INTERMEDIARY COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-225

STATOIL USA ONSHORE PROPERTIES INC.,

Petitioner Below, Petitioner,

vs.

MATTHEW IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent.

PETITIONER'S REPLY & RESPONSE IN OPPOSITION TO CROSS-APPEAL

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

Secondary Sources

I. SUMMARY OF ARGUMENT

Respondent's Cross-Assignment of Error alleges that Petitioner's appeal is jurisdictionally barred because it was originally filed with the West Virginia Office of Tax Appeals ("WVOTA") outside the 60-day period proscribed by statute. This assertion completely sidesteps the actual issue in this case, which is whether WVOTA and the Circuit Court of Kanawha County, West Virginia properly determined that Respondent was equitably estopped from enforcing that statute. To be very clear, Petitioner is not seeking a radical adjustment of the jurisprudence of equitable estoppel so that it is easier to satisfy—Petitioner seeks only straightforward application of the existing jurisprudence of equitable estoppel, as written, to the particular and rather unique facts of this case.

Concisely stated, Respondent's Cross-Assignment of Error is meritless because: (a) it fails to identify the actual issue of equitable estoppel; (b) both WVOTA and the Circuit Court agreed that this case was controlled by the *Hudkins v. State Consol. Pub. Ret. Bd,* 220 W. Va. 275, 647 S.E.2d 711 (2007) decision; (c) Respondent's argument in favor of its Cross-Assignment of Error rests largely on outdated legal standards that pre-date *Hudkins*; (d) a straightforward reading of *Hudkins* demonstrates that a private individual need not prove "affirmative misconduct or wrongful conduct" to equitably estop the government, as "affirmative misconduct or wrongful conduct" is one of several different, equally viable methods of doing so; and (e) Respondent fails to provide any meaningful opposition to WVOTA's or the Circuit Court's analysis of the public interest. Thus, there is no error in the Circuit Court's decision, or WVOTA's subsequent decision.

Further, Respondent's brief fails for myriad reasons to oppose the Assignments of Error or alter the conclusion proven by Petitioner in its brief that WVOTA erred in calculating its severance tax. 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.

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 of 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 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.

Furthermore, despite bringing a Cross-Assignment of Error, Respondent omitted nearly all facts relevant to that claim. Petitioner therefore states: On June 28, 2018, Petitioner[1] filed an Amended Severance Tax Return for tax year 2015 requesting a refund of $4,837,548.01. D.R.0088; D.R.0284. Seven months later, on January 23, 2019, the Respondent issued a first refund decrease letter in which the requested refund was reduced by $2,216,115.02. D.R.0088; D.R.0284; D.R.0296 (letter). Petitioner immediately reached out to Respondent to discuss errors

[1] Petitioner had, at all relevant times, engaged Ryan LLC, a tax consulting firm, to represent it in filings to and communications with the Respondent's office. Tomas Gaytan is currently a Principal at Ryan LLC, and was a Director during the time in question.

in the tax calculation, in an effort to resolve such issues prior to filing an appeal. D.R.0088; D.R.0226-27 (testimony); D.R.0298-99 (email from Tomas Gaytan). As Respondent has conceded, this was common practice, particularly with this Petitioner. D.R.0197-98. After Petitioner discussed the first refund decrease letter with Stacey Acree, then the Acting Director of Business Tax, Ms. Acree agreed that the severance tax was "not calculated right" and acknowledged the letter lacked the proper review by upper management. D.R.0195-96 (testimony); D.R.0301-02 (email). Whereupon, Ms. Acree told Petitioner the refund denial letter would be "pulled back" and reviewed again. D.R.0088; D.R.0197-98; D.R.0301-02. As Ms. Acree testified, Respondent and Petitioner "agreed to go ahead and review" the refund amount "versus letting them file a petition [for appeal] . . . we decided to work with them on it to get it cleaned up." D.R.0203-4. Ms. Acree confirmed this "pull back" for review by e-mail to Petitioner dated February 13, 2019. D.R.0088; D.R.0197-98; D.R.0301-02 (email).

Consistent with Ms. Acree's representation, Respondent issued Petitioner a second refund denial letter dated February 27, 2019 which contained a different refund amount that was still roughly $1.5 million less than what Petitioner sought in its petition. D.R.0088; D.R.0304 (letter). As clarified at hearing, the second refund denial letter retracted and replaced the first refund denial letter—effectively rendering the first refund denial letter moot. D.R.0221. The next day, February 28, 2019, Petitioner contacted Respondent to discuss errors with the second denial letter. D.R.0244-46. As Petitioner's representative Tomas Gaytan testified, on February 28, 2019 he spoke to Ms. Acree and two other officials from Respondent's office regarding: (a) a mathematical error totaling $23,671.54 that would again alter the refund amount, and (b) securing a final refund amount from Respondent which Petitioner could use in its appeal. *Id.*; D.R.0244-46; D.R.0257;

D.R.0307-10 (Affidavit of Tomas Gaytan).[2] Mr. Gaytan testified that during this conversation, he was told by Ms. Acree that the $23,671.54 would be reviewed and that a third refund denial letter would be issued with a final refund amount. D.R.0088-89; D.R.0244-46; D.R.0257; D.R.0307-10. At hearing, Ms. Acree testified that she did not recall whether or not she told Mr. Gaytan a third refund letter would be issued or whether an appeal was discussed.[3] D.R.0088-89; D.R.0209. Ms. Acree did recall, however, that during this telephone call, plans were made to send Petitioner the Respondent's case file on this matter so that Petitioner could determine no other disputes existed, and that she instructed a clerk to analyze the $23,671.54 miscalculation. D.R.0209. Despite this plan, Respondent sent Petitioner a refund check a few days later on March 3, 2019 for the amount in the second denial letter, which did not include the still-under-review $$23,671.54. D.R.0088; D.R.208-09.

