INTERMEDIARY COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-226

EQUINOR USA ONSHORE PROPERTIES, INC.,

Petitioner Below, Petitioner,

vs.

MATTHEW IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent.

PETITIONER'S BRIEF

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
Counsel for Petitioner
Equinor USA Onshore Properties, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE CASE 2

A. Factual Background 2

B. Procedural Background 5

III. SUMMARY OF ARGUMENT 7

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 8

V. ARGUMENT 9

A. Jurisdiction 9

B. Standard Of Review 9

C. Operation and Language Of The Applicable Severance Tax Code 10

D. WVOTA Erred In Finding Petitioner's Gross Proceeds Equaled The "Product Value" Listed On The Settlement Statement 12

i. It Is Undisputed That The Only Money "Actually Received" By Petitioner For Sale of NGLs Is The "Net Value" On Settlement Statements 12

ii. WVOTA Did Not Value Natural Gas At The Wellhead, As Required 16

iii. WVOTA's Ruling Forces Petitioner To Use A Different Accounting Method For State and Federal Taxes In Violation Of Statute 19

E. WVOTA Erred In Finding That Certain Expenses Were Attributable To, And Deducted By, Petitioner 23

i. The Expenses Were Not Incurred In Petitioner's System, As Required 24

ii. The Expenses Were Not Incurred Before Sale, As Required 27

iii. WVOTA Improperly Disregarded A Persuasive And Factually Analogous Tax Decision From 2004 32

F. WVOTA Erred When it Improperly Denied Petitioner's Request for 15% Safe Harbor 36

VI. CONCLUSION 36

TABLE OF AUTHORITIES

Statutes

W.Va. Code §11-10-10A 1, 33
W.Va. Code §11-10-10A(C).....33
W. Va. Code §11-13A-2(b)(5).....1, 7, 11, 13, 14, 15, 33
W.Va. Code § 11-13A-2(b)(10).....27, 30
W. Va. Code § 11-13A-2(c)(6).....13, 33
W.Va. Code § 11-13A-2(c)(8).....11, 16, 19
W. Va. Code § 11-13A-2(c)(9).....16
W.Va. Code §11-13A-3a 15, 33
W.Va. Code § 11-13A-3a(a).....10
W.Va. Code § 11-13A-3a(b).....7, 10, 11, 13, 14
W.Va. Code § 11-13A-3a(c)(6)(G).....33
W. Va. Code § 11-13A-4(c)..... 16
W. Va. Code §11-13A-7 .....19, 20, 21, 22, 23
W. Va. Code § 11-27-22 .....21, 22
W.Va. Code § 29A-5-4(g). 10
W.Va. Code § 51-11-4(b)(4).....9

Legislative Rules

W.Va. Code R. §110-13A-2a.10.1.....7, 10, 11, 13, 14, 15, 16, 19
W. Va. Code R. §110-13A-2.7 .....1, 10, 11, 13, 16
W. Va. Code R. § 110-13A-2.13 26
W.Va. Code. R. §110-13A-4.8.1 .....7, 8, 11, 12, 23, 24, 25, 26, 27, 30, 31
W. Va. Code R. § 110-13A-4.8.4 .....1, 23, 33, 35, 36

Administrative Decisions

03-106SV Administrative Decision (2004) 1, 18, 19, 23, 31, 32, 33, 34, 35

Cases

Antero Res. Corp. v. Steager, ...9, 10,

244 W. Va. 81, 851 S.E.2d 527 (2020)
Appalachian Power Co. v. State Tax Dep't of W. Va.,..... 12, 25
195 W.Va. 573, 466 S.E.2d 424 (1995)
C & P Tel. Co. of W.Va. v. Pub. Serv. Comm'n of W.Va., ...31, 32
171 W. Va. 708, 301 S.E.2d 798 (1983)
Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Va., ...20, 21, 22, 23
224 W. Va. 591, 687 S.E.2d 374 (2009)
Crockett v. Andrews, ...12, 25
153 W. Va. 714, 172 S.E.2d 384 (1970)
Davis Mem'l Hosp. v. W. Virginia State Tax Com'r, ...34
222 W.Va. 667, 671 S.E.2d 682 (2008)
Griffith v. Conagra Brands Inc., ...12
229 W.Va. 190, 728 S.E.2d 74 (2012)
Matter of Starcher, ...35
202 W.Va. 551, 501 S.E.2d 772 (1998)
Putnam Cnty. Bd. of Educ. v. Andrews, ...31
198 W. Va. 403, 481 S.E.2d 498 (1996)
State v. Elder, ...12, 25
152 W. Va. 571, 165 S.E.2d 108 (1968)
Washington Cnty. Bd. of Equalization v. Petron Dev. Co., ...11, 16
109 P.3d 146, 149 (Colo. 2005)

West Virginia Rules of Appellate Procedure

Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure.....8
Rule 19(a)(1) of the West Virginia Rules of Appellate Procedure.....9
Rule 21(d) of the West Virginia Rules of Appellate Procedure 9

I. ASSIGNMENTS OF ERROR

1. The West Virginia Office of Tax Appeals ("WVOTA") erred when it concluded that "[t]he market value of the natural gas in the vicinity of the wellhead, as those terms are used under West Virginia law, is the amount reflected as the "product value" on the settlement sheets introduced in this matter."

2. The WVOTA erred by improperly calculating the gross value or gross proceeds of the Petitioner's natural gas and natural gas liquids to be anything other than the "net value" on the settlement sheets introduced in this matter, which is undisputedly the amount of money actually received by Petitioner from the third-party purchaser in exchange for a sale of natural gas.

3. The WVOTA erred in finding that fees contractually charged to Petitioner are "expenses" of the Petitioner under West Virginia Code §11-13A-2(b)(5) and West Virginia Code of State Rules §110-13A-2.7 when those fees are actually costs incurred by the third-party purchaser of Petitioner's natural gas.

4. The WVOTA erred in finding that Petitioner had deducted its own actual transportation and transmission costs from the gross value of its severed natural gas.

5. The WVOTA erred in failing to follow a 2004 WVOTA decision (03-106SV Administrative Decision), which supports the Petitioner's requests for refund, even though that previous WVOTA decision was not appealed by the State and a notice of nonacquiescence was not filed by the Tax Commissioner pursuant to W.Va. Code §11-10-10A.

6. The WVOTA erred denying Petitioner's application for the safe harbor which allows for a deduction of "transportation or transmission costs in the amount of 15% of the gross proceeds of the natural gas severed and produced." W. Va. Code R. § 110-13A-4.8.4.

II. STATEMENT OF THE CASE

A. Factual Background

This case involves the proper calculation of state severance tax imposed upon the natural gas liquids ("NGLs") found within the natural gas that Petitioner extracts within this state. Petitioner is a natural gas producer with operations across the United States, including West Virginia. D.R.0025-26 at ¶¶ 2-5. Through its production of natural gas, Petitioner has added substantial economic value to this state through jobs, infrastructure, and the payment of taxes. For the two tax years at issue, Petitioner has already paid $8,892,221.56 (2018) and $8,842,446.46 (2019) in severance taxes and is seeking a refund of overpaid amounts totaling $1,533,548.37 (2018) and $1,084,061.59 (2019) that was denied. *See* D.R.0044-45 (tax records showing taxes paid during each year); D.R.0074-75 (Answer of Respondent); D.R.0088-92 (petition for reassessment listing amount in controversy for tax year 2018); D.R.0125-35 (petition for reassessment listing amount in controversy for tax year 2019); D.R.0093 (refund denial letter tax year 2019); D.R.0130 (refund denial letter tax year 2018).

The process of severing and producing natural gas can be complicated, as can the resulting calculation of severance taxes. In its simplest form, Petitioner originally severs natural gas from the ground at what the industry calls the "wellhead." At that time, the natural gas is an impure mix of various natural resources, water, and sediment. D.R.0024 at ¶3. Petitioner uses production equipment it owns, operates, and maintains to transform the impure mix into "raw gas". D.R.0024-25 at ¶¶3-4. It is only once natural gas becomes "raw gas" that it adheres to applicable pipeline specifications and can be transported to the purchaser's pipeline system. F.D.D.R.0203-04 at § 7.1 (gas quality).[1]

[1] As explained in the procedural history Section II(B) *infra*, 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,

Petitioner has entered into the *Second Amended and Restated Gas Processing Agreement* dated December 1, 2013 ("Gas Processing Agreement") and the *Natural Gas Liquids Exchange and Purchase Agreement* dated March 1, 2011 ("NGL Agreement") with MarkWest Liberty Midstream & Resources LLC ("MarkWest"). *See* F.D.D.R.0160-82 (NGL Agreement); F.D.D.R.0185-226 (Gas Processing Agreement). Petitioner and MarkWest are two completely separate companies who negotiated these contracts at arms-length. F.D.D.R.0435. According to these contracts, Petitioner delivers the raw gas it extracts in West Virginia to MarkWest at a specified receipt point—the "Plant Inlet" of the processing plant owned, operated, and maintained by MarkWest. F.D.D.R.0196 at ¶ 5.1. Once the raw gas leaves Petitioner's wellsite and reaches the Plant Inlet at MarkWest's processing plant, MarkWest gains title to the raw gas. *See* D.R.0025 at ¶6; F.D.D.R.0177 at ¶7.4; F.D.D.R.0160-61 at ¶¶1(B) & 4(B); F.D.D.R.0211 at ¶14.2.[2] From the Plant Inlet onward, MarkWest has exclusive custody, control, and possession of the raw gas. F.D.D.R.0211 at ¶ 13.2; F.D.D.R.0384; F.D.D.R.0431. It is at this point that a sale of natural gas from Petitioner to MarkWest occurs. D.R.0025 at ¶6; F.D.D.R.0380-81.

