INTERMEDIARY COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-235

SHENANDOAH PERSONAL COMMUNICATIONS, LLC,

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE RULES

WEST VIRGINIA RULES OF APPELLATE PROCEDURE

OTHER AUTHORITIES

I. ASSIGNMENTS OF ERROR

Assignment of Error 1: The Circuit Court of Kanawha County, West Virginia ("Circuit Court") erred when it concluded that Petitioner did not qualify for the direct use exemption of West Virginia Code §11-15-9(b)(2).

Assignment of Error 2: The Circuit Court erred when it concluded that Petitioner's provision of these purchased cellphones to select customers constituted "retail sales" and did not constitute "communication" under West Virginia Code §11-15-2(b)(2).

Assignment of Error 3: The Circuit Court erred when it concluded that Petitioner's purchase of the cellphones "was not a direct use of the phones . . . ." pursuant to West Virginia Code §11-15-9(b)(2).

Assignment of Error 4: The Circuit Court erred when it concluded that Petitioner's purchase of the cellphones was "incidental, and not integral, to its communication business."

Assignment of Error 5: The Circuit Court erred when it concluded that Petitioner's purchase of the cellphones and providing them to a certain subset of customers constituted "marketing" under West Virginia Code of State Rules §110-15-123.3.2.5

Assignment of Error 6: The Circuit Court erred when it concluded that Petitioner did not qualify for the sale for resale exemption under West Virginia Code §11-15-9(a)(9).

Assignment of Error 7: The Circuit Court erred when it claimed that Petitioner "admits that there was no sale of the phones to the former nTelos customers."

Assignment of Error 8: The Circuit Court erred when it relied upon *Sprint Spectrum, LP v. Dep't of Revenue*, 174 Wash. App. 645, 302 P.3d 1280 (2013) to reach its conclusion.

Assignment of Error 9: The Circuit Court erred when it disregarded the description of a "sale" found in West Virginia Code of State Rules §110-15-9.3.4.3 when evaluating whether Petitioner qualified for the "sale for resale" exemption.

Assignment of Error 10: The Circuit Court erred when made a finding of fact that Petitioner provided cellphones to certain customers "as an inducement to stay with Petitioner or Sprint" and thereby disregarded undisputed testimony that the provision of those cellphones were for multiple exempt purposes.

II. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The facts are largely undisputed. Petitioner is a Virginia limited liability company, headquartered in Edinburg, Virginia. *See* SHENANDOAH_000036.[1] Petitioner is a wireless telecommunications company which engages in business in West Virginia and several other states. *Id.* Petitioner and its affiliates own and maintain wireless network equipment throughout the State to support its wireless telecommunication services. A.R.36; A.R.324; A.R.337-338. As a result of a contractual affiliate agreement with Sprint, Petitioner's physical network infrastructure is married to Sprint's spectrum to provide wireless telecommunication services in West Virginia. A.R.37. As a result of this contractual affiliate agreement, Sprint's wireless "signal" is accessed and transmitted throughout West Virginia via the equipment infrastructure owned and provided by Petitioner (referred to herein as the "Sprint/Shentel network"). *Id*. Petitioner also owns and operates Sprint branded stores in several locations in West Virginia. *Id*. In essence, Petitioner provides wireless telecommunication services in West Virginia under the Sprint brand name.

[1] The appendix record has designations SHENANDOAH_000001 to SHENANDOAH_000494. For ease, all citations to the appendix record herein will be [AR#]. Thus, SHENANDOAH_000016 will be cited A.R.16.

In 2016, Petitioner purchased all of the assets of nTelos in West Virginia. A.R.37. nTelos was another wireless telecommunications company operating in this state. *Id.* Some nTelos customers in West Virginia were unable to switch their wireless telecommunication service from nTelos to Petitioner because their cellphones were not compatible with the Sprint/Shentel network. A.R.37; A.R.327; A.R.333 (examination of customer's cellphone to determine if it works with Sprint/Shentel network). Without a cellphone compatible with the wireless service being provided, a customer cannot receive or use the wireless telecommunication services. A.R.327 (non-compatible cellphone would "no longer work" after transition); A.R.331-332 (customer cannot transmit voice and data over network without compatible cellphone). As a result, pursuant to the nTelos acquisition, Petitioner purchased cellphones compatible with their network from out of state vendors in order to provide the same to former nTelos customers who lacked a compatible cellphone. A.R.328; A.R.332-333; A.R.384.

This offer of a compatible cellphone was communicated to former nTelos customers via a letter dated April 2017, stating "If you have an iPhone 5c or newer, you'll be able to keep your same phone; all other devices will be replaced at no additional cost." A.R.384. This letter clearly stated that the offer of a replacement cellphone was limited to "migrating" nTelos customers who lacked compatible cellphone. *Id.* This limitation was imposed because only those specific customers were unable to access the Sprint/Shentel network and were at risk of being left with a noncompatible cellphone that cannot make calls, texts, or connect to the internet, through no fault of their own. A.R.328; A.R.332-333; A.R.384.

To be clear, former nTelos customers who already had a cellphone compatible with the Sprint/Shentel network (i.e. the iPhone 5c or newer) were not offered or provided a free cellphone by Petitioner. A.R.384. The Petitioner provided no cellphone accessories or extraneous cellphone

equipment (cases, screen covers, stands, car chargers, batteries, car mounts, etc.), limited the existing customers to the available inventory, forbid custom orders, or provide other electronics that it had in stock at its retail stores (iPads, speakers, batteries, etc.). *See* A.R.334 (cellphones provided were compatible, and not necessary a "higher level" or newer model/next generation); A.R.345-346 (cellphone accessories and other electronic products available but not provided to customer); A.R.384 (letter to customers detailing limits of inventory).

Petitioner did not offer any other "free phone" programs during the time period of this case to existing customers, new customers, the general public, or anyone coming into a retail store "off the street." A.R.328-329; A.R.384. If a former nTelos customer failed to migrate or switch their wireless telecommunication service plan over within the allotted time, it was automatically migrated or switched over for them. A.R.333.

B. PROCEDURAL BACKGROUND

Petitioner originally paid West Virginia use tax on its purchases of the subject cellphones from out of state vendors or manufacturers. A.R.37; A.R.344; A.R.368-382. Petitioner did not charge the customers with West Virginia sales tax in relation to the cellphones. A.R.37. Later, on June 17, 2019, Petitioner filed a claim for refund for $914,404.58, which constituted the use tax it paid for all of the cellphones provided to customers between May 1, 2016 and December 31, 2017. A.R.368-382. On July 16, 2019, the Tax Account Administration Division of the West Virginia State Tax Commissioner's Office (the "Respondent") issued a Refund Denial Letter to Petitioner, which denied Petitioner's request for a refund in its entirety. A.R.383. Petitioner appealed the denial of its refund to the West Virginia Office of Tax Appeals ("WVOTA") in Docket No. 19-479. A.R.16-33. An evidentiary hearing was held before the WVOTA on October 1, 2020. A.R.17. Ultimately, the WVOTA upheld the denial in its "Amended Final Decision" entered June 1, 2021. A.R.15-33.

Petitioner timely appealed the WVOTA decision to the Circuit Court of Kanawha County, West Virginia ("Circuit Court") in Case No. 21-AA-38. A.R.34-47. By "Final Order Denying Shenandoah Personal Communication, LLC's Petitioner for Appeal and Affirming the Decision of the Office of Tax Appeals" entered May 3, 2023, the WVOTA decision was upheld. A.R.34-47. Petitioner timely appealed the decision of the to the Circuit Court of Kanawha County, and is now before this Court. A.R.3-47.

