any of the 19 findings of fact from the Final Decision, but are instead pulled from the "discussion" section.

§§V(E)-(F). Given that incorrect assessment, Petitioner argues it is free to use the one transmission and transportation allowance it sought under West Virginia Code of State Rules §110-13A-4.8.4 (15% safe harbor) (hereinafter "Regulation 4.8.4").

G. Neither Respondent Nor WVOTA Are Entitled To Deference

Respondent argues that it and WVOTA are entitled to deference as they are the tax agency and this case involves interpretation of tax statutes. This confuses the procedural posture of the case. Deference is not appropriate in these circumstances.

i. Deference Is Not Appropriate For Respondent's Interpretation Of Its Own Regulation Because There Is No Ambiguity

To be clear, in this case, WVOTA was not determining whether a severance tax regulation includes a proper interpretation of the severance tax statute.[7] Instead, the issue is whether the Respondent's interpretation of its own legislative rules (specifically, those governing "gross value" of natural gas, and transmission and transportation allowances), when applied to the facts of this case, is proper. It is well-established that a reviewing court is only required to afford deference to an agency's interpretation of its own regulation if the regulation contained an ambiguity. *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 220, 832 S.E.2d 135, 146 (2019) (quoting *Cookman Realty Group, Inc. v. Taylor*, 211 W. Va. 407, 411, 566 S.E.2d 294, 298 (2002)). Further, a "statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Div. of Pub. Serv. Comm'n of W. Va. v. Pub. Serv. Comm'n of W. Va.*, 182 W. Va. 152, 386 S.E.2d 650 (1989). Further, an agency's interpretation of a statute or regulation is not entitled to deference when it goes beyond the meaning the statute can

[7] In such a procedural posture, deference may be awarded under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 639, 827 S.E.2d 417, 427 (2019). However, even under the first prong of *Chevron*, no agency deference is proper when the legislature has already clearly spoken on an issue. *Chevron's* second prong also prohibits agency deference when it constitutes an impermissible construction of the statute.

bear. *Pittston Coal Group v. Sebben,* 488 U.S. 105, 113, 109 S.Ct. 414, 420, 102 L.Ed.2d 408, 419–20 (1988) (Cleckley, J., concurring).[8]

Here, there is no ambiguity that would permit deference to an agency's interpretation of its own regulation. The statutes and regulations regarding "gross value" of natural gas are clear and unambiguous—it is the "actual" money received by taxpayer in a sale of natural gas, less transportation and transmission costs under West Virginia Code of State Rules §110-13A-4.8. Similarly, Regulation 4.8.1 unambiguously lays out the stipulation by which actual transmission and transportation costs may be assigned to a producer. Petitioner explains this, in detail, in its briefings, including how Respondent's interpretation of "gross value" arises from the wrong statute and contradicts the plain language of the relevant statutes, associated regulations, and the Respondent's own legal citations. *See, e.g., supra* §V(A)-(D) *and* Petitioner's Brief §V(D). Given there is no ambiguity in the severance tax statutes or regulations, and Respondent's position contradicts these same statutes and regulations, there is no deference.

ii. <u>Dereference Is Not Provided For Inconsistent Agency Interpretations</u>

Furthermore, inconsistency of the agency's position "is one of the relevant factors to be considered" for deference and an agency interpretation which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than one "consistently held" by the agency. *Appalachian Power Co. v. State Tax Dep't of W. Virginia,* 195 W. Va. 573, 592, 466 S.E.2d 424, 443 (1995) (quoting *Good Samaritan Hosp. v. Shalala,* 508 U.S. 402, 417, 113 S.Ct. 2151, 2161, 124 L.Ed.2d 368, 383 (1993)). As explained more fully in Petitioner's brief,

[8] Respondent posits that it is entitled to deference if its interpretation of the severance tax regulations as long as that interpretation is not arbitrary, capricious, or manifestly contrary to the statute. *See* Respondent Brief p. 16. For the reasons listed in its briefings, Petitioner states that Respondent's position is manifestly contrary to the statute. *See supra* §§V(B), V(D) *and* Petitioner's Brief §§V(D)-(E). Furthermore, Petitioner argues in its briefings that Respondent's position and WVOTA's Final Decision are arbitrary and capricious. *See supra* §§V(B), V(D), Petitioner's Brief §§V(D)-V(E) and Footnote Nos. 4, 5 & 9).

WVOTA's Final Decision was inconsistent with both the ALJ's verbal statements at the evidentiary hearing on critical points, and the prior 2004 Decision. *See* Petitioner Brief §V(E)(iii) & FN 4, 5, 9. Such inconsistency precludes deference.

iii. Deference Is Not Given To An Agency's Litigation Arguments or Positions

Finally, deference is not extended to every agency action—for example, an agency is not given deference for "*ad hoc* representations on behalf of an agency, such as litigation arguments." *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573 at fn 17, 588, 466 S.E.2d 424, 439 (1995); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213, 109 S.Ct. 468, 474, 102 L.Ed.2d 493, 503 (1988) (little weight should be given to expedient litigation position of an agency); *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 213 (4th Cir. 2009) (holding "deference may not be required when the agency's advocated interpretation is one that it has just adopted for the purpose of litigation and that is "wholly unsupported by regulating, rulings, or administrative practice."). Thus, to the extent Respondent's interpretation of the regulations constitutes a litigation argument or position, it is afforded no deference.

In conclusion, there is no cause for this Court to afford any deference to the Respondent's interpretation of the statutes or its regulations.

IV. CONCLUSION

Respondent's brief fails to address vital portions of Petitioner's argument, including the undisputed fact that Petitioner was paid only the "net value" on the settlement statements when it sold raw gas to MarkWest, and that the sale occurred prior to any processing costs at issue being incurred by MarkWest in the systems MarkWest exclusively owns. Respondent's main position—that "gross value" is equal to the "product value" on settlement statements because it constitutes "market value" and accounts for "post-production" costs—is contrary to numerous provisions of

the severance tax code. Taken together, Respondent's brief does not combat the legal and contractual analysis provided in Petitioner's brief. Thus, Petitioner's conclusion remains unchanged: WVOTA's Final Decision contains numerous errors, it must be reversed in its entirety.

Based on the foregoing, Petitioner respectfully requests that this Honorable Court:

1. reverse the decision of the WVOTA;
2. remand this case to the WVOTA for reassessment of Petitioner's request for refunds for tax years 2014 and 2016 consistent with this Court's opinion; and
3. grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

Statoil Onshore Properties, Inc.,
now known as
Equinor USA Onshore Properties, Inc.

By counsel,
/s/ Alexander Macia

Alexander Macia, Esq. (WV Bar No. 6077)
Paul G. Papadopoulos, Esq. (WV Bar No. 5575)
Chelsea E. Thompson, Esq. (WV Bar No. 12565)
Spilman Thomas & Battle PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
304-340-3800
amacia@spilmanlaw.com
ppapadopoulos@spilmanlaw.com
cthompson@spilmanlaw.com

INTERMEDIATE COURET OF APPEALS OF WEST VIRGINIA

STATOIL USA ONSHORE PROPERTIES, INC.,

Petitioner Below, Petitioner,

vs. **No. 22-ICA-111**

MATTHEW IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent.

CERTIFICATE OF SERVICE

I, Alexander Macia, counsel for the Petitioner, do hereby certify that service of the foregoing **PETITIONER'S REPLY** has been made upon counsel for the Respondent on February 22, 2023, by causing a true copy of the same to be transmitted through the File and Serve X-Press system which will send notification of the same to all counsel of record.

/s/ Alexander Macia
Alexander Macia, Esq. (WV Bar No. 6077)