At its processing plant, MarkWest breaks down the raw gas into its component parts: "raw make," which are unprocessed NGLs, and "residue gas."[3] D.R.0025 at ¶7; F.D.D.R.0373. The raw make continues on to MarkWest's fractionation plant to be fractionated into individual NGLs. D.R.0025 at ¶9. Throughout processing and fractionation, MarkWest maintains title, custody,

---

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.

[2] Full citations and explanation of these title provisions is provided in Section E(ii) *infra*.

[3] The tax treatment of any residue gas is not at issue in this matter. F.D.D.R.0429. Only the tax treatment for NGLs is at issue. To the extent the Final Decision relied upon findings of fact or conclusions of law related to residue gas, it erred. *See* Footnote 13 *infra*.

control, and possession of the raw make and the resulting NGLs. F.D.D.R.0177 at ¶7.1. All facilities used in processing and fractionation are exclusively owned and operated by MarkWest. D.R.0025 at ¶¶5, 7 & 9; F.D.D.R.0259-60; F.D.D.R.0438-39. Once fractionation is complete, MarkWest then sells the NGLs to third parties. D.R.0025 at ¶9; F.D.D.R.0371-72. MarkWest transports the NGLs from its plants to the final consumer through pipelines owned by MarkWest or third parties. F.D.D.R.00259-60; F.D.D.R.0370-72; F.D.D.R.0381-83. MarkWest determines who to sell the NGLs to and what price to sell the NGLs for—Petitioner has no role in that process. F.D.D.R.0432.

Each month, MarkWest authors a settlement statement listing the amount of component NGLs it processed from the raw gas it purchased at the Plant Inlet from Petitioner. D.R.0025 at ¶¶10-11. The settlement statements contain three key financial components: product value, fees, and net value. *See, e.g.,* F.D.D.R.0231-37. These represent:

- Per the NGL Agreement, the "product value" is the "weighted average sales price per gallon that MarkWest receives for" each NGL that MarkWest sells to third parties during the calendar month at MarkWest's fractionation plant. F.D.D.R.00162-63 at ¶ 5(C)(i); *see also* F.D.D.R.0372-75 (testimony that product value is what money MarkWest receives for sale of individual NGLs to third parties).

- The "fees" are the various transportation, marketing, and processing fees that MarkWest incurred in processing the raw gas into raw make and residue gas, and further fractionating the raw make into individual NGLs. *See* F.D.D.R.00162-63 at ¶¶5(A) & 5(C). MarkWest negotiated in *the Gas Processing Contract* and *NGL Agreement* for these specific fees to be deducted from the product value in calculating payment to Petitioner. F.D.D.R.0162-63 at ¶ 5(C)(i); *see also* F.D.D.R.0372-75 (testimony on contractual fees); F.D.D.R.0439 (testimony that contract's fees are typical in this industry).

- The "net sales price" on the settlement statement is the sales price that MarkWest pays to Petitioner as described in the NGL Agreement. F.D.D.R.00162-63 at ¶5(C)(i). In determining the net sales price, MarkWest shall include and deduct all associated third-party costs including all third-party transportation, tank car rentals, taxes (excluding income taxes), offsite storage, and similar marketing costs and expenses incurred by MarkWest to determine a net price freight on board (FOB) the Fractionation Plant. *Id.* MarkWest will identify in reasonable detail all of the types of costs incurred, and the

> aggregate amount thereof, to determine the Net Sales Price on Producer's statement each month. F.D.D.R.00162-67 at ¶ 5(A)(i). It is undisputed that the net value is the amount MarkWest actually pays to Equinor for sale of the NGLs. D.R.0026 at ¶14; *see also* F.D.D.R.0139-41 (letter regarding banking and tax reporting); F.D.D.R.0436-40 (testimony regarding payment and verification of payment from MarkWest to Petitioner).

Petitioner uses the "net value" on the settlement statements when preparing both its state severance tax forms and federal income tax forms. F.D.D.R.0139-40.

B. <u>Procedural Background</u>

This case arises from the calculation of severance taxes. Petitioner determined that it had overpaid in severance taxes and petitioned the State Tax Commissioner ("Respondent") for a refund for tax years 2018 and 2019. D.R.0093; D.R.0130. The Respondent responded by issuing a Tax Refund Decrease Letter to Petitioner for the tax years 2018 and 2019, in which it denied "the marketing, demand fees and administrative fees on the actual transportation allowance." D.R.0093 (2019 tax year); D.R.0130 (2018 tax year). Additionally, it denied the 15% safe harbor because it asserted that Equinor was "claiming actual transportation expenses. D.R.0093; D.R.0130. By incorrectly classifying the purchaser's fees as Petitioner's actual transportation and transmission cost and adding the fees expensed by MarkWest to the gross proceeds actually received by Petitioner for the sale of its commodities, Respondent effectively and incorrectly inflated the gross proceeds of the sale over and above what was actually realized by the Petitioner. Petitioner appealed the denial letter to WVOTA, arguing Respondent's calculation of severance taxes did not comply with the applicable statutes. D.R.0088-92 (petition for reassessment tax year 2019); D.R.0125-35 (petitioner for reassessment tax year 2018).

At or around the same time, the Respondent issued similar Tax Refund Decrease Letters to Petitioner using the same calculation of severance taxes for tax years 2014, 2015, and 2016. Thus, WVOTA assigned the following case numbers: No. 19-008 (tax year 2014), No. 20-111 (2015),

No. 19-064 (2016), No. 20-222 (2018) and No. 22-023 (2019). Two cases (No. 20-222 and No. 22-023) are the basis of this appeal.[4] WVOTA, however, recognized that all of the cases pending before it shared the same facts and presented the same legal questions, but were simply for different tax years. *See*, *e.g.,* D.R.0081-84; D.R.0122-23; D.R.0039-41.

While all of these cases were pending at WVOTA, the parties and WVOTA agreed that two cases would proceed as "test cases," specifically Case No. 19-008 for tax year 2014 and Case No. 19-064 for tax year 2016. After an evidentiary hearing on April 28, 2021, WVOTA issued a "Final Decision" in Case Nos. 19-008 and 19-064 on August 18, 2022 affirming the Respondent's denial of refund. D.R.0023-38. In particular, WVOTA concluded that the "market value of natural gas in the vicinity of the wellhead, as those terms are defined under West Virginia law, is the amount reflected as the product value on the settlement sheets introduced in this matter." D.R.0037 at ¶8. Further, WVOTA concluded that "the fees contractually charged to the Petitioner [in settlement statements] are "expenses" of the Petitioner." D.R.0037 at ¶9. Overall, WVOTA upheld Respondent's valuation of the severance tax in all respects including the reduction of Petitioner's refund.

Given the similarities of the cases, all parties and WVOTA agreed that these two cases would also be bound by the Final Decision. *See, e.g*., D.R.0066 (letter from Judge Pollock dated Sept. 7, 2022 stating that this case for Case No. 20-222 and Case No. 22-023 would resolve by "adopting the reasoning in the Final Decision issued in Docket Nos. 19-008 and 19-064."). Accordingly, on October 7, 2022, WVOTA issued in Case No. 20-222 and Case No. 22-023 an "Order Affirming Tax Commissioner's Refund Denial," which upheld the Respondent's calculation of severance tax and denial of refund, and memorialized the parties' agreement to be

[4] Petitioner similarly appealed the other WVOTA decisions to this Court, which have designated them Case No. 22-ICA-111 (tax years 2014 and 2016) and Case No. 22-ICA-225 (tax year 2015).

bound in this case by the Final Decision issued in Case Nos. 19-008 and 19-064. *See* D.R.0039-41. Petitioner timely appealed the "Order Affirming Tax Commissioner's Refund Denial." D.R.0006-22.

III. SUMMARY OF ARGUMENT

This case presents three interrelated issues: (1) whether, under the severance tax code, the "product value" or "net value" on the settlement sheets is the proper "gross value" or "gross proceeds" basis for calculating Petitioner's severance tax; (2) whether the fees subtracted from the "product value" by MarkWest on the settlement statements are the Petitioner's actual transportation and transmission expenses as defined by W.Va. Code. R. §110-13A-4.8.1; and (3) whether Petitioner is entitled to the 15% safe harbor deduction for transportation and transmission fees. Faced with these issues, WVOTA issued a decision that failed to adhere to the unambiguous, plain meaning of the applicable severance tax statutes or meaningfully engage with an on-point prior decision.

The statutes and legislative rules clearly state that the severance tax is computed as 5% of the "gross value" of natural gas "at the well head immediately preceding transportation and transmission," and that the "gross value" is equal to the "gross proceeds." W.Va. Code § 11-13A-3a(b) (imposition of tax). Gross proceeds mean "the value, whether in money or other property, actually proceeding from the sale." W.Va. Code. §11-13A-2(b)(5) (statutory definition of "gross proceeds"); *see also* W.Va. Code R. §110-13A-2a.10.1 (gross value of natural gas specifically). Simply stated, the tax is equal to 5% of the money a producer actually makes from selling natural gas. WVOTA's decision, however, ignores the undisputed fact that the only money Petitioner *actually* received from the sale of NGLs to MarkWest is listed as the "net value" on the settlement statements. D.R.0026 at ¶14. Instead, WVOTA found that gross proceeds were actually the higher

"product value" listed on settlement statements, even though the contracts clarify that the "product value" is the value that MarkWest receives when it sells the individual NGLs to third parties. D.R.0037 at ¶8. The WVOTA decision therefore erred by improperly moving the calculation both temporally and geographically away from the Petitioner's wellhead and to the end of MarkWest's processing plants, thereby inflating the value of the NGLs beyond their statutorily mandated wellhead value and therefore, also inflating the resulting severance tax numbers.