III. SUMMARY OF ARGUMENT

Petitioner's claim or refund of sales and use tax are based on two separate exemptions from the use tax, namely the "direct use exemption" of West Virginia Code § and the "sale for resale" exemption of West Virginia Code §. To prevail, only one such exception must apply. The Circuit Court erroneously ruled that neither exemption applied.

The Circuit Court erred in several respects in its ruling. It disregarded swaths of the applicable tax code supporting Petitioner's direct use exemption, including the definition of "communication," and specific statutory examples of what constitutes direct use found in West Virginia Code §11-15-2(b)(4)(A). Rather than applying the plain language of the tax code and its examples specifically designed and intended to resolve the question before it, the Circuit Court impermissibly substituted its own definition of "use" and "direct use" of cellphones.

The Circuit Court again sidestepped the many code provisions supporting Petitioner's qualification for the direct use exemption, and instead remained fixedly focused on the single appearance of the word "marketing" in the statute, concluding that the direct use exemption does not apply to the cellphones because they were a "marketing" ploy. In its fixation, the Circuit Court failed to analyze or consider the undisputed reason why Petitioner had to provide cellphones to a specific subset of customers: because Petitioner could have lost these nTelos customers whose

contracts it had just purchased. Simply put, this was not marketing. Given that the direct use statute did not support it, the Circuit Court relied upon an unbinding out-of-state case with distinguishable facts and law to support its conclusion that the direct use exemption did not apply.

The Circuit Court dedicated even less argument to the equally availing sale for resale exemption, quickly concluding that this it did not apply because there was no consideration and the cellphones were provided free of charge. This again disregards language in the statute that presumes a sale occurs when possession changes hands, as it undisputedly did here. More egregiously, the Circuit Court employed contradictory logic—if the cellphones were provided to customers as a marketing ploy to induce them to enter into valuable service contracts, how is there also no consideration for the provisions of the cellphones? Surely, entering into a valuable contract is sufficient consideration to find that a "sale" occurred, even within the Circuit Court's own definition of that term, and clearly within the provisions of the legislative rules. W. Va. Code §11-15-9(a)(17); *see also* W.Va. Code R. §110-15-2.79; W.Va. Code R. §110-15-9.3.4.3.

Accordingly, the Circuit Court erred in reaching its conclusion because it largely did adhere to the tax code, which supports Petitioner being exempt under one or both of these exemptions. Its positions on the two exemptions are diametrically opposed, so that its position for denial of one constitutes grounds for granting of the second. For this reason, the Circuit Court's decision must be reversed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 8(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 Rule 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 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 provides the following legal argument in support of its appeal, all of which supports a single conclusion: Petitioner's purchase of the cellphones at issue are exempt from use tax under either the direct use exemption or the sale for resale exemption, and the Circuit Court of Kanawha County erred in affirming the decision of the WVOTA.

A. JURISDICTION

This Court has jurisdiction over this matter pursuant to West Virginia Code § 51-11-4(b)(1) as Petitioner is appealing a final judgment, order, and decision of a circuit court in a civil case entered after June 30, 2022.

B. STANDARD OF REVIEW

The standard of review applicable here is articulated in Syllabus Point 1 of *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 728 S.E.2d 74 (2012):

> In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in W. Va. Code § 29A-5-4(g) [1988]. Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although

> administrative interpretation of State tax provisions will be afforded sound discretion, this Court will review questions of law *de novo.*

Applicable here, our state has recognized that "interpreting a statute or a regulation presents a purely legal question subject to *de novo* review." *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 581–82, 466 S.E.2d 424, 432–33 (1995). Further, West Virginia Code § 29A-5-4(g) provides, in relation to the circuit court's review:

> The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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.

C. OPERATION AND LANGUAGE OF THE SALES AND USE TAX CODE

By way of background, generally, if a business buys a good or service from someone for use in this state, then one of two things will occur. Either the seller will charge that purchaser with West Virginia sales tax under West Virginia Code § 11-15-3, or the purchaser will later pay a use tax to the Respondent pursuant to West Virginia Code §11-15A-2. The latter code provision imposes a use tax on the use of tangible personal property in the state, at a rate of 6% of the

purchase price of the property. There are, however, exemptions to the sales and use tax. Two of those exemptions are at issue in this case: the direct use exemption found at West Virginia § 11-15A-9(b)(2) and the sale for resale exemption found at West Virginia Code § 11-1-9(a)(9).[2] Either of these exemptions qualify the purchaser to be reimbursed for any sales or use taxes paid in a given tax year.

In this case, Petitioner is the purchaser and paid Respondent for use tax on certain cellular telephones it purchased between May 1, 2016 and December 31, 2017. A.R.37; A.R.344; A.R.368-382. The question before this Court is whether Petitioner is qualified for refund of the use tax paid under either the direct use or sale for resale exemption. This Court need only find that one of the two aforementioned exemptions apply for Petitioner to prevail and be entitled to reimbursement. Though tax cases can become complex, this case presents a generally straightforward application of undisputed facts to the plain, ordinary meaning of the statutory exemptions.

D. THE CIRCUIT COURT ERRED IN FINDING THE DIRECT USE EXEMPTION DOES NOT APPLY

The first use tax exemption that Petitioner qualifies for is for purchase of goods or services which are "directly used or consumed" in certain businesses. This is known as the "direct use" exemption, and the applicable statute states, in relevant part:

> (b) *Refundable exemptions*. — Any person having a right or claim to any exemption set forth in this subsection shall first pay to the vendor the tax imposed by this article and then apply to the Tax Commissioner for a refund or credit, or as provided in §11-15-9d of this code give to the vendor his or her West Virginia direct pay permit number. The following sales of tangible personal property and services are exempt from tax as provided in this subsection:
> …
> (2) **Sales of services, machinery, supplies, and materials directly used or consumed in the activities of** manufacturing,

[2] Pursuant to West Virginia Code §11-15A-3(a)(2) and (a)(4), exemptions from sales tax also apply to use tax.

> transportation, transmission, **communication**, production of natural resources, gas storage, generation or production or selling electric power, provision of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision and does not apply to purchases of gasoline or special fuel;
>
> W. Va. Code §11-15-9(b)(2) (emphasis added).

Thus, the statute exempts the Petitioner from paying use tax in this case if (a) Petitioner is engaged in communication activity and (b) the cellphones Petitioner purchased were directly used or consumed in communication activity. The Circuit Court erred in finding that neither were satisfied here, as the substantial and undisputed evidence demonstrates otherwise.

1. THE CIRCUIT COURT MISUNDERSTOOD OR MISCHARACTERIZED PETITIONER'S ARGUMENT

When considering whether Petitioner satisfied the direct use exemption, the Circuit Court grossly misunderstood or mischaracterized Petitioner's argument, stating Petitioner "argues that because it is a communications company, it is generally exempt from use tax for its business-related purchases." A.R.39. This is entirely untrue. Petitioner has never sought a general or blanket exemption. A.R.368-382 (refund request). This is a request to refund a certain amount of money already paid to Respondent, and is limited to cellphones provided during a specific period of time to a select subset of existing customers in response to a singular event—Petitioner's purchase of nTelos. A.R. 332 (excessive inventory of cellphones purchased in response to acquisition of nTelos); A.R.368-382 (refund request). To the extent the Circuit Court based its opinion on a misunderstanding or mischaracterization of Petitioner's argument, it erred.