Unfortunately, the clerk assigned to review Petitioner's refund and the $23,000 miscalculation passed away in September 2019. D.R.208-09. It was not until February 27, 2020 that Ms. Acree revisited the issue and determined that Petitioner was, in fact, due the $23,671.54. that Mr. Gaytan had alerted her to nearly a year before. D.R.0323. Petitioner was informed of this additional refund through an email from Ms. Acree. *Id.* Accordingly, on or about February 27, 2020, the Respondent sent Petitioner another refund check totaling $23,671.54. *Id.* Respondent did not issue a third refund denial letter to Petitioner at this time, or any other. *See* D.R.0234; D.R.0309. Petitioner appealed the entire refund denial on April 7, 2020. D.R.0089-90.

[2] It must be noted that Ms. Acree and her office were fully aware that Petitioner intended to appeal the total $1.5 million denial of its refund. As this Court is aware, Petitioner had several concurrent cases with Respondent with the same factual and legal issues, but for different tax years. Those appeals were also being filed and discussed with Respondent at or around this same time of February 2019. *See* D.R.0308 at ¶5. By virtue of these communications, WVOTA and Respondent knew that this case would be appealed alongside its brethren. D.R.0309 at ¶13.

[3] As a result, WVOTA originally determined, as a finding of fact, that Mr. Gaytan was told by Ms. Acree that a third refund denial letter would be issued. D.R.0111.

On appeal, Respondent moved to dismiss this action arguing WVOTA lacked jurisdiction because Petitioner did not appeal within 60 days of the second refund denial letter dated February 27, 2019. D.R.0328-34. After a hearing and briefing by the parties, WVOTA initially granted the motion. D.R.0109-22. Petitioner timely appealed to the Circuit Court of Kanawha County, West Virginia, who reversed and remanded the WVOTA's decision. D.R.0082-96. Accordingly, WVOTA issued a second opinion denying Respondent's motion to dismiss. D.R.0079-81. Petitioner appealed the Final Decision of the WVOTA regarding calculation of severance tax, and Respondent filed this Cross-Assignment of Error. D.R.0007-23 (appeal by Petitioner).

III. ARGUMENT - OPPOSITION TO CROSS ASSIGNMENT OF APPEAL

Respondent raises a single Cross-Assignment of Appeal, that:

> [WV]OTA and the Circuit Court of Kanawha County should have dismissed [Equinor's] case for lack of jurisdiction because the Petitioner for Reassessment (herein "Petitioner") at OTA was filed beyond the 60-day period prescribed by statute.
>
> Respondent's Brief p. 1.

This Cross-Assignment of Error fails to address the ultimate issue decided by WVOTA and the Circuit Court, which is whether the Respondent may be equitably estopped from enforcing the statutory deadline for appeal that was undisputedly missed. Nonetheless, Petitioner responds in opposition to this Cross-Assignment of Error for the reasons outlined below, in addition to those Petitioner previously supplied to the WVOTA (D.R.0150-9; D.R.0284-294) and Circuit Court (which are not part of the designated record) in separate briefings.

As a final introductory matter, Petitioner must dispute Respondent's overarching mischaracterization of this case. Petitioner is not seeking, as Respondent suggests, a radical adjustment to the jurisprudence of equitable estoppel so that it is easier to satisfy. Petitioner seeks only a straightforward application of the existing jurisprudence of equitable estoppel, as written,

to the particular and unique facts of this case. Accordingly, this case does not risk the floodgates of equitable estoppel being thrown open wide, so that every innocent error or misstatement by a government official becomes actionable. Properly narrowed to the Assignments of Error and Cross-Assignment of Error, this appeal is brought only to ensure that Petitioner may present its case on the merits and seek its duly and properly owed refund. Nothing more, nothing less.

A. Respondent's Argument in Section I(A) is Unnecessary and Confuses the Issue

Petitioner first notes that Respondent argues at great length in Section I(A) of its Brief regarding the statutory deadline. It is undisputed that Petitioner did not file an appeal within 60 days of the second denial letter dated February 27, 2019. Thus, Respondent's argument here is, frankly, irrelevant and Respondent does not address it, except to say that its appeal was filed within 60 days of the date upon which it received the second refund check totaling $23,671.54, the receipt of which finalized both the amounts refunded and denied for tax year 2015.

B. Nothing In West Virginia's Case Law Precludes The Application of Equitable Estoppel to a Jurisdictional Deadline or Tax Matter

Respondent first argues that equitable estoppel cannot "confer statutory jurisdiction in tax cases" under any circumstances. Respondent's Brief § I(B). No such bright line preclusion exists, however, and the cases relied upon by Respondent for one are either distinguishable or misstated. As a result, the Cross-Assignment of Error cannot stand.

i. Nothing In The *Hudkins* Decision Limits Its Application To Tax Or Jurisdictional Cases

As explained below, the proper precedent in this case is *Hudkins v. State Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007). As *Hudkins* clearly stated:

> The general rule prohibiting the application of the doctrine [of equitable estoppel] is not without exceptions. ***This Court in its prior decisions never intended to preclude the application of equitable estoppel against the State in every case.*** We therefore agree with

> the trial court's acknowledgment that the general rule that equitable estoppel does not apply against a governmental agency is not without exceptions.
>
> *Hudkins*, 220 W. Va. at 280, 647 S.E.2d at 716 (emphasis added).

Thus, *Hudkins* squarely considered and rejected Respondent's argument that it is totally immune from the application of equitable estoppel. Critically, the Court's statement that "prior decisions never intended to preclude the application of equitable estoppel against the State in every case" is exemplified by *Bradley v. Williams*, 195 W. Va. 180, 465 S.E.2d 180 (1995). In *Bradley*, a taxpayer sought to toll the deadline in which to request a refund of taxes using equitable estoppel. The Supreme Court of Appeals did not forbid the taxpayer from doing so because it was a tax case or dealt with jurisdictional statutes of limitations. *Bradley*, 195 W. Va. at 185, 465 S.E.2d at 185. Instead, the Court examined the general principles of equitable estoppel—including precedent that it is applied more cautiously against the government than a private citizen—and concluded that the traditional element of misrepresentation had not been met. *Id.* In doing so, the Supreme Court of Appeals applied equitable estoppel to the statute of limitations in a tax case, and demonstrated *Hudkins'* point that under West Virginia law there is no bright line preclusion of equitable estoppel against the government.