WVOTA also erred when it held that the fees listed on the settlement statement were expenses attributable to Petitioner, and not MarkWest, despite those expenses (a) being contractually recognized as belonging to MarkWest, (b) occurring exclusively in plants and pipelines owed by MarkWest, and (c) happening after Petitioner has relinquished title, possession, custody, and control of the raw gas to MarkWest. In reaching this decision, WVOTA failed to apply the plain meaning of the applicable state rule, namely West Virginia Code of State Rules §110-13A-4.8.1, and neglected to follow a prior WVOTA decision issued February 5, 2004 that is directly on point, claiming it was not persuasive simply because it was decided "many years" before and on stipulated facts. D.R.0035-36.

Finally, WVOTA upheld the Respondent's position that Petitioner had already deducted its "actual transportation and transmission costs" by virtue of the fees on the settlement statement and could not also receive the 15% safe harbor for transportation and transmission costs. D.R.0036-38; *see also* W.Va. Code. R. §110-13A-4.8.1. Given that its conclusion is predicated on the incorrect legal conclusions that the fees in the settlement statement were Petitioner's expenses incurred in its system, WVOTA erred in affirming denial of the safe harbor.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, Petitioner

respectfully requests that this Court grant oral argument, as it believes the decision-making process in this case would be significantly aided by oral argument. Rule 19(a)(1) of the West Virginia Rules of Appellate Procedure states that a case is suitable for Rule 19 oral argument if it involves "assignments of error in the application of settled law . . . ." Here, all of the assignments of error have to do with the application of well-settled severance tax law in West Virginia.

Furthermore, Petitioner respectfully requests entry of a decision through a signed opinion. Because Petitioner is seeking a reversal of the administrative judge's decision, this case is not appropriate for a memorandum decision, which is only permitted in limited circumstances as set forth in Rule 21(d) of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

Petitioner supports its appeal with the following legal argument, all of which leads to a single conclusion: WVOTA erred in reaching the Final Decision and Order Affirming Tax Commissioner's Refund Denial, and they must be reversed.

A. Jurisdiction

This Court has jurisdiction over this matter pursuant to West Virginia Code § 51-11-4(b)(4) as Petitioner is appealing a final judgment, order, and decision of an agency or an administrative law judge entered after June 30, 2022.

B. Standard of Review

On appeal of a decision of the WVOTA to this Court, findings of fact by the administrative law judge are accorded deference, unless the reviewing court concludes the findings to be clearly wrong and, although administrative interpretation of state tax provisions will be afforded sound discretion, questions of law are reviewed *de novo*. *Antero Res. Corp. v. Steager*, 244 W. Va. 81,

84, 851 S.E.2d 527, 530 (2020) (citing Syl. Pt. 1, *Griffith v. Conagra Brands Inc*., 229 W.Va. 190, 728 S.E.2d 74 (2012)).

Furthermore, this Court "shall reverse, vacate or modify the order or decision of the agency" if "the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions decision or order" are:

> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> W.Va. Code § 29A-5-4(g).

C. Operation and Language Of The Applicable Severance Tax Code

In order to assess the WVOTA's Final Decision, which is the basis and reasoning for its Order Affirming Tax Commissioner's Refund Denial, we must interpret the language of several statutes and legislative rules on severance tax. To do so meaningfully, we must first understand how severance tax operates. West Virginia imposes a tax upon producers for the privilege of severing natural resources within its borders. W.Va. Code § 11-13A-3a(a). For gas and oil, this tax is equal to "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* . . . ." W.Va. Code § 11-13A-3a(b) (emphasis added). The applicable legislative rules provide guidance on what "gross value" is for natural gas specifically, stating that it is the "value of the natural gas *at the well head* immediately preceding transportation and transmission." W.Va. Code R. §110-13A-2a.10.1 (emphasis added); *see also* W. Va. Code R. § 110-13A-2.7 (definition of gross value of natural

resources generally "means the market value of the natural resources product, *in the immediate vicinity, where severed* . . . .") (emphasis added). Thus, the severance tax aims to tax the value of natural gas at a specific point in time and at a specific geographic location—the wellhead. *See, e.g.,* W.Va. Code § 11-13A-2(c)(8) ("gross value" generally is "the market value of natural resource product, *in the immediate vicinity, where severed*") (emphasis added); W.Va. Code R. §110-13A-2a.10.1; W. Va. Code R. § 110-13A-2.7; *Washington Cnty. Bd. of Equalization v. Petron Dev. Co*., 109 P.3d 146, 149 (Colo. 2005) (noting that the wellhead is an industry term meaning, "the point where the mineral product is severed or removed from the ground"). In order to value natural gas at this specific time and place, West Virginia Code 11-13A-3a(b) directs us to look at the "gross proceeds derived from the sale thereof by the producer" of the natural gas. "Gross proceeds" is statutorily defined as "the value, whether in money or other property, actually proceeding from the sale or lease of tangible personal property, or from the rendering of services, without any deduction for the cost of property sold or leased or expenses of any kind." W.Va. Code. §11-13A-2(b)(5).

Calculating the gross value or "gross proceeds" of natural gas at the wellhead can be difficult because natural gas is often not sold right at the wellhead; rather, it is usually transported, processed, and then sold away from the wellhead. Such is the case here. Thus, the gross proceeds from a sale by the producer of the natural gas will not accurately represent the value *at the wellhead*, as the statutes and legislative rules require. To address this issue, the severance tax legislative rules provide four different methods by which a taxpayer may calculate the wellhead value of the natural gas that is not sold at the well-mouth. W.Va. Code. R. §110-13A-4.8.1 *et seq*. These methods permit a producer to deduct from the gross proceeds from sale certain defined

transportation and transmission costs associated with getting the natural gas from the wellhead to the point of sale, thereby doing a "netback" calculation of the value at the wellhead. *Id.*

This case implicates three aspects of calculating severance tax: (a) what figure on the settlement statements constitutes Petitioner's "gross proceeds," (b) whether fees on the settlement statements qualify as Petitioner's actual transportation and transmission costs under Regulation 4.8.1, and (c) which method of deducting transportation and transmission costs Petitioner may use. WVOTA's errors as to each issue are described in detail below.

D. WVOTA Erred In Finding Petitioner's Gross Proceeds Equaled The "Product Value" Listed On The Settlement Statement

The WVOTA erred when it concluded that "[t]he market value of the natural gas in the vicinity of the wellhead, as those terms are used under West Virginia law, is the amount reflected as the "product value" on the settlement sheets introduced in this matter." D.R.0036 at ¶8. In doing so, the WVOTA ignored the plain, unambiguous language of the applicable statutes and legislative rules in several respects.

i. It Is Undisputed That The Only Money "Actually Received" By Petitioner For The Sale Of Natural Gas Is The "Net Value" Listed On Settlement Statements

In its Final Decision, WVOTA erred by misconstruing the statutory definition of "gross proceeds." A statute that is "clear and unambiguous" will be "applied and not construed." Syl. Pt. 1, in part, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970). "If the text of a statute, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995).

Here, severance tax is five percent of the "gross value" of the natural gas. W.Va. Code § 11-13A-3a(b). Per the legislative rules, "gross value" for natural gas specifically is the "value of the natural gas at the well head immediately preceding transportation and transmission." W.Va. Code R. §110-13A-2a.10.1; *see also* W. Va. Code § 11-13A-2(c)(6) (statutory definition of gross value for natural resources generally is "the market value of the natural resource product, in the immediate vicinity where severed, determined after application of post production processing generally applied by the industry to obtain commercially marketable or usable natural resource products"); W. Va. Code R. § 110-13A-2.7 (same). Therefore, to determine gross value, we look to the "market value" of the natural gas "at the well head" before any transportation or transmission occurs. The statute further states that "gross value" or market value can and will be "shown by the gross proceeds derived from the sale thereof *by the producer* . . . ." W.Va. Code § 11-13A-3a(b) (emphasis added). The term "gross proceeds," in turn, means "the value, whether in money or other property, *actually proceeding from the sale* or lease of tangible personal property, or from the rendering of services, without any deduction for the cost of property sold or leased or expenses of any kind." W.Va. Code. §11-13A-2(b)(5) (emphasis added). This approach makes sense, as the best way to determine gross value or market value of the natural gas is to look to the amount a purchaser will pay for the natural gas on the open market, in an arms-length transaction.

Taken together, the statutory language is plain and free from ambiguity—gross value is demonstrated by gross proceeds and, to determine gross proceeds, one must look to the monetary amount a producer "actually" receives for the sale of the natural gas. This conclusion is confirmed by the common definitions of the words "gross" and "proceeds," and the severance tax legislative rules, which contain an example of how to calculate gross value for natural gas: "A is a producer of natural gas within West Virginia. The entire output of natural gas from A's well is purchased at

the well head by a public utility for $25,000. On his severance tax return, A will report $25,000 as gross income." W.Va. Code R. § 110-13A-2a.10.1. Given the amount of money actually received in the above example ($25,000) matches the gross value and gross proceeds reported for severance tax purposes ($25,000), the state rule provides further confirmation that the money *actually received in a sale* determines gross proceeds. *Id.*

In this case, Petitioner sells the natural gas at a point distant from the wellhead, but that does not change the fact that the money actually received by the Petitioner for the sale determines the gross proceeds pursuant to West Virginia's severance tax laws. Petitioner sells NGLs to Mark West, and MarkWest authors monthly settlement statements that itemize both the product values MarkWest received for selling the NGLs to third parties, and the fees deducted per the "Net Sales Price" in the NGLs Agreement. *See* D.R.0025 at ¶10-11. It is undisputed that MarkWest pays Petitioner, and Petitioner receives, only the "net value" listed on the settlement statements. D.R.0026 at ¶14. To be clear, Petitioner is not paid the higher "product value" listed on the settlement statements. *See, e.g.,* D.R.0026 at ¶13 (compare $386,174.91 product value with $341,383.23 net value in the January 31, 2015 statement); F.D.D.R.0139-41 (letter regarding confirmation of payment and tax reporting); F.D.D.R.0437-40 (testimony of payment to Petitioner and payment verification). A straightforward application of the plain language of West Virginia Code §11-13A-2(b)(5), which mandates that gross proceeds means the "value . . . in money . . . actually proceeding from the sale," leaves only one result—Petitioner's gross proceeds are the "net value" on the settlement statements because Petitioner actually receives that amount as part of the sale to MarkWest. Given that the applicable statute answers the question of which figure on the settlement statements is Petitioner's gross proceeds, there is no need for interpretation, hypothetical examples, or "further inquiry."