2. PETITIONER WAS ENGAGED IN COMMUNICATION ACTIVITY

As shown above, the "direct use" exemption applies to entities engaged in "communications . . . activities." W. Va. Code §11-15-9(b)(2). The Circuit Court, incredibly,

found that Petitioner—a wireless service provider—was not participating in communication activities. Its finding directly contradicts the Respondent, who conceded early in briefing before the WVOTA that "[b]ecause Petitioner is engaged in the business of providing cell phone services to its customers, it is engaged in communication activity." A.R.270. Given Respondent's obligation to enforce the tax code, its concession that Petitioner is engaged in communication activity should end this inquiry in Petitioner's favor. *See, also, Frankum v. Bos. Sci. Corp.*, No. 2:12-CV-00904, 2015 WL 1976952, at *14 (S.D.W. Va. May 1, 2015) (Finding that a party had conceded a point, and stating "I decline to raise counterarguments on their behalf.").

Petitioner notes, however, that Respondent's concession is entirely warranted under the statute. "Communication" is broadly defined to include "all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission or other encoded symbolic information transfers and includes commercial broadcast radio, commercial broadcast television and cable television" W. Va. Code §11-15-2(b)(2); W.Va. Code R. §110-15-2.17 (same or substantially similar definition). Here, Petitioner is engaged in the communications business as it provides wireless telecommunications services in West Virginia and maintains, owns, or leases towers, equipment, and other facilities to support this business in our State. *See* A.R.36-37; A.R.324; A.R.337-338. This is undisputed thanks to the Petitioner's representative's clear testimony before the WVOTA that Petitioner is "a communications company. They provide cable, fiber, and telephone services to customers, and then they are also a Sprint affiliate, where they own wireless Sprint stores, and then they also provide tower communication for that wireless business." A.R.318. Petitioner's wireless telecommunications services permit the transmission of voice, text, and data (i.e. internet) between cellphones and it is Petitioner's job to "make sure the call goes

through" for cellphones connected to the Sprint/Shentel network in West Virginia. A.R.331-332; A.R.337-338. Thus, communication activities are the heart and soul of Petitioner's business, and Petitioner falls within the statutory definition of communication activity.

Despite this statutory definition of "communication," the Circuit Court found that Petitioner was engaged in "retail sales" and not "communication activities" when it provided the cellphones.[3] There is absolutely nothing in the statutory or regulatory definition of "communication" that supports the Circuit Court's position.

Nothing in the statutory definition of "communication" states, or let alone suggests, that retail sales of communication devices cannot also be communication activities. The definition of "communication" is intentionally broad, capturing "all telephone communication." W. Va. Code §11-15-2(b)(2); W.Va. Code R. §110-15-2.17. Even the Circuit Court acknowledged, "communication" would include "the act of connecting parties together through electronic means to permit them to communicate." A.R.38. The unavoidable and indisputable truth is that wireless telephone communications cannot—and do not—occur without a compatible, physical cellphone. A.R.327 (non-compatible cellphone would "no longer work" after transition); A.R.331-332 (customer cannot transmit voice and data over network without compatible cellphone); A.R.332 (compatible cellphone is necessary to participate in wireless telephone service). And as described in detail in Section V(D)(3) *infra*, Petitioner only provided the cellphones at issue to a particular subset of existing customers who lacked a compatible cellphone—and in doing so, Petitioner was taking only the steps necessary to "connect" those customers to its electronic network to "permit

[3] This is the first of several internally inconsistent positions taken by the Circuit Court, who held that Petition did not qualify for the direct use exemption because it was engaged in "retail sales" instead of communication activities, but later held that Petitioner does not qualify for the sale for resale exemption because no "sale" occurred. *Compare* A.R.37-38 (retail sales) and A.R.42-33 (no sale occurred). The Circuit Court neither recognized nor explained how Petitioner can be engaging in "retail sales" when no "sale" takes place.

them to communicate." A.R.334; A.R.384. It was doing what was necessary to, essentially, "make sure the call goes through." A.R.37; A.R.337. The Petitioner provided no accessories or extraneous cellphone equipment (cases, screen covers, stands, car chargers, batteries, car mounts, etc.), limited the existing customers to the available inventory, forbid custom orders, and provided no other electronics that it had in stock at its retail stores (iPads, speakers, batteries, etc.). A.R.345-346; A.R.384. In fact, the cellphones provided were compatible first and foremost, and were not necessarily newer, a "higher level," or more advance model. A.R.345-346. In short, Petitioner did nothing more and nothing less than provide a device compatible with the Sprint/Shentel network to existing nTelos customers who lacked one. In doing so, Petitioner was taking the necessary steps (and only the necessary steps) to connect those customers and permit them to communicate. Thus, both the broad statutory definition of "communication" and logic dictate that activities dealing with physical telephones or cellphones should be considered communications activities, even if the cellphones are considered distributed via a retail store.

In short, Petitioner engaged in communication activities as the term is statutorily defined, and this point has been conceded in writing by Respondent. Accordingly, the Circuit Court erred in holding otherwise.

3. PETITIONER DIRECTLY USED THE CELLPHONES AT ISSUE IN COMMUNICATION ACTIVITIES

Having satisfied the first portion of the direct use exemption by proving it engaged in communication activities, Petitioner need only prove only that the cellphones at issue were directly used or consumed in communication activity to qualify for this exemption, to be entitled to the refund it seeks.

By statute, "directly used or consumed in the activities of manufacturing, transportation, transmission, communication or the production of natural resources means used or consumed in

those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities." W. Va. Code §11-15-2(b)(4); W.Va. R. §110-15-2.27. The statute further provides a list of fourteen uses of property or consumption of services which direct use or consumption, plus a "catch all" example for things "otherwise using as an integral and essential part of . . . communication." W. Va. Code §11-15-2(b)(4)(A); *see also Antero Res. Corp. v. Steager*, 244 W. Va. 81, 86, 851 S.E.2d 527, 532 (2020) (describing "catch-all" category of W.Va. Code§11-15-2(b)(4)(A)(xiv)). The analysis of "direct use" therefore turns to what is considered "integral and essential." As the WVOTA has previously noted, "essential" means "something necessary, indispensable, or unavoidable," while "incidental" means "subordinate, nonessential, or attendant in position or significance." *Lindy Paving, Inc. v. State Tax Commissioner*, WVOTA Docket No. 15-035 RC (citing *Webster's Third New International Dictionary*, 777 and 1142 (16th ed. 1971)).