Additionally, nothing in *Hudkins*' analysis or conclusion limited its holding to certain types of cases, or certain statutes. *Hudkins* dealt with the West Virginia Consolidated Public Retirement Board, a state agency just like Respondent. The key citation to 28 Am.Jur.2d *Estoppel and Waiver* § 140 is titled "What must be shown to estop government" and is not limited to a certain type of governmental agency or function. Thus, taken together, *Hudkins* expressly nullifies Respondent's argument and does not limit its applicability to cases like this.

ii. Respondent's Cited Legal Authority Does Not Support Its Argument

Having ignored the language in *Hudkins*, Respondent provides several other cases for its proposition that equitable estoppel can never apply to cases involving taxes or jurisdictional statutes. However, the case law cited in the Respondent's Brief does not support its conclusion.

First, Respondent relies heavily on *Helton v. Reed*, 219 W. Va. 557, 561, 638 S.E.2d 160, 164 (2006) for the opening proposition that "filing requirements established by statute, like the ones involved in the instant case are not readily susceptible to equitable modification or tempering." Respondent's Brief p. 14.[4] However, Respondent ignores the immediately preceding sentence in *Helton*, in which the court acknowledged that the taxpayer's arguments had "some equitable force." Similarly, the *Helton* court only declined to impose equitable principals after also finding that the taxpayer, itself, acted inequitably. Nowhere does *Helton* hold that there is a bright-line rule against equitable estoppel in tax or jurisdictional cases. [5] In fact, *Helton* openly considered equitable principles like "equity will not enforce a forfeiture" and "he who seeks equity must do equity" in reaching its conclusion.[6] Accordingly, the *Helton* case does not support Respondent's assertion, and it is factually distinguishable from the case at bar because there are no allegations that Petitioner acted inequitably in any way.

Second, Respondent repeatedly cites a Fourth Circuit case, *Webb v. United States*, 66 F.3d 691 (4th Cir. 1995) even though it similarly fails to support Respondent's argument that equitable

[4] In its original grant of the motion to dismiss, WVOTA held that *Helton* did not control in this matter. D.R.0113-4.
[5] Petitioner further notes that at the hearing on the motion to dismiss, the ALJ *sua sponte* stated that *Helton* did ***not*** say "it is black letter law that if you miss the 60-day deadline, there is no circumstance whatsoever or no fact pattern whatsoever can the Office of Tax Appeals grant relief or obtain – well, I should say obtain jurisdiction." D.R.0266. Respondent's counsel agreed that the ALJ's interpretation "sounds reasonable." *Id.* Now, however, it is citing *Helton* in its brief for the opposite conclusion—that equitable tolling is bright line precluded in tax jurisdictional cases.
[6] Specifically, the court considered the maxims, "equity will not enforce a forfeiture" and the maxim "he who seeks equity must do equity. *Helton v. Reed*, 219 W. Va. 557, 561, 638 S.E.2d 160, 164 (2006).

estoppel is wholly precluded in this matter. *Webb* is a federal case out of Virginia that pre-dates *Hudkins* and is based on federal tax law and the government's sovereign immunity from suit. *Webb*, 66 F.3d at 693-4. Critically, *Webb* concedes that numerous other courts have held that equitable tolling applies in tax refund cases—just as Petitioner seeks to do. *Id.* at 696. Ultimately, like *Helton*, *Webb* did not hold that equitable estoppel cannot be applied in tax cases or jurisdictional cases—*Webb* simply declined to extend to federal tax litigation the "rebuttable presumption" that equitable estoppel applies to governmental lawsuits the same as private lawsuits. *See, e.g., Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). *Id.* at 702 (first articulation of this rebuttable presumption in a Title VII case). In short, *Webb* is distinguishable because Petitioner does not seek any presumption—rebuttable or otherwise—or support its argument with *Irwin*. Furthermore, *Webb* has not aged well, having suffered significant negative treatment, notably with a risk of being overruled by *Merck & Co. v. Reynolds*, 559 U.S. 633, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010) (addressing statute of limitation based on plaintiffs' discovery of defendant's misrepresentations and fraud regarding prescription drug). Thus, Respondent's reliance is misplaced.

Third, Respondent quotes *Cate v. Steager*, No. 16-0599, 2017 WL 2608434 (W. Va. June 16, 2017) at length, with a string cite[7] of cases purporting to support Respondent's position. However, *Cate* fares no better than its predecessors. In *Cate*, a taxpayer failed to timely file an appeal and made no opposition to the Respondent's motion to dismiss for lack of jurisdiction. *Cate*, 2017 WL 2608434, at *2. The taxpayer offered no justification for their lateness, but

[7] Respondent notes that the cases in this string cite similarly fail to apply to this case. For example, in *Elk Run Coal Co. v. Babbitt*, 930 F. Supp. 239, 239 (S.D.W. Va. 1996) the government failed to timely appeal a summary judgment decision and sought extension under Federal Rule of Civil Procedure Rule 4(a)(5), which permits such extension if there is "upon a showing of excusable neglect or good cause." Clearly, this is not the same fact pattern or legal standard at issue here.

appealed the dismissal nonetheless. *Id*. Critically, the taxpayer's "sole argument on appeal is that the circuit court erred in affirming the motion to dismiss his petition for reassessment because it did not have personal jurisdiction over him." *Id.* To be clear, in *Cate*, there was absolutely no argument, briefing, or holding about equitable estoppel—it was a straightforward application of the jurisdictional statute as written. *Id.* Accordingly, the paragraph about "equitable modification and tampering" and string cite quoted by Respondent are mere dicta that neither binds this Court nor establishes precedent. *See, e.g., SWN Prod. Co., LLC v. Kellam*, 247 W. Va. 78, 875 S.E.2d 216, 226 (2022). Thus, Respondent's position that tax deadlines can never be subject to equitable estoppel remains legally unsupported. As a result, the Cross-Assignment of Error cannot stand.