The WVOTA, however, resorted to impermissible interpretation and inquiry. The WVOTA cited the definition of gross proceeds as being "value . . . in money . . . actually proceeding from the sale," *and* recognized the key undisputed facts regarding money "actually" received by Petitioner in the sale, yet concluded that it was "unpersuaded" by the Petitioner's argument that the gross proceeds equal the "amount of the check for the sales." D.R.0031; D.R.0036.[5] WVOTA, in fact, erroneously suggested that Petitioner wanted to "rewrite the statutory and regulatory provisions so that the severance tax amount is simply five (5) percent of the amount of the check written." D.R.0031.[6] Ultimately, WVOTA found that the "product value" was the equivalent of gross proceeds because it better represented the "value of the natural resources." D.R.0036 at ¶9. The WVOTA's conclusion completely disregards the plain and unambiguous language found in the statutory definitions of "gross value" and "gross proceeds" cited above, which rely upon the amount of proceeds "actually" received from the sale by the producer—i.e. the amount on the check Petitioner, as the producer, receives. *See* W.Va. Code § 11-13A-3a(b) (imposition of tax); W.Va. Code. §11-13A-2(b)(5) (definition of gross proceeds generally); W.Va. Code R. §110-13A-2a.10.1 (definition of gross value for natural gas). WVOTA knew and understood, because it was undisputed, that Petitioner did not "actually" receive the "product value" amount from MarkWest for the sale of the NGLs, yet held product value was nonetheless

[5] At hearing, the Judge communicated that he was largely in agreement with Petitioner's conclusion on this point, stating: "I think if we're going to give plain and ordinary meaning to a statute [11-13A-3A] which I'm going to do. The gross proceeds – I think the legislature meant the gross proceeds derived from the sale would be the money you put in the bank." F.D.D.R.0179. However, the Final Decision found otherwise.

[6] This portion of the Final Decision is notable because it is the exact opposite of what was said at the hearing, namely that the Judge felt that it was the Respondent—not Petitioner—who was attempting to re-write the law: "I'm going to be looking at every word in 11-13A-3A, and just my gut tells me off the top of my head without having read the briefs that, to some extent, the Respondent is trying to rewrite that section to take out as shown by the gross proceeds derived from the sale." F.D.D.R.0536-37; F.D.D.R.0532-33 (Judge continues, "Gross value numerous times both Ms. Acree --- and I believe, Ms. Winter, you've alluded to it, too --- gross proceeds is the value of the gas. That's not what Section 3A says. It says gross value of the gas as shown by the gross proceeds derived from the sale. You know? I'm not going to --- I can tell you --- you know, you guys know me well enough. I'm not going to rewrite the statute."). However, the Final Decision found otherwise.

gross proceeds. D.R.0025 at ¶14; D.R.0037 at ¶8. In doing so, WVOTA failed to adhere to the recognized rules of statutory interpretation, and erred in its conclusion. The fact that it portrays Petitioner as trying to "re-write" statutes and legislative rules to be precisely what the statutes and legislative rules already say only serves to further demonstrate WVOTA's misconstruction and misinterpretation of the statute. Thus, WVOTA erred and this Court should reverse its decision.

ii. WVOTA Did Not Value Natural Gas At The Wellhead, As Required

Finally, WVOTA failed to adhere to statutory mandates that natural gas be valued at the wellhead. When computing severance tax, the "gross value" of natural gas is the "value of the natural gas *at the well head* immediately preceding transportation and transmission." W.Va. Code R. §110-13A-2a.10.1 (emphasis added).[7] The wellhead is a geographic location where the natural gas is severed from the ground. *See, e.g.,* W.Va. Code § 11-13A-2(c)(8); W. Va. Code R. § 110-13A-2.7; *Petron*, 109 P.3d at 149. As WVOTA recognized, the product that first emerges from the ground is an impure mixture of various natural resources, water, and sediment. D.R.0024 at ¶3. After processing and transport by Petitioner in its system, it is considered "raw gas" that conforms to pipelines specifications and may be delivered to MarkWest at the Plant Inlet. D.R.0024-25 at ¶¶4-5; F.D.D.R.0203 at § 7.1 (gas quality for delivery); F.D.D.R.0371. MarkWest then subjects the raw gas, in MarkWest's system, to various forms of processing to (a) process the raw gas into its constitute parts of raw make and residue gas, and (b) fractionate the raw make into individual NGLs. D.R.0025 at ¶¶5, 7, 9; F.D.D.R.0259-60; F.D.D.R.0370-72. After these processes, MarkWest sells the NGLs to third parties at prices MarkWest exclusively negotiates. D.R.0025 at ¶9; F.D.D.R.0432. The resulting settlement statements reflect the "Net Sales Price" that MarkWest pays to Petitioner for the NGLs. D.R.0025 at ¶¶10-11; F.D.D.R.0231-37. Respondent argued, and

[7] Additionally, the statute mandates that "[t]he privileges of severing and producing oil and natural gas shall not include any conversion or refining process." W. Va. Code § 11-13A-4(c); *see also* W. Va. Code § 11-13A-2(c)(9).

the WVOTA held, that the value of Petitioner's natural gas is the "product value" rather than the "Net Sales Price" which impermissibly values the natural gas after significant processing, far from the wellhead, and based on a value the purchaser, *i.e.*, MarkWest, received from a secondary sale. D.R.0037 at ¶8.

Though the WVOTA complained in its Final Decision that it did not know what "product value" was, the contracts—which were included as exhibits to the evidentiary hearing—contain the answer. D.R.0033-34. The NGL Agreement, in particular, explains how to calculate compensation for Petitioner's sale of natural gas to MarkWest and, in so doing, explains what the terms "product value," "fees," and "net value" mean. F.D.D.R.00162-63 at ¶ 5(C)(i). In relevant part, the NGL Agreement states:

> As used herein, the "Net Sales Price" per gallon shall be determined for each individual Fractionated Product and shall be based on the *weighted average sales price per gallon received by MarkWest for each individual Fractionated Product sold during the calendar month at the Fractionation Plant. In determining the average sales price, MarkWest shall include and deduct all associated third party costs* including all third party transportation, tank car rentals, taxes (excluding income taxes), offsite storage, and similar marketing costs and expenses incurred by MarkWest to determine a net price freight on board (FOB) the Fractionation Plant. *MarkWest will identify with reasonable detail all of the types of costs incurred*, and the aggregate amount thereof, to determine *the Net Sales Price on Producer's statement each month* . . .
>
> . . . *MarkWest shall pay to Producer*, in accordance with Article 5 of the General Terms and Conditions, *an amount equal to 100% of the Net Sales Price* for each individual Fractionated Product . . .
>
> F.D.D.R.0162-3 at ¶ 5(C)(i)-(ii) (emphasis added).

Given this explanation of compensation, the higher "product value" is the "weighted average sales price per gallon received by MarkWest" for each of the finished NGL products "sold

during the calendar month" by MarkWest to third parties.[8] This conforms with the testimony Petitioner offered at the evidentiary hearing, namely that the product value is what MarkWest receives for the resale of NGLs. *See, e.g.,* F.D.D.R.0375. MarkWest lists out the "costs and expenses incurred by MarkWest" as "fees" in the settlement statements, and subtracts those "fees" from the "product value" to determine the "net value" or "net sales price" which is the actual amount MarkWest pays to Petitioner. D.R.0025-26 at ¶12.

In light of these explanations, the value of Petitioner's natural gas "at the wellhead" cannot be the "product value" on the settlement sheets. The "product value" is the sale price MarkWest receives for a wholly different product (individual NGLs) than the impure mix of various natural resources, water, and sediment that Petitioner originally severs from the ground at the wellhead. *Compare* D.R.0024 at ¶3 *with* D.R.0025 at ¶¶ 7 & 9; F.D.D.R.0162-63 at ¶ 5(C)(i); F.D.D.R.0375. The "product value" therefore captures the added value that MarkWest's processing and fractionation provide to the raw gas purchased from the Petitioner by MarkWest, as NGLs are far more valuable than impure natural gas. WVOTA has recognized this fact before, notably in a February 5, 2004 decision in Case No. 03-106SV ("2004 Decision"), in which an administrative law judge stated:

> Simply put, the well-mouth value of the natural gas severed by the Petitioners—that amount is the measure of the severance tax—does not include qualitative and place-utility values *added* by the various processing and transportation services employed by the purchasers of such gas. Rather, it is precisely because of those costs that just-

[8] WVOTA considered Petitioner's testimony that the "product value" was the value at which MarkWest sold the final NGLs and found it "ridiculous" and failing the "straight face test" because, in WVOTA's estimation, that leaves MarkWest without a "profit." D.R.0032-33. WVOTA even created a hypothetical scenario of payment allegedly showing how MarkWest would make no money under Petitioner's definition of "product value." *Id*. However, the contractual language clearly defines "product value" as MarkWest's weighted average sale price for NGLs. F.D.D.R.00162-3 at ¶ 5(C)(i)-(ii). WVOTA's reliance upon a "no profit" hypothetical assumes—with no evidentiary basis—that the fees in the settlement statements are MarkWest's *actual expenditures or costs that are simply being reimbursed*. Petitioner posits that the fees MarkWest charges in the contracts and includes on the settlement statements include profit margins, particularly given the contractual language charges fees at a flat rate per gallon and increases according to national oil and gas price indices.