The Circuit Court held that Petitioner did not "directly use" the cellphones for a variety of reasons, none of which have merit.

a. <u>PROVIDING CUSTOMERS WITH A COMPATIBLE CELLPHONE IS DIRECT USE IN COMMUNICATION ACTIVITIES BECAUSE OTHERWISE, TELEPHONE CALLS ARE IMPOSSIBLE</u>

Here, cellphones are necessary and indispensable to the provision of wireless telecommunication services. It is undisputed in this case that wireless telecommunication simply cannot occur absent a network-compatible cellphone. Petitioner's representative testified that (a) former nTelos customers could not receive or use the wireless telecommunication services unless and until they had a compatible cellphone, (b) non-compatible cellphones are not able to access the Sprint/Shentel network, and (c) former nTelos customers had their non-compatible cellphones

"stop working" when the transition to the Spring/Shentel network took effect. *See* A.R. 327-328; A.R.332-333; A.R.384. The same non-compatibility has been recognized by other courts. *See, e.g., Sprint Nextel Corp. v. AT & T Inc.*, 821 F. Supp. 2d 308, 326 (D.D.C. 2011) (finding "not all carriers' networks are compatible with each other: phones designed for one network cannot be used on many others"). Thus, both testimony and logic conclude that a wireless telecommunications network like the Sprint/Shentel network would sit—ready and waiting but unused—unless and until someone uses a compatible cellphone to send a text, make or receive a voice call, or use cellular data. *See* A.R.332 (cellphone is a necessity to participate in wireless telephone service). Given that those calls, texts, and data literally and technologically cannot be transmitted through the Sprint/Shentel network without a compatible cellphone, then a compatible cellphone is "necessary, indispensable, or unavoidable" to Petitioner's wireless telecommunication services.

Despite this evidence, supporting law, and logic, the Circuit Court found that "providing free cell phones to customers is not directly related to actual communications, such as allowing cell phones users to make and receive telephone calls." *See* A.R.38. The Circuit Court's conclusion may be warranted if Petitioner had been handing out free cellphones to any customer who wanted one, or to any customers who came forward to sign up for a new service contract. But that was undisputedly not the case. A.R.327 ("not anybody can come in off the street to sign up for a new Sprint plan and get a free phone"). As explained in detail in Section V(D)(3)(a) and Section V(D)(4) *infra*, only a specific subset of existing customers who migrated to the Sprint/Shentel network from nTelos and lacked a compatible cellphone were eligible to receive the "free cellphone." A.R. 328; A.R.332-333; A.R.384. The cellphones for these particular customers undisputedly "stop working" as a result of the Petitioner's acquisition of nTelos, and their inability to access the Sprint/Shentel network meant they could not make calls, send texts, or use cellular

data unless and until they got a compatible cellphone. A.R.37; A.R.327; A.R.332-333. Thus, the provision of compatible cellphones to this specific subset of existing employees was done precisely to "allow[] cell phones users to make and receive telephone calls," which the Circuit Court acknowledged would qualify. A.R.38. Thus, Circuit Court's conclusion is largely dismissive of the details about which customers received cellphones, and fails to appreciate that their non-compatible cellphones absolutely barred those customers from enjoying basic wireless telecommunication functions.

Taken together, it was "integral and essential" to both Petitioner and its customers for these customers to have a cellphone compatible with the Sprint/Shentel network. Otherwise, wireless telecommunications were literally and technologically impossible. Accordingly, Petitioner has satisfied the statutory definition of direct use.

b. <u>STATUTORY EXAMPLES OF DIRECT USE CONFIRM SUCH OCCURRED HERE</u>

Petitioner's satisfaction of the "direct use" definition is further confirmed by the statutory examples. The statute provides particular descriptions and examples of what constitutes "direct use or consumption," which include (in relevant part) the following:

> Uses of property or consumption of services which constitute direct use or consumption in the activities of manufacturing, transportation, transmission, communication or the production of natural resources include only:
>
> … (iii) Transporting or storing property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;
>
> …
>
> (v) Physically controlling or directing the physical movement or operation of property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

> (vi) Directly and physically recording the flow of property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;
>
> …
>
> (xi) Maintaining or repairing of property, including maintenance equipment, directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
>
> …
>
> (xiv) Otherwise using as an integral and essential part of transportation, communication, transmission, manufacturing production or production of natural resources.
>
> *See* W. Va. Code §11-15-2(b)(4)(A)

Thus, the statutory examples describe numerous actions that constitute "direct use" within the statutory definition. Importantly, the statutory examples are made in the disjunctive, meaning any one of the subparagraphs is sufficient, and each subparagraph contains multiple qualifying actions (i.e. subparagraph (iii) is satisfied by **either** transporting **or** storing). *See Carper v. Kanawha Banking & Trust Co.,* 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974) ("Recognizing the obvious, the normal use of the disjunctive 'or' in a statute connotes an alternative or option to select"). Thus, to qualify as a "direct use," Petitioner need only prove that one of the many actions listed in any of the explanatory subparagraphs of West Virginia Code §11-15-2(b)(4)(A) apply.

Here, the cellphones at issue fall directly within the scope of several statutory examples, particularly subparagraphs (iii), (v), (vi), (xi), and (xiv) of West Virginia Code §11-15-2(b)(4)(A). As Petitioner's representative testified, Petitioner's wireless telecommunications network and compatible cellphones work together to receive, transport, communicate, and store voice, text, and cellular data. *See* A.R.330-331. This is done primarily by connecting a compatible cellphone with

the cellular equipment that Petitioner owns, which are attached to cellular towers owned by a wholly owned subsidiary. A.R.338. In light of this undisputed testimony, cellphones fall within the expressly listed examples of direct use in:

- Subparagraph (iii) as to transporting property undergoing communication, including voice, text, and data;
- Subparagraph (iii) as to storing property undergoing communication, including voice, text, and data;
- Subparagraph (v) as to controlling or directing the physical movement or operation of that property, namely controlling or directing signals from a compatible cellphone that initiates a call, text, or cellular data use to a cellular tower containing the Petitioner's equipment, and onward again to the recipient telephone as applicable; and
- Subparagraph (vi) as to directly and physically recording the flow of property undergoing communication, as the Supreme Court of West Virginia has already recognized that cellular service providers like Petitioner "create and maintain records of cell phone interaction with cell phone towers . . . for its own business purposes, perhaps to monitor or optimize service on its network or to accurately bill its customers for the segments of its network that they use." *State v. Johnson*, 238 W. Va. 580, 586, 797 S.E.2d 557, 563 (2017).

Further, Petitioner may also satisfy subparagraph (xi) West Virginia Code §11-15-2(b)(4)(A) given the specific use of the cellphones at issue. Petitioner replaced non-compatible cellphones with ones that were compatible with the Sprint/Shentel network—this is akin, in many ways, to the maintenance or repair of a cellphone as described in subparagraph (xi). As the Petitioner's representative testified, certain customer's non-compatible cellphones stopped working when the transition to the Sprint/Shentel network took effect. A.R. 327; A.R.331-332. Given the non-compatibility, the only true way to "repair" the cellphone and "maintain" access to the Sprint/Shentel network was to provide new, compatible equipment. Accordingly, the provision of cellphones under these particular facts would constitute direct use under subparagraph (xi) as well.

Finally, as explained more fully above, a compatible cellphone is intrinsically necessary for someone to send a text, make or receive a voice call, or use cellular data on the Sprint/Shentel network (or any other wireless communications network). A.R.327; A.R.331-332; A.R.384. Accordingly, this would easily fall within the catch-all provisions of subparagraph (xiv). *See, also, Antero*, 244 W.Va. at 88-89, 851 S.E.2d at 534-535 (finding crew quarters and restrooms qualified for catch all provision as to natural gas production).