C. WVOTA and Circuit Court Agreed that *Hudkins* Decision Controls When Equitable Estoppel Applies to the Government, Not Prior Standards From the 1950s As Cited By Respondent

Having established that, under West Virginia law, a governmental agency may be equitably estopped, the question becomes: when? Up until this point, the parties, WVOTA, and Circuit Court all agreed that the issue of equitable estoppel of the government was governed by *Hudkins*, though they have different interpretations of it. *See, e.g.,* D.R.0090 (Circuit Court states it "agrees with the Parties that *Hudkins v. State Consolidated Public Retirement Board*, 220 W. Va. 275, 674 S.E.2d 711 (2007) (per curiam) is the leading authority on whether the doctrine of equitable estoppel may be applied against a government entity."). Now, at this late juncture, Respondent's Brief offers an entirely different legal standard that hinges on whether the Respondent was working in a "governmental capacity" urges the Court to ignore *Hudkins* and adopt an older standard in its place. Respondent's Brief §I(A)-(B). The "governmental capacity" standard and its supporting case law all pre-date *Hudkins* by decades, hailing from 1950 (*Shaffer*), 1981 (*Western Maryland Railway Co.*), and 1993 (*McFillan***)**. After those cases were decided, *Hudkins* came before the

Court, who heard arguments on this precise issue—equitable estoppel as applied to governmental agencies—and set the applicable legal standard, which does not differentiate between "governmental or proprietary capacity." The proper standard is the one articulated in *Hudkins*, and not the cases that came before it. As a result, the Cross-Assignment of Error cannot stand.

D. Circuit Court Properly Interpreted *Hudkins* Decision To Have Multiple Methods of Proving Equitable Estoppel Against Government

Now that it is established that *Hudkins* has articulated the proper standard, our attention turns to that decision. In *Hudkins*, the plaintiff was a member of the Public Employees Retirement System nearing retirement. 220 W. Va. at 276, 647 S.E.2d at 712. Prior to retiring, plaintiff wanted to determine if she could convert her unused sick leave to service credit which would increase her retirement income when she reached retirement age. *Id.* Plaintiff contacted the Board and was told that the conversion was permitted, something the community services manager confirmed to Plaintiff in writing. *Id.* Relying on the verbal and written statements, Plaintiff retired a few weeks later. 220 W. Va. at 277, 647 S.E.2d at 713. Two years later, Plaintiff learned for the first time that the conversion would not be permitted. *Id.* Plaintiff appealed the decision of the Board to the Circuit Court of Kanawha County, who reversed it. 220 W. Va. at 278, 647 S.E.2d at 714. The subsequent appeal put it before the Supreme Court of Appeals, who said, "[w]e believe that this case can be decided upon principles of equitable estoppel." 220 W. Va. at 280, 647 S.E.2d at 716.

The *Hudkins* Court began its analysis with the general proposition that "[t]he doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine against the state." *Id.* (quoting Syl. Pt. 7 of *Samsell v. State Line Development Company,* 154 W.Va. 48, 174 S.E.2d 318 (1970)). It immediately clarified, however that:

> The general rule prohibiting the application of the doctrine is not without exceptions. This Court in its prior decisions never intended to preclude the application of equitable estoppel against the State in every case. We therefore agree with the trial court's acknowledgment that the general rule that equitable estoppel does not apply against a governmental agency is not without exceptions.
>
> 220 W. Va. at 280, 647 S.E.2d at 716.

Having established that exceptions exist whereby the government and its agencies may be equitably estopped, the *Hudkins* Court found its conclusion supported by American Jurisprudence, specifically 28 Am.Jur.2d *Estoppel and Waiver* § 140. The Court cited that American Jurisprudence provision in full, which stated:

> **§ 140. What must be shown to estop government.**
> In recognition of the heavy burden bourne by one seeking to estop the government, courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent. Likewise, courts have held an estoppel against the government may be raised only when -
> — the injury to the public interest if the government is estopped is out weighed by the injury to the plaintiff's personal interest or the injustice that would arise if the government is not estopped.
> — raising the estoppel prevents manifest or grave injustice.
> — raising the estoppel will not defeat a strong public interest or the operation of public policy.
> — the exercise of government functions is not impaired or interfered with.
> — circumstances make it highly inequitable or oppressive not to estop the government.
> — the government's conduct works a serious injury and the public's interest will not be harmed by the imposition of estoppel.
>
> 28 Am.Jur.2d *Estoppel and Waiver* § 140.

It is from this citation that Respondent's support of its Cross-Assignment of Error arises.

i. The Plain Language Of *Hudkins* Provides Multiple, Equally Effective Methods Of Establishing Equitable Estoppel Against The Government

Specifically, Respondent argues that *Hudkins* held that, in order to equitably estop the government, the individual must prove "affirmative misconduct or wrongful conduct" by the government. However, a simple and straightforward reading of the decision, particularly the quoted American Jurisprudence provision, demonstrates otherwise. The provision notes that courts have applied equitable estoppel to the government when an individual proved that the government engaged in "affirmative misconduct or wrongful conduct," but it does not end there. The court's citation of American Jurisprudence continues with the key word "likewise" to describe *other* circumstances that have sustained estoppel against the government. Specifically, the quoted provision of American Jurisprudence lists, in bullet point fashion, an additional six situations and/or legal standards in which courts have permitted equitable estoppel to be applied to the government, none of which involve misconduct.

The word "likewise" is key here.[8] The common definition of "likewise" is "in like manner; similar," or "in addition."[9] This is consistent with how the West Virginia Supreme Court of Appeals has interpreted that word historically, as a synonym of "in addition to." *See, e.g., State v. State Rd. Comm'n*, 100 W. Va. 531, 131 S.E. 7 (1925) (when interpreting regulations, "the words "in addition to" are equivalent to "also," "likewise," and "besides.""). Thus, the use of the word "likewise" in the American Jurisprudence demonstrates that the six bullet points constitute other, equally effective methods of establishing equitable estoppel against the government—in addition

[8] In its Brief, Respondent does not acknowledge or discuss the inclusion of the word "likewise" in the American Jurisprudence quotation, or its impact on its interpretation.