> extracted, unprocessed natural gas is worth *less* at the well-mouth than at any point closer to the final consumer.
>
> D.R.0112 (emphasis in original).

Certainly, given the amount of processing and fractionation that MarkWest subjects the raw gas to in order to create the individual NGLs that it sells (*see*, *e.g.*, D.R.0025 at ¶¶7 & 9; F.D.D.R.0259-60; F.D.D.R.0370-72), the "product value" is far removed from the wellhead temporally, geographically, and in the amount of processing it has undergone. Accordingly, WVOTA failed to adhere to West Virginia Code § 11-13A-2(c)(8) or West Virginia Code of State Rules §110-13A-2a.10.1 when it held that Petitioner's gross proceeds of natural gas equal the "product value" on the settlement statements, as it impermissibly moves the valuation from the wellhead, as required by statute, until much further downstream. Thus, the "net value" on the settlement statement is the appropriate value of Petitioner's natural gas not only because it more accurately reflects the value of the raw gas "at the wellhead" before MarkWest purchases it and begins processing, but because "net value" is the amount of money Petitioner, as the producer, actually receives from MarkWest, the purchaser. *See* Section D(i) *supra*. This Court should find WVOTA erred and reverse its decision on this point.

iii. WVOTA's Ruling Forces Petitioner To Use A Different Accounting Method For State and Federal Taxes In Violation Of Statute

WVOTA's decision also runs afoul of the accounting methodology statute applicable to severance taxes. West Virginia Code § 11-13A-7 deals with the accounting methods related to severance tax and 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). The state Legislature mandates such accounting consistency in the tax code to "assist taxpayers in maintaining consistency in their record keeping and, in so doing, prevent

the significant burden on the taxpayer that having to keep multiple sets of books and to apply multiple accounting methods would impose." *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) (speaking of identical accounting language in healthcare tax code) [hereinafter *CAMC*]. During the evidentiary hearing, the WVOTA *sua sponte* raised the issue of accounting methods, and West Virginia Code § 11-13A-7 specifically, claiming that if the amount Petitioner reported for state severance tax purposes (i.e. "net value" on settlement statements less permissible transportation and transmission cost deductions discussed Section E *infra*) matched what Petitioner reported to the IRS for federal income tax purposes, it would "end the debate." F.D.D.R.0351. Counsel for the Respondent agreed that if Petitioner's state and federal tax reporting were consistent, it would "help us a great deal in ending the debate" and Respondent would be "much more inclined to concur" with Petitioner. F.D.D.R.0351; F.D.D.R.0524.

In response, Petitioner submitted a letter to the Respondent and WVOTA dated June 23, 2021, in which employees Randy Aram (responsible for preparation and filing of Petitioner's West Virginia state severance tax returns) and Swee Pang (responsible for preparation and filing of Petitioner's consolidated federal income tax returns) explain that Petitioner files *consolidated* federal income tax returns, in which income figures from multiple entities and enterprises nationwide are consolidated. F.D.D.R.0139-41. As such, Petitioner's federal income tax returns would not contain details of these particular transactions and, thus, review of the returns would not be instructive. Aram and Pang were able, however, to jointly confirm that Petitioner uses the same "gross proceeds" figure (being net value, *e.g.*, the "net sales price" as reflected in the MarkWest contract, or "funds received" that are "ultimately paid to [Petitioner]") for purposes of both state severance tax and federal income tax reporting, and that their accounting methods are audited by

independent auditors annually. *Id.* Thus, Petitioner has put forth sufficient evidence[9] that its accounting methods for severance taxes and federal income tax are the same, in compliance with West Virginia Code § 11-13A-7.

WVOTA's holding, however, wholly ignores the issue of accounting methods despite raising it *sua sponte* during the evidentiary hearing. In fact, the Final Decision does not mention West Virginia Code § 11-13A-7, federal income tax filings, or the June 23, 2021 letter at all. D.R.0023-38. Instead, the Final Decision would require Petitioner to change its accounting method and report "product value" as gross proceeds for state severance tax purposes, yet continue to report "net sales price" as gross proceeds for federal tax purposes. Thus, WVOTA diverges Petitioner's state and federal accounting methods in violation of West Virginia Code § 11-13A-7.

The Supreme Court of Appeals of West Virginia considered identical language regarding accounting methods in the healthcare tax statute, which states: "A taxpayer's method of accounting under this article shall be the same as taxpayer's method of accounting for federal income tax purposes." W. Va. Code § 11-27-22. The Supreme Court of Appeals reversed the circuit court's decision (which upheld the Respondent's position in that case) because of the "failure of both the ALJ and the circuit court to properly apply" this accounting provision. *CAMC*, 224 W. Va. at 596, 687 S.E.2d at 379. The Supreme Court reviewed the language of West Virginia Code §11-27-22 and found no ambiguity, concluding that a plain reading "indicates that it clearly and unambiguously provides, in relevant part, that "[a] taxpayer's method of accounting under this article *shall* be the same as taxpayer's method of accounting for federal income tax purposes." *CAMC*, 224 W. Va. at 597-98, 687 S.E.2d at 380-81 (emphasis in original). The Supreme Court of Appeals clarified that the word "shall" is "afforded a mandatory connotation" and that nothing

[9] Petitioner notes that the 03-106SV Administrative Decision, discussed in Section E(iii) *infra*, an affidavit from the taxpayer's accountant, and not its tax returns, was also used for this same purpose. D.R.110.

else in the healthcare tax code "superceded, changed, or otherwise altered a taxpayer's accounting method." *Id*. (internal citations omitted).

Ultimately, the Supreme Court of Appeals found that "[u]ndisputedly, CAMC did not report the "accounting entries" reflecting the costs associated with the health care it provided to its covered employees through its self insurance program as "gross receipts" for federal income tax purposes," and concluded that the administrative law judge and circuit court required CAMC to include those same accounting entries in gross receipts for the health care provider tax. *CAMC*, 224 W. Va. at 597-98, 687 S.E.2d at 380-81. In doing so, the administrative law judge "assessed additional health care provider taxes" and "mandate[ed] CAMC to deviate from the accounting method it uses for federal tax purposes." *Id.* This deviation was "erroneous and violated the provisions of West Virginia Code § 11–27–22(c)." *Id.*

The *CAMC* case provides substantial persuasive authority regarding the language and impact of West Virginia Code § 11-13A-7. Here, as in *CAMC*, it is undisputed that the taxpayer had certain accounting methods for reporting gross proceeds on federal tax filings, namely the "net sales price" on settlement statements for Petitioner, and the exclusion of "administrative fees" for self-insurance for CAMC. F.D.D.R.0139-41; *CAMC*, 224 W. Va. at 597, 687 S.E.2d at 380. In both instances, the ALJ at WVOTA ruled that the taxpayer had to deviate from their accounting method for federal tax purposes to increase their gross proceeds and tax liability—in this case, the WVOTA orders Petitioner to use the higher "product value" as gross proceeds, while in *CAMC* it ruled for CAMC to add "administrative fees" to gross proceeds. D.R.0037 at ¶8; *CAMC*, 224 W. Va. at 598, 687 S.E.2d at 381. Given that the language of West Virginia Code § 11–27–22(c) and West Virginia Code § 11-13A-7 is virtually identical, the Supreme Court of Appeals' conclusions that the latter is unambiguous and mandates consistency in state and federal tax filings should

apply equally to the former. *Id.* Accordingly, this case should reach the same conclusion as *CAMC*—a finding that WVOTA erred in forcing a taxpayer to deviate its accounting method for state severance tax filings from its accounting method for federal tax filings in violation of West Virginia Code § 11-13A-7. Further, as discussed *infra* Section D(iii), this identical analysis was applied previously by WVOTA in its February 5, 2004 decision in Case No. 03-106SV. Accordingly, the Court should therefore find WVOTA erred and reverse its decision.

E. WVOTA Erred In Finding That Certain Expenses Were Attributable To, And Deducted By, Petitioner

WVOTA erred on a second, intertwined issue of what transportation and transmission expenses are attributable to, and deducted by, Petitioner. As explained above, the legislative rules provide four methods by which a taxpayer may compute gross proceeds at the wellhead when the natural gas is not actually sold at the wellhead. This case involves two such methods: deducting the value of actual costs of transportation and transmission "through the system of the producer from the well-mouth point of severance and production to the point of sale" under West Virginia Code of State Rules §110-13A-4.8.1 (hereinafter "Regulation 4.8.1"), or taking a safe harbor equal to 15% of the gross proceeds of the natural gas under West Virginia Code of State Rules §110-13A-4.8.4 (hereinafter "Regulation 4.8.4").

Petitioner originally requested the 15% safe harbor for the 2018 and 2019 tax years at issue under Regulation 4.8.4. *See* D.R.0093 (denial letter for tax year 2019); D.R.0130 (denial letter for tax year 2018). Respondent denied this request, claiming that Petitioner had already deducted its actual costs of transportation and transmission expenses under Regulation 4.8.1, in the form of the "fees" on the settlement statement. D.R.0093; D.R.0130. In so doing, Respondent asserted the fees on the settlement statement were expenses attributable to Petitioner, and not MarkWest. D.R.0093;

D.R.0130. WVOTA upheld Respondent's decision, finding "the fees contractually charged to the Petitioner [in settlement statements] are "expenses" of the Petitioner." D.R.0037 at ¶ 9.[10]

Respondent's argument, and the WVOTA's affirmation of it, is in error. The fees at issue do not qualify for deduction as Petitioner's actual transportation and transmission costs under the plain language of Regulation 4.8.1 because (a) the fees are not incurred in Petitioner's system, (b) the fees are incurred after the point of sale, and (c) it is contrary to substantially persuasive authority from a prior 2004 WVOTA decision.

i. <u>The Fees Were Not Incurred In The Producer's System, As Required</u>

Regulation 4.8.1 provides one method whereby a taxpayer deducts the value of the *actual* costs for transportation and transmission. It states, in relevant part:

> [T]here shall be allowed a deduction in the amount of the costs of transportation or transmission of such gas *through the system of the producer from the well-mouth point of severance and production to the point of sale.* The deduction shall be limited to actual costs of transportation or transmission incurred without reference to items unrelated to transportation or transmission such as general administration, overhead, or return of investment.
>
> W.Va. Code R. §110-13A-4.8.1 (emphasis added).