As a result, a cellphone unit meets five separate statutory examples of the "direct use" exemption, any one of which is sufficient. The Circuit Court, however, failed to acknowledge, analyze, apply, or even cite the statutory examples in its final decision. *See, contra, Antero*, 244 W.Va. at 88-89, 851 S.E.2d at 534-535 (analyzing catch all provision and others. In doing so, it fails to provide a meaningful application of the plain wording of the statute to the facts of this case. This is a serious error. The West Virginia Supreme Court of Appeals has described its "cardinal rule of statutory construction" to be "that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. pt. 3, *Meadows v. Wal–Mart Stores, Inc.,* 207 W.Va. 203, 530 S.E.2d 676 (1999); *In re R.S.*, 244 W. Va. 564, 573, 855 S.E.2d 355, 364 (2021) ("Our rules of statutory construction do not permit us to disregard a statute without legislative direction to do so. Instead, "[i]t is always presumed that the legislature will not enact a meaningless or useless statute.""). Given that the legislature provided these specific examples of what "direct use" means within the statute in order to resolve any doubts left by its statutory definition, those examples must be acknowledged and followed. Thus, the statutory examples of direct use in West Virginia Code §11-15-2(b)(4)(A) cannot be disregarded, and they must be given force and effect. The Circuit Court's decision was in error.

c. <u>CONTRARY TO THE STATUTE'S DEFINITION AND EXAMPLES, THE CIRCUIT COURT IMPOSED ITS OWN DEFINITION OF</u>

DIRECT USE AND CONCLUDED THAT ONLY CUSTOMERS USED THE CELLPHONES

Despite the statutory definition and examples of direct use that Petitioner satisfies, the Circuit Court held that Petitioner did not actually "use" the cellphones at all, and that the cellphones were instead "used" by the customers who ultimately received them. As the Circuit Court briefly stated: "it is clear that the cell phones were not directly used by [Petitioner] because the phones were given to customers for their use. Sunnie Barr, Senior Financial Analyst for [Petitioner], testified at the hearing before the OTA that the cell phones were never used by [Petitioner] itself to make phones calls or send text messages, but rather only used by the customers for those purposes." A.R.38-39. Thus, the Circuit Court found Petitioner did not actually "use" the cellphones—only customers did—and the direct use exemption could not apply. *Id.* This finding is contrary to the statute. The tax statute is clear on what constitutes direct use, and lays out both a definition and explanatory examples in West Virginia Code §11-15-2(b)(4). In situations such as this, where the language of a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation. Syl. Pt. 2, *State v. Elder,* 152 W. Va. 571, 165 S.E.2d 108 (1968). The Circuit Court failed to apply the plain meaning of the statutory definition and examples of direct use.

Here, Petitioner directly used the cellphones because it satisfied the statutory definition and examples, as explained above. Petitioner also used the cellphones by (a) giving them to a specific subset of existing customers to connect them to the Sprint/Shentel network, (b) using them to provide customer service to those customers via conversations or communications made on those cellphones, and (c) creating records based on customer data.[4] A.R. 37; A.R.327; A.R.333; *see also*

[4] This demonstrates another inconsistency in the Circuit Court's logic—how can Petitioner not "use" the cellphones in any way, yet use them for marketing? Petitioner would not logically "use" the cellphones as an incentive in the

Johnson, 238 W. Va. 580, 586, 797 S.E.2d 557, 563 (2017) ("cell service provider collects and stores historical cell site data for its own business purposes, perhaps to monitor or optimize service on its network or to accurately bill its customers for the segments of its network that they use."). Thus, the Circuit Court's narrow definition of how a cellphone is "used" is unwarranted and not supported by the facts or statute.

d. THE *ANTERO* DECISION SUPPORTS A FINDING OF DIRECT USE UNDER THESE FACTS

The Circuit Court further found that Petitioner's provision of cellphones was not a "direct use" because they were not was "integral and essential." A.R.38-40. This is because, it claimed, Petitioner "would have been able to continue its communications business without providing free cell phones to some of the former nTelos customers." A.R.40. The fact that Petitioner could continue to function and would not collapse as a company if these cellphones were not provided is not dispositive, because that is not what the statute requires. West Virginia Code §11-15-2(b)(4) requires only for the direct use to "constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities." W. Va. Code §11-15-2(b)(4); W.Va. R. §110-15-2.27. It does not require that business cease if the direct use does not occur. The *Antero* decision demonstrates that the "all or nothing" approach taken by the Circuit Court in this case incorrect, and that the cellphones at issue are "integral and essential."

In *Antero*, a natural gas and oil company,[5] sought the direct use exemption for purchase of three types of property (a) crew quarters and related equipment, (b) portable toilets, sewage

alleged marketing ploy, if the Circuit Court is to be believed (and, for the reasons stated in Section V(D)(4) it should not).

[5] The "direct use" exemption is equally applicable to both "producers of natural resources" like Antero and "communications" companies like Petitioner, so the *Antero* opinion is instructive here.

systems, related water systems, and septic cleaning charges, and (c) trash trailers and waste receptacles, all of which were part of living quarters for intendent contractors who worked at the remote well site for two weeks at a time. 244 W.Va. at 85-86, 854 S.E.2d at 531-532. Antero argued that all of this property was "directly used or consumed" in producing natural resources as they were an "integral and essential" part of its business activities. *Id.* The State Tax Department disagreed with Antero, just as they do with Petitioner, arguing that crew living quarters, portable toilets, and sewage systems did not fall within one of the statute's examples of integral and essential purchases but rather were for the "personal comfort of personnel" (a statutory example of purchases which are not integral and essential but are simply incidental, convenient or remote). *Id.*[6] The *Antero* court considered the statutory definition of "direct use" and the statutory examples found in West Virginia Code §11-15-2(b)(4)(A), and never held or indicated that Antero failed to qualify for exemption because it "would have been able to continue" its natural gas business without providing" the living quarters and portable toilets. Instead, the *Antero* court found that given the need for 24/7 coverage at the well site, that independent contractors worked at the well site for two weeks at a time, and that the well site was remote, then the crew quarters and related equipment, portable toilets, sewage systems, related water systems, and septic cleaning charges were an "integral and essential part of Antero's production activity, and as such, these items were directly used in the production activity." 244 W.Va. at 88-89, 854 S.E.2d at 534-535.

The *Antero* decision only affirms Petitioner's position, as *Antero* goes further than Petitioner requests this Court to go. In *Antero*, the provision of sleeping quarters and bathrooms

[6] Petitioner notes that the Respondent took similar legal positions in both this case and Antero. Here, Respondent largely sidesteps the statutory definition of direct use and the thirteen statutory examples, focusing almost exclusively on one reference to marketing. In *Antero*, the Respondent also largely sidestepped the statutory definitions and examples, focusing almost exclusively on one reference to personal comfort. In fact, the references to marketing and personal comfort are next to each other in the same code provision, West Virginia Code §11-15-2(b)(4)(B)(iii) (personal comfort) and West Virginia Code §11-15-2(b)(4)(B)(v) (marketing). The Respondent's argument was not successful in *Antero*, and its very similar argument should not succeed here.

may not, intrinsically or on the surface, be integral to the production of natural gas and oil. However, in that specific context, where the well site where natural gas and oil were produced was remote and crew had to stay on site for weeks at a time, those same sleeping quarters and bathrooms became integral and essential to the natural gas and oil production. 244 W.Va. at 88-89, 854 S.E.2d at 534-535. As the *Antero* court stated, "[i]t is difficult to imagine how the drilling operations could proceed without such facilities." 244 W.Va. at 88-89, 854 S.E.2d at 534-535. Here, the provision of a compatible cellphone is intrinsically integral to cellular telecommunication, as such communications literally cannot proceed without one. *See* Section V(D)(3)(a) *supra*. This case does not require the Court to "imagine how" a cellphone call could "proceed" without a cellphone- it is a technological fact supported by undisputed testimony.