[9] *See* "Likewise." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/likewise. Accessed 28 Feb. 2023.

to "affirmative misconduct or wrongful conduct."[10] In short, "affirmative misconduct or wrongful conduct" is not the only one. Thus, a plain reading of the *Hudkins* decision and the American Jurisprudence provision cited therein confirm that "affirmative misconduct or wrongful conduct" is merely one of several different ways to equitably estop the government, and it is not, as Respondent argues, a necessary requirement.

ii. The Legal Analysis in the *Hudkins'* Decision Also Contradicts Respondent's Argument

Respondent's argument is not only contrary to the plain wording of the American Jurisprudence provision, but to the actual analysis contained in *Hudkins*.

First, the remainder of the decision does not reference "affirmative misconduct or wrongful conduct" at all. These phrases only appear within the American Jurisprudence quotation and, accordingly, are not an integral part of the decision. "Affirmative misconduct or wrongful conduct" are therefore merely dicta. In fact, in its original grant of Respondent's motion to dismiss, the WVOTA even acknowledged that by requiring "affirmative misconduct or wrongful conduct," it was relying on dicta in *Hudkins*. *See* D.R.0120 fn. 5. Under the well-established common law of this state, however, dicta cannot bind subsequent courts or constitute precedent. *See, e.g., SWN Prod. Co.*, 875 S.E.2d at 226 ("Just as the United States Supreme Court has recognized, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."); *In re Kanawha Valley Bank*, 144 W.Va. 346, 383, 109 S.E.2d 649, 669 (1959) ("Obiter dicta or strong expressions in an opinion, where such language was not necessary to a decision of the case, will not establish a precedent.").

[10] Respondent does not offer any analysis or explanation of why these bullet points exist, if not to be equally sufficient methods of proving equitable estoppel. In fact, Respondent largely ignores their existence.

Second, *Hudkins* does not analyze the conduct of the governmental agency (PERS Board) at all, and certainly does not apply the alleged "affirmative misconduct or wrongful conduct" standard to the facts of the case before it. Respondent concedes this point in its brief. *See* Respondent's Brief p. 20. Given this concession and the complete lack of analysis about misconduct, *Hudkins* simply does not require proof of misconduct before equitable estoppel may apply to the government. Respondent cannot credibly argue that *Hudkins* requires Petitioner to prove the government engaged in either "affirmative misconduct or wrongful conduct" when the *Hudkins* decision, itself, did not require proof, analysis, or findings of "affirmative misconduct or wrongful conduct."

Third, the Court's decision in *Hudkins* is squarely based upon the considerations listed in the bullet points of the American Jurisprudence quote. Specifically, it states in full:

> We believe the principles set forth in 28 Am.Jur.2d *Estoppel and Waiver* § 140 and in Syllabus Point 6 of *Stuart v. Lake Washington Realty Corp., supra,* and the cautious advice provided in Syllabus Point 7, *Samsell v. State Line Development Company, supra,* have been met. The record reflects that the financial impact of this decision is approximately $51.00 per month. Given the likelihood that Ms. Hudkins will be required to live on a fixed income for the remainder of her life, we find that the ***injury and injustice to Ms. Hudkins outweighs the public interest*** by estopping the Board in this case. We therefore conclude that by permitting estoppel to operate in this case, we ***will prevent a manifest and grave injustice***.
>
> Finally, we do not believe that a ***strong public interest or operation of public policy will be defeated by this decision***. By expressly limiting our decision to the specific facts of this case, we further find that the ***exercise of government functions will not be impaired*** or interfered with, ***nor will the public interest be harmed***.
>
> *Hudkins*, 220 W. Va. at 281–82, 647 S.E.2d at 717–18 (emphasis added).

Indeed, the actual analysis of *Hudkins* focuses on injustice, public interest, and impairment of government functions. These are directly tied back to the bulleted considerations outlined in

American Jurisprudence and mirror their language. Given that these considerations may "likewise" support equitable estoppel the same as governmental misconduct, the *Hudkins* Court was not "disregarding" or "ignoring" the legal standard, or engaging in an improper "pick and choose" approach, as Respondent alleges. *See* Respondent's Brief p. 20. It simply was applying several of the equally viable considerations from the American Jurisprudence provision.

The *Hudkins* analysis quoted in full above makes it clear that (a) an individual does not need to prove the government committed "affirmative misconduct or wrongful conduct" to equitably estop it, and (b) injustice, public interest, and impairment of government functions—which constitute many of the six justice-based considerations listed in the bullet points in the American Jurisprudence—should be considered and have equal force.

Fourth, the other cases that the *Hudkins* Court considered did not require a finding of "affirmative misconduct or wrongful conduct" to equitably estop the government.[11] Specifically, *Hudkins* refers to decisions from Wisconsin and Alaska, neither of which discuss or analyze whether the government committed any type of misconduct. Like *Hudkins* itself, these cases only apply equitable estoppel to the government on the basis of injustice and public interest. *See, e.g., Wisconsin Dep't of Revenue v. Moebius Printing Co.,* 89 Wis. 2d 610, 638, 279 N.W.2d 213, 225 (1979) ("we have recognized that estoppel may be available as a defense against the government if the government's conduct would work a serious injustice and if the public's interest would not

[11] Though not cited in *Hudkins*, Petitioner notes that many states have legal standards under which a government may be equitably estopped without any requirement that the government commit misconduct. *See, e.g., S. Nevada Mem'l Hosp. v. State, Dep't of Hum. Res.,* 101 Nev. 387, 390, 705 P.2d 139, 141 (1985) ("While courts have traditionally held that a government could not be estopped while acting in a governmental capacity, the modern trend permits the application of equitable estoppel against a government to avoid manifest injustice and hardship to the injured party"). Other jurisdictions have applied equitable estoppel in the context of tax appeals or remedies, without need to prove misconduct. *See, e.g., 1555 Bos. Rd. Corp. v. Fin. Adm'r of the City of New York*, 61 A.D.2d 187, 192, 401 N.Y.S.2d 536, 540 (1978); *Hardy, Hardy & Assocs., Inc. v. State, Dep't of Revenue*, 308 So. 2d 187 (Fla. Dist. Ct. App. 1975); *Vill. of Morrisville Water & Light Dep't v. Town of Hyde Park*, 129 Vt. 1, 270 A.2d 584 (1970).