Here, Respondent argues and WVOTA affirmed that the fees listed by MarkWest on the settlement statements fall within this regulatory definition and constitute the Petitioner's actual costs for transportation and transmission, and that Petitioner has already deducted the fees from gross proceeds and cannot further deduct the 15% safe harbor.[11] D.R.0037 at ¶9. Petitioner strongly

[10] This is another instance in which the Judge's statements at hearing conflicted with the later Final Decision. As the Judge stated: "I'm no accountant, but I think I know enough about accounting to know that the Mark West proceed statements, that is not an expense of the petitioners to call those amount[s] in the proceed statement an expense." F.D.D.R.0525. *Id.* The Final Decision, however, found differently.

[11] At the evidentiary hearing, Respondent's witness Ms. Acree testified that Respondent denied deduction of the "administration fee" and "marketing fee" on the settlement statement as an "overhead" or "administrative cost." D.R.0093 (refund denial letter tax year 2019); D.R.0130 (refund denial letter tax year 2018); F.D.D.R.0461; F.D.D.R.0488-89. Respondent's position appears to be that all other fees listed on the settlement statement are the actual expenses of Petitioner and were deducted.

disagrees. To resolve the dispute, classic statutory interpretation is required. When doing so, the "clear and unambiguous" language of a statute is applied using its "plain" meaning, without "resort to interpretation." Syl. Pt. 1, *Elder*, 152 W. Va. at 571, 165 S.E.2d at 108; Syl. Pt. 2, *Crockett*, 153 W. Va. at 714, 172 S.E.2d at 384. When that plain language answers the question before the court, "the language must prevail and further inquiry is foreclosed." *Appalachian Power*, 195 W.Va. at 587, 466 S.E.2d at 438.

Here, the plain language of Regulation 4.8.1 imposes several prerequisites before a transportation or transmission cost can be deducted from gross proceeds: (1) the costs must arise as natural gas moves "through the system of the producer;" (2) the costs must be incurred between "the well-mouth point of severance" and "the point of sale;" and (3) the deduction shall be limited to actual costs of transportation or transmission incurred without reference to items unrelated to transportation or transmission such as general administration, overhead, or return of investment. W. Va. Code R. §110-13A-4.8.1 There is no ambiguity in this language, as they specify recognizable geographic (producer's system) and temporal (before sale) limits, and clarify that only true transportation and transmission costs may be deducted. The fees on MarkWest's settlement statements do not satisfy the first two prerequisites, meaning a plain reading and application of this state rule precludes a finding that the fees are Petitioner's actual transportation and transmission costs attributable to, and deducted by, Petitioner under Regulation 4.8.1.

First, the fees do not arise from gas moving through the producer's system. These fees at issue are incurred by MarkWest as it transports and processes (in its own system) the purchased raw gas into raw make and residue gas, and then into NGLs, and then transports the NGLs (in its system or systems of third parties) to the point of sale to MarkWest's customers. As the NGL Agreement acknowledges, these "fees and expenses" on the settlement statement are *"*incurred by

MarkWest." F.D.D.R.0167 at ¶ 5(C)(i). It further clarifies that the fees and expenses are to be paid "in connection with the receipt and exchange of Producer's Raw Make for Fractionated Products" that MarkWest pledges to do. F.D.D.R.0160 at ¶1(B) & F.D.D.R.0162-4 at §5(A). Taken in conjunction, these contractual provisions clarify that the fees and expenses listed on the settlement statement are *only* incurred *by* MarkWest in connection with *MarkWest's* processing, fractionation and transportation to its customers.

More importantly, these fees are incurred as natural gas moves through the processing and fractionation plants owned and operated exclusively by MarkWest and transportation systems owned by third parties, a fact acknowledged by the Respondent and WVOTA. D.R.0025 at ¶¶ 5, 7, & 9; F.D.D.R.0381-83. Undisputed schematics, contracts, and testimony provided at the evidentiary hearing demonstrate precisely what facilities were owned by Petitioner (being to the left of the "red line") and what facilities were owned by MarkWest (being to the right of the "red line") which include the processing and fractionation plants. F.D.D.R.00259-60; F.D.D.R.0370-72; F.D.D.R.0381-83. For these reasons, the fees listed in the settlement statements do not arise from natural gas moving through "the system of the producer," as required by Regulation 4.8.1. These fees instead arise from natural gas moving through systems and facilities undisputedly owned by MarkWest, the purchaser,[12] during its own processing and fractionation, and from MarkWest's processing facilities to MarkWest's point of sale to third parties. Thus, under the clear

[12] Clearly, MarkWest is not *the* producer at issue in this case, as it is Petitioner's severance taxes that are at issue and Petitioner and MarkWest are distinct and unrelated entities. To the extent Respondent argues otherwise, MarkWest is not *a* producer at all, under the statutory definition. A producer is defined as "every person who engages in the business of severing . . . for his sale, profit or commercial use any natural resource products from his own land or from the land of another . . . ." W. Va. Code R. § 110-13A-2.13. The legislative rules continue that a "producer must have a direct interest in the minerals in place and look solely to mineral sales proceeds for his income from the production." *Id.* Here, it is undisputed that the natural gas at issue was originally severed from the earth by Petitioner, and MarkWest only came to own and possess the raw gas afterwards through the Gas Processing Agreement and NGL Agreement. D.R.0025 at ¶ 5. MarkWest therefore has no direct interest in the minerals in place and did not sever or extract those natural resources. Accordingly, MarkWest does not qualify as a producer under the applicable definition.

and unambiguous prerequisite language of Regulation 4.8.1, the fees on the settlement statements cannot be transportation and transmission costs of Petitioner subject to deduction. WVTOA, however, claimed that it was not "determinative that the fees being charged to the Petitioner here are in fact for activities that are occurring in the purchaser's processing plants," thereby wholly disregarding the "through the system of the producer" language in Regulation 4.8.1. D.R.0031. WVOTA therefore erred in concluding that "the fees contractually charged to the Petitioner [in settlement statements] are "expenses" of the Petitioner," and this Court should reverse its decision.

ii. <u>The Fees Did Not Occur Before Sale, As Required</u>

The fees at issue also did not occur during the permissible time limit. Regulation 4.8.1 states that deductible transportation and transmission costs must be incurred after "the well-mouth point of severance" and before "the point of sale." W. Va. Code R. §110-13A-4.8.1. In the severance tax code, a "sale" is defined as "any transfer of the ownership or title to property, whether for money or in exchange for other property or services, or any combination thereof. . . ." W.Va. Code § 11-13A-2(b)(10).

Here, the contracts determine how title for the raw gas transfers from Petitioner to MarkWest and, accordingly, when a sale occurs. The Gas Processing Agreement states that title to the "Plant Products and Condensate" "shall be deemed to have been transferred to MarkWest at the receipt point therefore under the [NGL Agreement]," with title for the further processed "Fractionated Products" passing as governed by the NGL Agreement. F.D.D.R.0211 at ¶14.2. In turn, Section 1(B) of the NGL Agreement states that "Producer agrees to deliver, or cause to be delivered, the Producer's Raw Make to MarkWest at the Receipt Point as further described below in Section 4, and MarkWest agrees to receive and take title to the Producer's Raw Make committed to MarkWest in Section 4 at the Receipt Point." F.D.D.R.0160 at ¶1(B). Section 4(B) of the NGL

Agreement further states that "Producer hereby commits and agrees to cause to be delivered to MarkWest at the Receipt Point, and MarkWest shall receive . . . and take title to, all of Producer's Raw Make." F.D.D.R.0161 at ¶4(B). Finally, under the contracts, the receipt point is the Plant Inlet near MarkWest's processing plant, where Petitioner's raw gas first enters MarkWest's system. F.D.D.R.0196 at ¶ 5.1. Thus, title to NGLs[13] transfers from Petitioner to MarkWest when the raw gas first enters MarkWest's system at the Plant Inlet.

At the evidentiary hearing, Respondent attempted to create doubt about when title transferred and, resultingly, when a sale occurred by pointing to Section 7.4 of the General Terms and Conditions portion of the NGL Agreement. That section states in full:

> Title to all Raw Make and the Fractionated Products derived therefrom, shall transfer to MarkWest at the Receipt Point. Title to Fractionated Products delivered at the Delivery Point for Producer's account shall transfer to Producer at Delivery Point. Title to any Fractionated Products purchased by MarkWest under this Agreement shall transfer from Producer to MarkWest at the Delivery Point.
>
> F.D.D.R.0177 at ¶7.4.

Respondent insinuated at the evidentiary hearing, and undoubtedly will argue on appeal, that under this language, title to NGLs does not pass until the "Fractionated Products" arrive at the

[13] To be absolutely clear, Petitioner retains title to the residue gas (a byproduct of processing raw gas into raw make) after the raw gas is delivered to MarkWest's plant, and that residue gas is returned to Petitioner, who then sells it to third parties. F.D.D.R.0395; F.D.D.R.0429. The taxation of residue gas is *not* at issue in this case. F.D.D.R.0429 (confirming proceeds of sale of residue gas to third parties is already included in tax reporting, and counsel clarifying scope of dispute is limited to NGLs). Thus, Petitioner retaining title to residue gas is ***irrelevant*** and, to the extent relied upon by Respondent or WVOTA, a red herring. Though the WVOTA considered the different title treatment of NGLs and residue gas to be "confusing" in its findings of fact (D.R.0025 at ¶8), it is simple: natural gas or raw gas is a composite of several different substances. D.R.0025 at ¶¶5, 7. One of these substances, residue gas, has its title remain with Petitioner. F.D.D.R.0395. The remaining substances and NGLs have title pass to MarkWest upon delivery at the Plant Inlet, per the contractual language cited in this Section E(ii). As only the taxation of NGLs is at issue, only the title of NGLs is relevant. Petitioner therefore argues that, to the extent the Final Decision relied upon analysis of the residual gas (whether its title or fees charged), it is in error as (a) questions regarding tax treatment of residual gas was not before it, and (b) WVOTA failed to differentiate between residual gas and NGLs, despite making a finding of fact that they were two separate products. D.R.0025 at ¶ 7.