In short, if the West Virginia Supreme Court of Appeals recently ruled that a bed and a portable toilet can be "integral" and "essential" to producing natural gas, then logically a compatible cellphone is "integral" and "essential" to wireless telecommunications. Accordingly, the *Antero* decision supports Petitioner's position that the direct use exemption applies here.

4. <u>THE CELLPHONES WERE NOT USED IN MARKETING</u>

The Circuit Court, however, disregarded all of the above portions of the statute and its supportive interpretation in *Antero* and focused on a single provision: its decision rests, in large part, upon its determination that Petitioner provided cellphones as "marketing," which does not constitute direct use pursuant to West Virginia Code § 11-15-2(b)(4)(B)(v). The term "marketing" is not defined in the tax code, but the Circuit Court found it applicable because Petitioner's representative testified that the cellphones were provided so that certain customers would continue to do business with Petitioner. A.R.41; A.R.344. However, this is an oversimplification, and the details about the actual provision of cellphones confirms that it was not a run-of-the-mill marketing

ploy with "free phone with qualifying purchase" banners hanging from a mall kiosk, as Respondent would have this Court believe.

It is undisputed that the cellphones were offered only to select subset of existing customers—former nTelos customers who lacked a compatible cellphone. A.R.328-329; A.R.332-333; A.R.384. Cellphones were never offered to the general public, new customers, former nTelos customers who failed to migrate, or even to Petitioner's other existing customers. *Id*. In fact, former nTelos customers who already had a compatible cellphone were also ineligible to receive a new cellphone, even though **all** former nTelos customers had the option to cancel their service contract when the acquisition occurred. A.R.333; A.R.384. Thus, if the cellphones were a marketing ploy, then it was a poor one that failed to capture everyone at risk of finding a new provider.

Critically, Petitioner provided this select subset of existing customers with only the equipment necessary to connect them to the Sprint/Shentel network—a compatible cellphone. A.R.384. It did not provide anything unrelated to the wireless telecommunication services it provided, despite having other desirable electronic products like iPads and Bluetooth speakers at its disposal. A.R.345-346; A.R.385. Additionally, Petitioner provided the select subset of customers with just the cellphone, and nothing superfluous, though it also had attractive cellphone accessories like screens, covers, cases, stands, and car mounts in stock as well. *Id.* Thus, if incentivizing customers had been the goal of this alleged marketing ploy, then Petitioner did not use all of the incentives at its disposal, and instead provided the bare minimum equipment needed to ensure network compatibility.

A similar incentive issue arises when the actual cellphones at issue are examined. Eligible customers may receive a cellphone free of charge, but could only select a cellphone from the

inventory in-stock at the particular location they visited, and custom orders were prohibited. A.R. 384. The cellphones in inventory were simply compatible ones, and were not necessarily newer models, "higher level," or more advanced versions. A.R.334. As was noted in the letter to former nTelos customers, eligible customers could not, for example, have any type or model of cellphone or device they wanted, and they could not get any color or style device they wanted. A.R.384. This resulted in eligible customers being fairly restricted in what cellphone they could actually select and receive. This lack of options would absolutely hinder the appeal or incentive of the alleged marketing ploy, as wireless devices "are becoming the primary driver in selection of wireless service" and "[d]evice preference increasingly drives customer choice of wireless carriers." *Sprint Nextel Corp. v. AT & T Inc.,* 821 F. Supp. 2d 308, 320 (D.D.C. 2011). In short, Petitioner did not give eligible customers many options as to the actual cellphones they could get, further providing that providing cellphones was about functionality and not marketing.

This focus on functionality carries through to the letter to customers that discusses receiving a replacement, compatible cellphone. All former nTelos customers received a letter on or about April 2017 that contained important information about the Petitioner's acquisition of nTelos and how it would affect their accounts. A.R.384. The "offer" of the cellphones at issue is a scant sentence buried within a bullet-pointed paragraph, stating that "if you have an iPhone 5c or newer, you'll be able to keep your same phone; all other devices will be replaced at no additional cost." *Id*..[7] Nowhere does the letter state that "if" the customer signs a contract, "then" customers would receive a free cellphone. Instead, the letter largely provides substantive information about continuation of wireless telecommunication services during the transition. *Id*. The letter actually

[7] The narrowness of the subset of existing customer who were even eligible for a no-cost compatible cellphone is further highlighted by this language in the letter. Even the iPhone 5c was compatible with the Sprint/Shentel network, and would not qualify its holder to a free cellphone, though it premiered back in 2013. By 2017, when this letter came out, Apple had already processed and introduced the iPhone 8.

fails to identify, describe, promote, or detail—in any meaningful way—the cellphones that are meant to entice customers. *Id*. Overall, the letter stands in stark contrast to the widely distributed, glossy advertisements that typically come in the mail to promote products, or the aforementioned banners at the mall kiosk, which usually contain photographs and detailed information about the incentivizing products. We are all familiar with those mail brochures and mall advertisements, and this is simply not one.

The evidence demonstrates that Petitioner's provisions of cellphones under these specific circumstances does not constitute marketing, as that term is commonly understood. The narrowness of the offer—both in who was eligible and what they could receive—points away from it being marketing or a run-of-the-mill "free phone" advertisements. This narrowness also reaffirms that Petitioner offered the cellphones to address the compatibility issue resulting from the nTelos acquisition, and to permit Petitioner to continue to offer wireless telecommunication services to the nTelos customers whose accounts were purchased in the acquisition, consistent with the previously executed service contracts. If anything, the provision of these cellphones to this subset of existing customers is more akin to customer service, as is referenced in the letter to former nTelos customers, than marketing. *See* A.R.384; *see also* Section V(D)(3)(b) *supra* (repair and maintenance of cellphones). Accordingly, the Circuit Court failed to examine the details of the alleged offer, which confirm it was not "marketing."

5. THE CIRCUIT COURT ERRED IN RELYING ON A DISTINGUISHABLE, NONBINDING CASE FROM WASHINGTON STATE

In order to support its conclusion that the provision of cellphones under these particular facts constitutes marketing, the Circuit Court had to look far field for support. In fact, the Circuit Court cited only two cases in its opinion—one being *Antero*, which for the reasons explained in Section V(D)(3)(d) *supra* supports Petitioner's position—and *Sprint Spectrum, LP v. Dep't of*

Revenue, 174 Wash. App. 645, 302 P.3d 1280 (2013) that deals with promotions. The Circuit Court's reliance on *Sprint Spectrum* is misplaced, however, for many reasons.

First, reliance on *Sprint Spectrum* is inappropriate because the West Virginia statute regarding direct use exemption is plain and unambiguous. When the language of a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation. Syl. Pt. 2, *State v. Elder,* 152 W. Va. 571, 165 S.E.2d 108 (1968). Given the clear wording of the direct use statute, there is simply no need to resort to interpretative case law of any sort or from any source.