be unduly harmed by the imposition of estoppel"); *Crum v. Stalnaker*, 936 P.2d 1254, 1256 (Alaska 1997) ("estoppel may apply against the government and in favor of a private party if four elements are present: (1) the government body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury."). Given that the cases that *Hudkins* examines and relies upon similarly do not require proof of misconduct, Respondent's interpretation is further refuted.

iii. Changes To American Jurisprudence After *Hudkins* Was Decided Confirms Respondent's Argument Is Incorrect

Respondent's argument rests entirely on *Hudkins'* quotation from American Jurisprudence. However, that American Jurisprudence provision has been updated since *Hudkins* was decided in 2007. Section 140 is now titled "Estoppel Against Municipal Corporations" which is not relevant here. The relevant and correlating provision is now Section 129 titled "Limitations On Application Of Estoppel Against Governmental Entities" which states in full:

> Courts have held that an estoppel against the government may be raised only when—
> — the injury to the public interest if the government is estopped is outweighed by the injury to the plaintiff's personal interest or the injustice that would arise if the government is not estopped.
> — raising the estoppel prevents manifest or grave injustice.
> — raising the estoppel will not frustrate a policy intended to protect the public interest.
> — the performance of government functions is estopped.
> — circumstances make it highly inequitable or oppressive not to estop the government.
> — the government's conduct works a serious injury and the public's interest will not be harmed by the imposition of estoppel.
>
> 28 Am. Jur. 2d Estoppel and Waiver § 129 (internal citations omitted).

This is the current American Jurisprudence provision that most closely mirrors the language cited in *Hudkins.* Critically, this provision currently does not require aggrieved misconduct or wrongful conduct by the government. The fact that the phrases "aggrieved misconduct or wrongful conduct" have been omitted from American Jurisprudence in more recent editions further demonstrates that Respondent's interpretation of it is impermissible.

iv. Conclusion On Correct Interpretation of *Hudkins* Decision

Taken together, a complete and thorough reading of the analysis and conclusion of the *Hudkins* decision defies Respondent's interpretation that *Hudkins* requires Petitioner to prove "affirmative misconduct or wrongful conduct" to equitably estop the government.[12] As a result, its Cross-Assignment of Error cannot stand.

E. Respondent Provides No Meaningful Opposition to The WVOTA's or Circuit Court's Analysis of Public Interest

At this point, Petitioner has demonstrated that *Hudkins* is the proper legal standard to equitable estoppel to the government, and that *Hudkins* does not require proof of governmental

[12] In its Brief, Respondent notes that WVOTA has previously interpreted *Hudkins* to require affirmative misconduct or wrongful conduct. To the extent this is true, those decisions all commit the same errors listed herein. Simply put, just because the WVOTA has done this repeatedly does not mean it is correct. This is particularly true as, outside of the WVOTA, Respondent can only point to two Berkley County Circuit Court cases which apply their same interpretation. *See* Respondent's Brief p. 19-20. However, the two cited cases actually contain identical opinions in related cases, meaning there is really only one opinion, issued in 2015. Those cases are distinguishable because the citizens attempting to estop the government failed to meet the traditional equitable estoppel requirements. Consequently, that decision, entered in two different cases, was not decided on the elevated burden a taxpayer must satisfy, and is therefore not useful to this Court. Finally, Petitioner notes that other circuit courts, notably the Kanawha County Circuit Court (who is obviously the court whose opinion is being appealed by Respondent) has held more than once that the government may be equitably estopped without any findings of governmental misconduct. *See, e.g., McKown v. West Virginia Consol. Pub. Ret. Bd*., No. 11-AA-47, 2012 WL 7677789 (W. Va. Cir. Ct. Jan 6, 2012) (holding that the government was equitably estopped from denying a veteran retirement credits for his military service after he detrimentally relied on statements by the State assuring him he would receive such credits); *Wood v. West Virginia Consol. Pub. Emps. Ret. Bd*., No. 11-AA-143, 2013 WL 7856591 (W. Va. Cir. Ct. Mar. 20, 2013) (holding government was equitably estopped the State from denying the petitioner five years of military service credit toward his retirement). Both *McKown* and *Woods* analyzed the additional elements contained within *Hudkins* concerning the public interest, governmental functions, and the gravity of the injustice. Neither discussed or addressed whether affirmative misconduct or wrongful conduct by the government had occurred. Thus, Respondent's reliance on Berkley County Circuit Court cases is misplaced and contrary to the law of the Circuit Court they are appealing.

misconduct—but it does encourage consideration injustice, public interest, and impairment of government functions. This is consequently the framework in which this case is to be decided.

Petitioner must point out the final, fatal flaw in Respondent's Brief: Respondent fails to actually argue that the proper considerations of injustice, public interest, and impairment of government functions do not support equitable estoppel. After pages of writing, it simply concludes, in a single sentence, that "as noted above, the public interest is clearly harmed when public funds are involved in equitable estoppel claims." However, it is not clear what that refers to at all. The prior argument under the heading of "OTA erred in finding that the *Hudkins'* equity factors should estop the Tax Department in this case" does not actually discuss equity, injustice, public interest or impairment of government functions at all. It exclusively argues that it was unreasonable for Petitioner to rely on Respondent's representations that a third denial refund letter was forthcoming. However, reliance is part of the traditional equitable estoppel test, not one of the equitable considerations added when it is applied to the government under *Hudkins*. Thus, it is entirely unclear what "public interest harm" Respondent is arguing about. Certainly, Respondent does not address the other considerations. Since Respondent fails to provide meaningful analysis of any of the six factors listed in *Hudkins*, its Cross-Assignment of Error cannot stand.