"Delivery Point," which is further down the processing line than the receipt point. The Respondent's fixation on this single line, however, misinterprets the take in-kind option available to Petitioner under the contracts, and conveniently ignores the other contractual provisions regarding title.

Consistently, the contracts state that title passes to MarkWest at the Plant Inlet, which is the designated receipt point and the place where Petitioner's system first interconnects with MarkWest's system. F.D.D.R.0160 at ¶1(B); F.D.D.R.0161 at ¶4(B); F.D.D.R.0189 (definition of Plant Inlet); F.D.D.R.0196 at ¶ 5.1; F.D.D.R.0211 at ¶14.2. Even Section 7.4 of the General Terms and Conditions echoes this, stating "[t]itle to all Raw Make and the Fractionated Products derived therefrom, shall transfer to MarkWest at the Receipt Point." F.D.D.R.0177 at ¶7.4. The following two sentences about "Fractionated Products" (i.e. NGLs) reflects that the NGL Agreement permits Petitioner, if it so chooses, to take-in kind—meaning, Petitioner may choose to take back the processed NGLs in-kind instead of receiving money from MarkWest for them. To be clear, Petitioner did not receive any in-kind NGLs in the two tax years at issue. F.D.D.R.0380. If Petitioner had taken in-kind NGLs, then title to those in-kind NGLs would have transferred from MarkWest back to Producer per the second sentence of Section 7.4 of the General Terms and Conditions, which reads: "[t]itle to Fractionated Products delivered at the Delivery Point for Producer's account shall transfer to Producer at Delivery Point." F.D.D.R.0177 at ¶7.4. Clearly, MarkWest cannot transfer title of Fractionated Products a/k/a NGLs to Petitioner if it does not already hold that title. By the other side of the coin, Producer cannot have title that it already holds transferred over to it. Consequently, Section 7.4 further confirms that MarkWest holds title to the NGLs after the Plant Inlet, and that title of the NGLs reverts to Petitioner *only if* Petitioner chooses to take NGLs in-kind, which it undisputedly never did.

The final sentence of Section 7.4, which Respondent seized upon at hearing, is merely a confirmation that when Petitioner does not take in-kind (as is the case here) title remains with MarkWest. The third sentence of Section 7.4 does not nullify the two sentences preceding it, which state that title of Raw Make and Fractionated Products/NGLs lies with MarkWest absent Petitioner electing to take in-kind, and it certainly does not invalidate the many other contractual terms stating that MarkWest agrees to take title to the Raw Make (of which NGLs are constituent parts) at the receipt point and Plant Inlet. F.D.D.R.0160 at ¶1(B); F.D.D.R.0161 at ¶4(B); F.D.D.R.0189 (definition of Plant Inlet); F.D.D.R.0196 at ¶ 5.1; F.D.D.R.0211 at ¶14.2.

The fact that title to NGLs passes to MarkWest at the Plant Inlet is confirmed by contractual language and testimony that MarkWest has the exclusive possession, custody, and control of the raw gas (including the constituent NGLs) after it enters MarkWest's pipeline system. F.D.D.R.0177 at ¶7.1 ("MarkWest and any of its designees shall be in custody, control and possession of the Raw Make hereunder after Raw Make is delivered at the Receipt Point and shall be in custody, control and possession of the Fractionated Products until they are sold to a third party"); F.D.D.R.0211 at ¶13.2; F.D.D.R.0348; F.D.D.R.0431. This exclusive possession, custody, and control is the hallmark of ownership. Accordingly, under the contracts, title in raw make and its inherent NGLs passes from Petitioner to MarkWest at the Plant Inlet, which is the first time it encounters MarkWest's system.

With this in mind, we turn to West Virginia Code § 11-13A-2(b)(10), which states that a sale occurs when title is transferred. Consequently, a sale of NGLs occurs when Petitioner's raw gas first enters MarkWest's system at the Plant Inlet, because this is when title transfers under the contracts. F.D.D.R.0177 at ¶7.4; F.D.D.R.0160 at ¶1(B); F.D.D.R.0161 at ¶4(B); F.D.D.R.0189 (definition of Plant Inlet); F.D.D.R.0196 at ¶ 5.1; F.D.D.R.0211 at ¶14.2. Under Regulation 4.8.1,

only transportation and transmission costs that occur *after* severance and *before* a sale occurs (i.e. when the raw gas enters MarkWest's system at the Plant Inlet and title passes) may be deducted. W. Va. Code R. §110-13A-4.8.1. Here, the evidence unequivocally demonstrates that the fees on the settlement statements are incurred during MarkWest's processing and fractionation at its facilities, which occurs *after* Petitioner has delivered the natural gas to MarkWest's system at the Plant Inlet, where the two systems first connect. *See, e.g.,* D.R.0025 at ¶¶ 5, 7, & 9; F.D.D.R.0160 at¶1(B); F.D.D.R.0162-64 at ¶5(A); F.D.D.R.0166-67 at ¶ 5(C)(i); F.D.D.R.0189 (definition of Plant Inlet); F.D.D.R.0259-60; F.D.D.R.0370-72. This is also common sense, as MarkWest cannot process (or incur fees related to processing) natural gas that it has not yet received. As the fees are incurred *after* Petitioner delivers natural gas to MarkWest at the Plant Inlet, they occur *after the sale* and therefore cannot qualify as Petitioner's actual costs under Regulation 4.8.1.

Taken together, the fees listed in settlement statements cannot be attributed to or deducted by Petitioner as actual transportation and transmission costs under the plain and unambiguous language of Regulation 4.8.1 because the fees occur *after* sale of the NGLs to MarkWest, which occurs at the Plant Inlet when title passes. Accordingly, WVTOA erred in concluding that "the fees contractually charged to the Petitioner [in settlement statements] are "expenses" of the Petitioner," and this Court should reverse its decision.

iii. WVOTA Improperly Disregarded A Persuasive And Factually Analogous Tax Decision From 2004

Petitioner provided WVOTA with persuasive authority supporting its position in the form of a prior WVOTA decision issued February 5, 2004 (Case No. 03-106SV, or "2004 Decision").[14]

[14] To be clear, "while one ALJ may look to another's decisions for guidance," administrative decisions are not binding on other administrative law judges. *Putnam Cnty. Bd. of Educ. v. Andrews*, 198 W. Va. 403, 407, 481 S.E.2d 498, 502 (1996). Thus, the 2004 Decision is not binding precedent. However, "[w]hen an administrative agency reverses course from its precedents, it must give reasonable notice and supporting rationale before it changes its standards, or its

The 2004 Decision concerned proper assessment of severance taxes upon 10 different producers (some of whom were joint ventures), who collectively argued the Respondent improperly "added back" into the producer's gross proceeds certain expenses of the natural gas purchaser, thereby increasing the producers' tax liability. The facts of the 2004 Decision are substantially similar to those here. For example, in both cases:

- The taxpayers' system delivers natural gas into the purchaser's pipelines. D.R.0025 at ¶5; D.R.0103 at ¶5 (2004 Decision); F.D.D.R.0160 at ¶1(B); F.D.D.R.0196 at ¶ 5.1; F.D.D.R.0211 at ¶ 13.2; F.D.D.R.0371-73 (describing where Petitioner delivers raw gas to MarkWest).

- The point of sale, "being the point at which the petitioner relinquishes title of the natural gas to the purchaser," is where the taxpayers' system first intersects with purchaser's system. Immediately before the intersection, title is held by the taxpayer and immediately after the intersection, title is held by the purchaser. D.R.0025 at ¶6; D.R.0103 at ¶¶7-8 (2004 Decision); F.D.D.R.0160 at ¶1(B); F.D.D.R.0161 at ¶4(B); F.D.D.R.0189 (definition of Plant Inlet); F.D.D.R.0196 at ¶ 5.1; F.D.D.R.0211 at ¶14.2; F.D.D.R. 0177 at ¶7.4.

- The natural gas purchase contracts were entered as a result of negotiations between the taxpayers, as producers/sellers, and the purchaser. D.R.0104 at ¶9 (2004 Decision); F.D.D.R.0160; D.R.0185.

- Based upon the terms of the applicable contracts, the ultimate price paid under the natural gas purchase contracts is a function of "purchaser adjustments representing many of the purchaser's costs associated with moving the natural gas through the pipelines to the ultimate end consumer." D.R.0025-26 at ¶¶12 & 14; D.R.0104 at ¶13(2004 Decision); F.D.D.R.0166-67 at § 5(C)(i)-(ii).

- "In the context of the natural gas purchase contracts, which reflect the practice of the oil and natural gas industry generally, the purchaser's adjustments consist of transportation fees, extraction fees, fuel retention fees, marketing fees, processing fees, gathering fees, and metering fees." D.R.0025-26 at ¶¶12 & 14; D.R.0104-105 at ¶14 (2004 Decision); F.D.D.R.0166-67 at § 5(C)(i)-(ii); F.D.D.R.0030-31 at ¶12; *see, e.g.,* F.D.D.R. 0231-37 (settlement statement).

---

actions appear arbitrary and capricious." *C & P Tel. Co. of W.Va. v. Pub. Serv. Comm'n of W.Va.,* 171 W. Va. 708, 715, 301 S.E.2d 798, 804 (1983).