Second, the Circuit Court's error in relying on *Sprint Spectrum* to interpret West Virginia tax code is particularly egregious because it is a Washington state case that applies to a different tax code. Though *Sprint Spectrum* deals with the use tax in Washington state, that state's use tax is wholly different than our state's use tax code. For example, Washington's use tax is imposed:

> . . . for the privilege of using within this state as a consumer: (a) Any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280(2) or (7).
>
> 23 RCW 82.12.020(1)

Thus, the entire imposition of that tax is different from the tax code applicable here, which has no mention or requirement of being a consumer. *Compare* W.Va. Code §11-15A-2 *and* 23 RCW 81.12.020(1). Additionally, Washington holds that the term "use" shall have its "ordinary meaning," while West Virginia contains significant statutory definitions and examples of "direct use." The applicability of Washington's use tax ultimately "hinges" not on direct use as it does in in this case, but on whether a party has used tangible personal property "as a consumer." *Sprint Spectrum*, 174 Wash. App. At 660, 302 P.3d at 1287. Accordingly, the Washington tax statute has

three different provisions that define "consumer," a term that does not appear in the applicable West Virginia tax code at all. *Id.*; W.Va. Code §11-15A-2. Though one of the definitions of consumer does reference promotions, the definitions also contain language and requirements not found in West Virginia's use tax, like the concept of an "intervening use" of the tangible personality property. Thus, the Washington and West Virginia use tax statutes and schemes are fundamentally and materially different.

In reaching its decision, the *Sprint Spectrum* court analyzed and engaged with Washington's tax code, which is different from West Virginia's in both language and scheme, and based its decision on material differences—for example, it found that the wireless provider in its case did not qualify for exemption because it was not a "consumer" as that term is statutorily defined, and it impermissibly made "intervening use" of the property. The requirement of being a "consumer" and the prohibition of an "intervening use" are not concepts found in West Virginia's use tax code. Accordingly, the holding reached in *Sprint Spectrum* cannot be applied to this case, because the tax codes upon which they are based differ in critical respects.

Third, the facts of the two cases are similarly different. In *Sprint Spectrum*, the taxpayer publicly promoted its offer to heavily discount cellphones for any and all potential customers to incentivize the purchase of a monthly wireless telecommunications service contracts. The amount of the discount was based on the length of contract eventually entered into, meaning purchasing a contract for a sufficiently long period of time would render a cellphone being fully discounted. Already, key factual differences arise as, in this case, Petitioner did not provide cellphones to just any customer who signed a contract, as was done in *Sprint Spectrum*. Petitioner only offered and provided a cellphone to a specific subset of existing customers who migrated from nTelos as part of the one-time acquisition, and lacked cellphones compatible with the Sprint/Shentel network.

A.R. 328-329; A.R.384. In fact, asset acquisition and cellphone compatibility were not issues in *Sprint Spectrum*, despite being the heart of the facts here. A.R.328; A.R.332-333; A.R.384. Finally, Petitioner provided a compatible cellphone to the subset of existing customers who needed it, and did not tie receipt of the cellphone to any discount or length of contract. A.R.384. Accordingly, the two cases are factually distinct on key points.

Fourth and finally, *Sprint Spectrum* is a non-binding case from another jurisdiction that has never been cited or relied upon outside of the state of Washington, and certainly has not been cited or relied upon in any West Virginia's court case or administrative decisions that undersigned counsel has found. As the Supreme Court of Appeals of West Virginia succinctly stated:

> After all is said and done, it is peculiarly within the province of this Court to interpret the statutory law of this State and in doing so the Court is not bound, and perhaps should not be persuaded, by the decisions of other jurisdictions based on statutory laws different from the West Virginia statute immediately under appraisement.
>
> *State v. C. H. Musselman Co.*, 134 W. Va. 209, 222–23, 59 S.E.2d 472, 479 (1950).

Accordingly, the Circuit Court erred in many ways when it relied on *Sprint Spectrum*.

6. <u>CONCLUSION ON DIRECT USE EXEMPTION</u>

For the many reasons outlined above, Petitioner sufficiently established through undisputed testimony and/or concessions from Respondent that it engaged in communications activity and directly used the cellphones in communication activity, as those terms are statutorily defined. Any doubt is resolved by the five or more statutory examples of "direct use" applying here. However, Circuit Court failed to adhere to either the statutory definitions or examples, preferring instead to supplant with its own definitions of "communication" activities and "direct use", and relied upon an out of jurisdiction case applying a different tax code and different facts to justify its decision. Accordingly, Petitioner has established the direct use exemption applies

pursuant to the plain language of the statute, and it is entitled to the refund it has requested. The decision of the Circuit Court is in error, clearly wrong, contrary to the substantial evidence, and constitutes an abuse of discretion. It should be reversed.

E. THE CIRCUIT COURT ERRED IN HOLDING THAT PETITIONER DID NOT "USE" THE CELLPHONES, BUT WERE NONETHLESS OBLIGATED TO PAY USE TAX

Petitioner must point out a fairly obvious, but decisive, point. If the Circuit Court is correct, and Petitioner did not use the cellphones because only customers "used" the cellphones to make calls and texts, then Petitioner is entitled to reimbursement without any further consideration of the direct use or sale for resale exemptions. A.R.38-40. That is because this case, at its core, involves whether Petitioner has overpaid and is entitled to a refund of **West Virginia use tax** pursuant to West Virginia Code §§11-15A-1 *et seq*. West Virginia use tax is imposed on businesses for purchases of goods or services made out of state **but for use inside of West Virginia**. *See* W. Va. Code §11-15A-2. As a result, in order to be initially liable for West Virginia use tax on the cellphones at issue, **Petitioner must "use" the cellphones in West Virginia**. The Circuit Court, however, held that Petitioner did not "use" the cellphones, and that only its customers did.[8] A.R.38-40. Taking the Circuit Court's holding literally only results in a victory for Petitioner—because if Petitioner did not use the cellphones at issue in West Virginia, then Petitioner does not owe West Virginia use tax in the first place, pursuant to the express language of West Virginia Code §11-15A-2. Accordingly, Petitioner paid use tax that it actually does not owe, and the sums paid must be returned. This remains true without any need for an exemption.

[8] This is another example of an internally inconsistent position. How can the Circuit Court uphold imposition of use tax on a business that it unambiguously held did not actually use the cellphones at issue? The Circuit Court neither recognizes nor explains this inconsistency.

F. THE CIRCUIT COURT ERRED IN FINDING THE SALES FOR RESALE EXEMPTION DOES NOT APPLY

Even if the Petitioner does not qualify for the direct use exemption—which it does for the many reasons listed above— a second exemption is available, and only one is needed for Petitioner to prevail. Here, Petitioner's provision of cellphones to certain former nTelos customers also constitutes exempt sales for resale. The applicable statute provides that "[s]ales of tangible personal property to a person for the purpose of resale in the form of tangible personal property" are exempt from sales tax. W. Va. Code §11-15-9(a)(9); W.Va. Code R. § 110-15-9.3.4. The word "sale" is defined by statute as follows:

> "Sale", "sales" or "selling" includes any transfer of the possession or ownership of tangible personal property or custom software for a consideration, including a lease or rental, when the transfer or delivery is made in the ordinary course of the transferor's business and is made to the transferee or his or her agent for consumption or use or any other purpose.