Petitioner notes, however, that WVOTA properly considered the factors listed in *Hudkins* and found they favored estoppel. Additionally, it argues that the factors are satisfied because:

- Without estoppel, Petitioner will be denied its due process rights to an appeal and faces a financial loss of hundreds of thousands of dollars in potential refund amounts that it wanted to appeal and cannot. Thus, the government's conduct if not estopped with impose serious injury to Petitioner.

- Given the seriousness of this injury, the injury and injustice to Petitioner outweighs the public interest by estopping the Respondent;

- Permitting estoppel will prevent a manifest and grave injustice to Petitioner who acted consistently, honestly, openly in all its communications with Respondent and, admittedly, has done nothing inequitable itself;

- Permitting estoppel will prevent and manifest and grave injustice to Petitioner, as here is undisputedly no letter in this case that tells Petitioner the *correct* amount of refunds issued to it, the *correct* amount of refund denied, and the *reasons* for such a denial. D.R. 0209 (admitting figures in second refund denial letter not accurate); Respondent evens admits that, given the lack of a third letter, the only way for Petitioner to know the final, total amount of its refund was to add up the amount of its checks—otherwise, the total amount only exists in Respondent's internal systems. D.R.0213.

- Permitting estoppel will prevent oppressive or inequitable conduct, in that Respondent will not be permitted to promise a taxpayer a key document and letter, and then back out of that promise without consequence;

- Strong public interest or operation of public policy will not be defeated by estopping the Respondent. Rather, the public interest will gain by estopping the government; as Petitioner was not the only taxpayer to receive erroneous refund denial letters, estoppel will prohibit the government from misleading taxpayers with inaccurately issued refund denial letters or imposing erroneous taxes on taxpayers;

- By expressly limiting the decision to the specific facts in this present appeal, the exercise of government functions will not be impaired, or interfered with, nor will the public interest be harmed. Respondent remains free to assess, collect, and refund taxes as it always has.

Thus, Petitioner has satisfied the standard for equitable estoppel against the government, as set forth in *Hudkins*. Respondent's Cross-Assignment of Error cannot stand.

F. <u>Petitioner Reasonably Relied on Representation A Third Letter Was Forthcoming</u>

Both WVOTA and the Circuit Court agreed that the traditional elements of equitable estoppel had been met. *See* D.R.0081 p. 3 fn. 2; D.R.0093 (Circuit Court stating, "In the matter at hand, OTA correctly ruled that the traditional elements of equitable estoppel cited by *Hudkins* were met by [Petitioner]." To the extent the reliance element of the traditional test for equitable estoppel is challenged by Respondent in its Brief, Petitioner argues that it clearly relied upon the misrepresentation that a third refund denial letter would be issued with the final refund amount when it did not file an appeal to the second refund denial letter. It did not file such an appeal

because it believed that a third letter was forthcoming to replace and nullify the second letter, in the same manner that the second letter replaced and nullified the first letter.

At hearing, Ms. Acree could not remember the February 28, 2019 conversation on key points, meaning Mr. Gaytan's testimony that Ms. Acree informed him of a forthcoming third letter was uncontested. Similarly, Mr. Gaytan testified many times that he attempted to obtain a third letter containing the final refund to facilitate an appeal identifying the correct final amount. There is also the logical point that unless and until Respondent issued Petitioner the additional refund check totaling $23,671.54 in February 2020 (a year after the second letter was sent), Petitioner did not actually know the amount of the refund it would be receiving. Thus, the need for a final refund amount, which Petitioner was led to believe would be in a forthcoming third letter, is established.

Petitioner's reliance is also reasonable for many reasons, including:

- The representation came from a high-ranking official at Respondent's office who was familiar with the case and worked with petitioner often;
- Petitioner had previously worked with Respondent on this case, and many others, to informally work out discrepancies without a need for appeal;
- In this same case, Respondent had previously told Petitioner the first letter would be pulled back and a second issued, meaning it would be reasonable for Petitioner to rely on the same representation made by the same person that the second letter would be also be pulled back and reviewed, and a third issued;
- Refund denial letters are the usual communication by which Respondent notifies a taxpayer that a refund has been denied, the reason(s) why it was denied, and for how much refund it being denied, meaning it was reasonable that Petitioner expected a third letter with the final refund amount; and
- The second refund denial letter, at all times and to this day, contains an incorrect refund amount that does not accurate reflect the amount actually refunded.

Taken together, Petitioner relied upon the representation made by Ms. Acree on February 28, 2019 that the final refund amount would be listed in a forthcoming third letter and accordingly did not file its appeal within 60 days of the February 27, 2019 second refund denial letter. Such

reliance was reasonable given the history of case and communication between the parties. Thus, Respondent's claims otherwise are meritless.

G. <u>In The Alternative, Aggravated Misconduct Or Wrongful Conduct Occurred</u>

In the alternative, Petitioner argues there is sufficient evidence that misconduct occurred here. It is undisputed that (a) a high-ranking officer in Respondent's office told Petitioner on February 28, 2019 that a third refund denial letter would be issued, and then (b) Respondent refused to issue a third letter *even though it paid additional refunds to Petitioner* a year later in February 2020 and *deviated from the refund amount listed in the second letter*. In short, the Respondent promised Petitioner a third letter and then chose, contrary to that promise, to not issue one when the refund total changed again. Instead of sending the promised third letter, Respondent just copied Petitioner on an e-mail authorizing another refund check. *See* D.R.0306. This conscious decision to not issue the promised third letter constitutes aggravated misconduct or wrongful conduct.