- The transportation fees, extraction fees, fuel retention fees, marketing fees, processing fees, gathering fees, and metering fees are all incurred by the purchaser "after the point of sale." D.R.0105-106 at ¶¶ 15, 18-24 (2004 Decision); F.D.D.R.0030-31; *see* Section E(ii) *supra*.

- "As negotiated and set forth in the natural gas purchase contracts, the purchaser's adjustments [i.e. fees] are deducted to yield the total payment due [to] the producer, a practice that is accepted and prevalent in the oil and natural gas industry." D.R.0025-26 at ¶¶12 & 14; D.R.0247 at ¶ 29 (2004 Decision); F.D.D.R.0166-67 at § 5(C)(i)-(ii); F.D.D.R.0139-41 (letter describing tax accounting methodology); F.D.D.R.0437-95 (testimony on values on settlement statement, payments from MarkWest to Petitioner, verification of payments, and standard industry practice regarding contractual fees); *see, e.g.,* F.D.D.R. 0231-37 (settlement statements).

- "Each month, the [taxpayers] receive a "payment report" from each respective purchaser which reflects the purchaser's adjustments as provided in the natural gas purchase contracts." D.R.0025-26 at ¶¶10-12; D.R.0107 at ¶30 (2004 Decision); *see, e.g.,* F.D.D.R.0166-7 at § 5(C)(i) to (ii); F.D.D.R.0437-40; *see, e.g.,* D.R.0118 (settlement statement); D.R.0156 (same).

- Testimony of the purchaser established that on the "payment report," the "gross payment" represented the value of the gas the purchaser "resold to ultimate customers and did not represent the price the [taxpayers] were entitled to receive from [purchaser] for the gas." D.R.0026 at ¶ 14; D.R.0112 (2004 Decision); F.D.D.R.0437-40 (testimony regarding actual payments to Petitioner and payment verification process).

Given the extreme factual similarities between the two cases, the 2004 Decision is considerably persuasive here.[15] In that case, the WVOTA administrative law judge applied these shared facts to the same statutory definitions of "gross value" and "gross proceeds" cited in the August 18, 2022 Final Decision and this brief, and concluded that "the purchaser's adjustments occur after the point of sale and do not represent the Petitioner's production costs" D.R.0105 at ¶15; *see also* W.Va. Code § 11-13A-3a; W.Va. Code § 11-13A-3a(c)(6)(G); W.Va. Code § 11-13A-2(b)(5); W.Va. Code § 11-13A-2(c)(6); W.Va. Code R. § 110-13A-4.8. Accordingly, the

[15] The 2004 Decision's persuasiveness is heightened by the fact that it was not appealed by the State and a notice of nonacquiescence was not filed by the Respondent pursuant to W.Va. Code §11-10-10A. "Nonacquiescence" would mean that the Respondent "does not accept one or more of the adverse conclusions reached by the office of tax appeals or the circuit court even though no appeal is taken from the decision. The decision is binding on the commissioner in the case not appealed but is not binding in any other case." W.Va. Code §11-10-10A(C).

administrative law judge "determined that the severance tax assessments do incorrectly add back sums expensed by the purchasers of [p]etitioner's gas, thereby inflating the gross proceeds of sale over and above that actually realized by the [p]etitioners." D.R.0113 (emphasis in original). The administrative law judge's reasoning in the 2004 Decision is very similar to Petitioner's reasoning here, notably:

- Costs incurred after sale are attributably solely to purchaser, as the title holder of the natural gas, *see* D.R.0105 at ¶15 & Section E(ii) *supra*;
- The taxpayer's federal and state methods of accounting did not include the purchaser's fees/costs, *see* D.R.0110-11 & Section D(iii) *supra*;
- The Respondent's valuation represented purchaser's resale amount after valuable processing, *see* D.R.00112-13 & Section D (ii) *supra*;
- Respondent's valuation was not at the well-head "immediately preceding transportation and transmission," *see* D.R.0112-13 & Section D(ii) *supra*; and
- Respondent's valuation did not reflect money actually proceeding from the sale or considered "gross income" under federal income tax, *see* D.R.0110 & Section D(i) *supra*.

Despite the similar legal arguments, the administrative law judge in this matter declined to analyze the 2004 Decision, much less rely upon it, because "of its age" and the fact that it was decided on stipulated facts instead of an evidentiary hearing with cross-examination. D.R.0035-36. Neither is a viable basis to wholly dismiss the 2004 Decision.

As to the first, there is no reason to disregard a well-reasoned decision simply due to its age, particularly as (a) the language of the key severance tax statutes and legislative rules was the same in 2004 and 2022, and (b) the Final Decision quoted legal standards from an almost equally "old" case from 2008 as viable precedent. *See, e.g.*, D.R.0028 & D.R.0037 (citing *Davis Mem'l Hosp. v. W. Virginia State Tax Com'r*, 222 W.Va. 667, 671 S.E.2d 682 (2008)).

As to the second, the use of stipulated facts does not discredit the 2004 Decision—it does the exact opposite. Under West Virginia law:

> [w]here facts are stipulated, they are deemed established as full as if determined by the [trier of facts]. A stipulation is a judicial admission. As such, it is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact.
>
> *Matter of Starcher,* 202 W.Va. 55, 61, 501 S.E.2d 772, 778 (1998) (internal citation omitted).

The stipulated facts in the 2004 Decision are therefore "judicial admissions" with the same legal force and effect as if they *had* come from a trier of fact after testimony and cross-examination. Accordingly, the administrative law judge's reasoning for failing to analyze, address, differentiate, or rely upon the 2004 Decision is not legally cognizable.

Taken together, though not binding precedent, the 2004 Decision provides substantial persuasive authority for Petitioner's position, given that it deals with nearly identical facts regarding purchaser's expenses under the same statutory language. WVOTA's proffered excuses for ignoring the 2004 Decision are contrary to clearly expressed law. Thus, WVOTA erred in concluding that "the fees contractually charged to the Petitioner [in settlement statements] are "expenses" of the Petitioner." D.R.0037 at ¶9. This Court should reverse its decision.

F. WVOTA Improperly Denied Petitioner's Request for 15% Safe Harbor

Petitioner requested to use the 15% safe harbor method of calculating its gross value of natural gas at the well-mouth pursuant to Regulation 4.8.4. Respondent denied this request, claiming Petitioner had already deducted its "actual transportation and transmission costs" in the form of the fees on the settlement statements, and therefore could not also receive the 15% safe harbor. D.R.0093 (refund denial letter tax year 2019); D.R.0130 (same for tax year 2018). All

parties agree that under Regulation 4.8, a taxpayer is entitled to only one deduction of transportation and transmission fees under one of the four alternative methods. However, given that Respondent's denial and WVOTA's affirmation were predicated on the incorrect legal conclusions that (a) the fees on the settlement statements were the Petitioner's expenses, and (b) Petitioner had already deducted these expenses from its "gross proceeds," the denial of the 15% safe harbor is improper. For the reasons stated herein, the fees on the settlement statement are solely attributable to MarkWest—they do not constitute Petitioner's actual transportation or transmission costs, and Petitioner's "gross proceeds" are the "net value" listed on settlement statements. As such, Petitioner has not "already" deducted its transportation or transmission costs under any of the permissible methods. Petitioner therefore is free to claim the 15% safe harbor.

VI. CONCLUSION

Calculation of severance tax can be complicated, but the issues presented to WVOTA, and now this Court, are straightforward statutory and contractual interpretation. Key facts—like how much money Petitioner receives from the sale to MarkWest—are undisputed, and the statutes and legislative rules at issue are well-settled and without any ambiguity. Nonetheless, WVOTA committed several distinct errors in reaching its August 18, 2022 Final Decision, which is the basis for the Order Affirming Tax Commissioner's Refund Denial appealed here. Many of these errors are attributable to WVOTA failing to adhere to the plain meaning of the applicable statutes. Such failures include, but are not limited to, WVOTA ignoring the monetary amounts Petitioner actually received in the sale, forcing deviation of state and federal accounting methods, valuing natural gas in its most processed form far away from the wellhead, and disregarding the fact that MarkWest's fees did not occur in Petitioner's system or before sale between the Petitioner and MarkWest. Other errors include an unfounded refusal to address an analogous 2004 tax decision offered by Petitioner

in support of its position, resorting to unfounded hypotheticals about profit, and failing to properly give weight to contractual language regarding title passage. These other errors are compounded by the Final Decision's deviation and apparent reversal from WVOTA's analysis of the underlying statutes as expressed during the evidentiary hearing. Given the many errors contained in the Final Decision, it must be reversed in its entirety.

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

1. reverse the decision of the WVOTA;
2. remand this case to the WVOTA for reassessment of Petitioner's request for refunds for tax years 2018 and 2019 consistent with this Court's opinion; and
3. grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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

EQUINOR USA ONSHORE PROPERTIES, INC.,

Petitioner Below, Petitioner,

vs. **No. 22-ICA-226**

MATTHEW IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent.

CERTIFICATE OF SERVICE

I, Alex Macia, counsel for the Petitioner, do hereby certify that service of the foregoing **PETITIONER'S BRIEF** has been made upon counsel for the Respondent, by mailing a true copy thereof in a properly stamped envelope, postage prepaid, deposited in the regular course of the United States mail this 19th day of December, 2022, addressed as follows:

Richard E. Boyle, Jr., Esq.
West Virginia State Tax Department
Legal Division
P. O. Box 1005
Charleston, WV 25324-1005

/s/ Alexander Macia
Alexander Macia, Esq. (WV Bar No. 6077)
WV State Bar No. 5570
Spilman Thomas & Battle, PLLC
P. O. Box 273
Charleston, WV 25321-0273

Counsel for Petitioner
EQUINOR USA ONSHORE PROPERTIES INC.