In West Virginia, there is not much, if any, developed case law on what constitutes aggravated misconduct or wrongful conduct sufficient to estop the government. Other jurisdictions have held, in cases against the IRS, that there is no single test for detecting the presence of affirmative misconduct; each case must be decided on its own particular facts and circumstances. *Lavin v. Marsh,* 644 F.2d 1378, 1382–83 n. 6 (9th Cir.1981)). Affirmative misconduct does require an affirmative misrepresentation or affirmative concealment of a material fact by the government, although it does not require that the government intend to mislead a party. *In re Howell*, 120 B.R. 137, 142 (B.A.P. 9th Cir. 1990). Additionally, a mere failure to inform or assist does not justify the application of equitable estoppel against the government, nor does unexplained delay. *Id.* Under this standard, Respondent's conscience decision to withhold a third refund denial letter, despite promising to do so and further altering the refund amounts, is

sufficient. The misconduct is far more egregious than: failing to help or inform a taxpayer (*see* 120 B.R. at 142); having an unexplained delay (*id.*); sending a somewhat confusing (but still legally correct) answer to a taxpayer (*see* 17-274 XX Administrative Decision, 2019 WL 11070960, at *4 (Jan. 28, 2019)); and failing to ascertain if a car is new or used for tax purposes (*see* 16-269 AFTC Administrative Decision, 2018 WL 11232383, at *3(Oct. 25, 2018)). In sum, Respondent took purposeful action that resulted in the concealment and/or denial of a key document, namely a third refund denial letter. This constitutes misconduct sufficient to warrant estoppel.

This misconduct is exacerbated by the fact that Respondent knew, both when it promised a third letter in February 2019 and when it refused to issue one in February 2020 alongside a new refund check, that Petitioner planned to appeal the total $1.5 million refund denial and had specifically contacted Respondent to get the final refund denial amount in which to use in said appeal. In conclusion, to the extent the Court finds aggravated misconduct or wrongful conduct a necessary pre-requisite, Petitioner argues that in the particular facts of this case, there has been aggravated misconduct or wrongful conduct by the government for the reasons listed above.

H. Conclusion on Cross-Assignment of Error

Respondent's single Cross-Assignment of Error cannot stand. Respondent argues that an older, improper standard applies, though WVOTA and Circuit Court properly concluded *Hudkins* governs. When confronting *Hudkins*, Respondent offers an interpretation that defies the plain wording, legal analysis, and citations of *Hudkins*. Finally, Respondent provided no meaningful analysis of equity factors under *Hudkins'* proper standard. This falls far short of proving its Cross-Assignment of Error and the Court should deny its appeal.

IV. ARGUMENT - REPLY AND SEVERANCE TAX

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

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) ("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 [] Court will assume that the respondent agrees with the petitioner's point of view on the issue.").

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

In numerous respects, Respondent's argument conflicts with established law.

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"[13] 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.[14]

[13] "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.

[14] 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[15] and, in doing so, it fails to meaningfully combat any points made by Petitioner, and Petitioner's assignments of error stand.

[15] 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

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. 2. As Respondent states in its brief:

> W. Va. Code § 11-13A-2(c)(6). The basis of the tax is the "market value" of the resource, not the amount received by the producer in a sale. 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

natural gas' "market 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.

or receivable by the taxpayer" in a sale. Respondent does not address the contradiction between 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, 6, 10, 12 (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 F.D.D.R.0166-68)[16] do not match, word for word, the terms on the settlement statements (i.e., "product value," "fees & adjudgments," and "net value" at F.D.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[17] 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. F.D.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.,* F.D.D.R.0231-34 (settlement statements); F.D.D.R.0162-64 (NGL Agreement fees). It is undisputed that Petitioner only receives the "net value" in payment from MarkWest. F.D.D.R.0031 at ¶14; *see also* F.D.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

[16] The Order Affirming Tax Commissioner's Refund Denial that is being appealed in this case adopts the conclusions and reasoning of the Final Decision issued in another case, which is currently pending before this court as Civil Action No. 22-ICA-111. However, the transcript and exhibits from the evidentiary hearing that led to the Final Decision are not part of the designated record in this case. Accordingly, it is necessary for Petitioner to cite to the transcript and exhibits in the designated record for Civil Action No. 22-ICA-111 so the Court may fully and meaningfully assess the facts or parties' legal argument. Accordingly, hereinafter, citations to the designated record for Civil Action No. 22-ICA-111 will be cited as "F.D.D.R." as an abbreviation for "Final Decision Designated Record." Citations to the designated record in this case remain "D.R." in accordance with the Order entered November 29, 2022.

[17] 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. F.D.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. F.D.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.

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* F.D.D.R.0030-31 at ¶12 (Final Decision) *with* F.D.D.R.0161-64 (NGL Agreement). Thus, Respondent's argument that the NGL Agreement is confusing or lacks the necessary information is baseless.[18]

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, 16-18. 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. F.D.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.* F.D.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"

[18] 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.

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 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 requires 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?" F.D.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. F.D.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.*, F.D.D.R.0139-41 (June 23, 2021 letter confirms Petitioner uses "net value" on settlement statements as "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. F.D.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[19] 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

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

[19] 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.

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 §§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.[20] 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

[20] 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.

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 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).[21]

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>Deference 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

[21] 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).

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, 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.*, 195 W. Va. at fn 17, 588, 466 S.E.2d at 439; *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 Cross-Assignment of Error regarding timeliness of appeal fails for many reasons, chief of which it is predicated upon an interpretation of *Hudkins* that is not supported by the decision's plain language, legal analysis, legal citations, or subsequent application by the

Kanawha County Circuit Court. Respondent fails to meaningfully argue that, under the correct equity standards in *Hudkins*, there was any error. Additionally, as to Petitioner's Assignments of Error, 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. Affirm the May 5, 2022 decision of WVOTA found at D.R.0079-81;

2. Affirm the April 12, 2022 decision of Kanawha County Circuit Court at D.R.0082-96;

3. Reverse the October 7, 2022 decision of the at D.R.0109-22;

4. Remand this case to the WVOTA for reassessment of Petitioner's request for refunds for tax year 2015 consistent with this Court's opinion; and

5. 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-225**

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 & RESPONSE IN OPPOSITION TO CROSS-ASSIGNMENT OF ERROR** has been made upon counsel for the Respondent March 6, 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)