W. Va. Code §11-15-9(a)(17); s*ee also* W.Va. Code R. §110-15-2.79 (definition of "sale"); W.Va. Code R. §110-15-2.67 (defining "purchase" broadly as "any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property or a taxable service, for a consideration."). A related state rule, found in West Virginia Code Rule § 110-15-9.3.4.3, provides further explanation and examples of what does and does not constitute a sale:

> 9.3.4.3. For providers of taxable services and sellers of tangible personal property subject to the consumers sales and service tax or use tax, property purchased is presumed to be purchased for resale if the final consumer or end user of the property sold will obtain possession of the property upon consummation of the final sale of the property or service sold.
>
> 9.3.4.3.a. Example: Property sold for resale relating to sales of taxable services would include: sales of plastic dry cleaning bags and hangers to persons in the business of dry cleaning, sales of

> television picture tubes, solder and wire to television and electronics repair businesses and sales of primers and paint to persons in the automobile body repair business.
>
> 9.3.4.3.b. Example: Property not sold for resale to such service providers would include: sales of dry cleaning fluid, cash registers or other office equipment or dry cleaning equipment to persons in the business of dry cleaning, and sales of soldering irons, electronic test equipment, office or shop furniture or electronics manuals and technical books to television or electronics repair businesses.
>
> 9.3.4.3.c. Sales of carpet shampoo to persons in the carpet cleaning business would not constitute sales for resale because, although the shampoo is applied to the customer's carpet in the cleaning process, it is extracted from the carpet, allowed to evaporate or otherwise effectively used up in the process rather than being the subject of a transfer of possession.

The Circuit Court briefly concluded that Petitioner did not qualify for the sale for resale exemption of West Virginia Code §11-15-9(a)(9) due to a lack of consideration, as the cellphones were provided to customers free of charge. A.R.42-43. That is the sole basis of their denial, which is not supported by the regulations that presume a sale, is not factually accurate, and conflicts with the other holdings in the Circuit Court's opinion.

1. A SALE IS PRESUMED TO HAVE OCCURRED BECAUSE CUSTOMERS TOOK POSSESSION OF THE CELL PHONES, EVEN IF NO CONSIDERATION WAS PAID, PURSUANT TO THE STATUTE

The regulations regarding the sale for resale exemption add additional explanation of the statutory definition of "sale," and state that "property purchased is presumed to be purchased for resale if the final consumer or end user of the property sold will obtain possession of the property upon consummation of the final sale of the property or service sold." W.Va. Code R. § 110-15-9.3.4.3. Thus, the regulation creates a presumptive sale when possession is transferred, in which no consideration is needed. As an example, the regulations provide that "sales of plastic dry-cleaning bags and hangers to persons in the business of dry cleaning" are presumptive sales without

consideration. W.Va. Code R. § 110-15-9.3.4.3a. This example makes sense, because possession of the bags and hangers is delivered to the customer when they pick up their dry cleaning, those bags and hangers are not returned, and there is no separate charge for the bags or hanger. On the other hand, "sales of dry-cleaning fluid, cash registers or other office equipment or dry-cleaning equipment to persons in the business of dry cleaning" are deemed not sold for resale because possession is not transferred to the customer.

The above regulations are the focus of two notable rulings of the Office of Hearings and Appeals. In Tax Decision 92-298 U, purchases by a car wash business of "engine sealers, armorall and wax which are applied for the purpose of protecting car surfaces and which remain on the car" were deemed exempt purchases for resale, while purchases of soap and cleaners which were consumed during a car wash were deemed not to be exempt. The Tax Commissioner reasoned:

> The basic rule set forth in the regulations is that in order to be considered a purchase for resale, the item purchased must be transferred to the consumer or end user. 110 C.S.R. §15 §9.3.4.3. Thus, the test is whether the items purchased are consumed in the rendering of the service or are actually transferred to the customer or end user.

Similarly, in Tax Decision 98-045 U, the Tax Commissioner[9] exempted as purchases for resale wax bought by a car wash business "because the customers are in effect getting possession of the wax in that the luster of the wax is apparent once the waxing process is completed."

Applying the above principles of law to this case, the purchase of cellphones by Petitioner is presumed to be an exempt sale for resale because possession of the cellphones was undisputedly provided to customers, who were the end users of the cellphones. A.R.328; A.R.353 (possession

[9] Office of Hearings and Appeals ("OHA") decisions were rulings by the Tax Commissioner. The statute provides that OHA hearings were to be conducted "by the Tax Commissioner or a hearing examiner designated by him or her." W. Va. Code §11-10-9(a). Additionally, only a taxpayer could appeal the decision of OHA to circuit court. W. Va. Code §11-10-10(a). As a result, the above administrative decisions are deemed those of the Tax Commissioner.

to customer conceded by Respondent). This is consistent with the customers who took possession of the car wax in the administrative decision, and dry-cleaning bags and hangers in the regulation. As explained above, the cellphones were necessary for the specific subset of customers to access the Sprint/Shentel network that they contracted for, just as the dry-cleaning bags and hangers were necessary to protect the clean clothes from dirt, wrinkles, and damage (as the customer had contracted for clean and pressed clothes), and car wax was necessary to protect the clean car from dirt and scratches (as the customer had contracted for a clean and undamaged car). A.R. 328-329; A.R.332-333; A.R.384.

Accordingly, this case is analogous to the regulation and administrative decisions where a presumptive sale occurs when possession to the customer and end user occurs, even if consideration is not exchanged. Petitioner undisputedly transferred permanent possession of the cellphones to its customers, who were the end users of those cellphones. A.R.328; A.R.353. Thus, a sale of the cellphones is presumed to have occurred under the applicable regulation even when consideration was not separately provided—just as separate consideration was not separately provided for the dry-cleaning bag, hanger, or car wax. As a result, both the regulations and administrative decisions confirm that Petitioner engaged in a "sale" of the cellphones to customers sufficient to satisfy the sale for resale exemption. The Circuit Court's denial of this exemption due to lack of consideration is therefore an error, clearly wrong, contrary to substantial evidence, and an abuse of discretion.

2. IN THE ALTERNATIVE, GIVEN THE CIRCUIT COURT'S HOLDING ABOUT "MARKETING," THEN CONSIDERATION WAS PAID BY VIRTUE OF A NEW CONTRACT

Alternatively, if consideration is required for the sale for resale exemption to apply, then Petitioner argues that requirement has been met under the Circuit Court's own ruling. The Circuit

Court found that the direct use exemption did not apply because Petitioner engaged in "marketing," claiming that Petitioner "admits that it gave away free cell phones to former nTelos customers for the express purpose of convincing them to sign a new cell phone contract." A.R.41. Setting aside whether this constituted marketing (which for the reasons set forth in Section V(D)(4) *supra*, it is not), the Circuit Court's conclusion, at a minimum, establishes valuable consideration for the cellphones.

The term "consideration" is not defined in the use tax code, but it has developed a robust definition in case law surrounding contracts generally. In West Virginia, consideration "consists either in some right, interest or benefit accruing to one party or some forbearance, detriment or responsibility given, suffered or undertaken by the other." *Hardwood Grp. v. Larocco*, 219 W. Va. 56, 64, 631 S.E.2d 614, 622 (2006). Here, under the Circuit Court's "marketing" holding, the valuable consideration for the cellphones was the service contracts, which was a benefit to Petitioner in terms of both monies paid over the life of the contract and the retention of customers.

Interestingly, the Circuit Court quoted the *Sprint Spectrum* case to support its conclusion that "marketing" occurred, including the *Sprint Spectrum* court's finding that Sprint "made intervening use of the phones it ultimately "sold" **for no money (but valuable consideration)** because the phones served the marketing purpose of convincing customers to purchase wireless service contracts." A.R.41 (emphasis added). Despite including this quote in its opinion, which expressly finds valuable consideration for cellphones can come in the form of executed service contracts, the Circuit Court found only a few lines later that Petitioner did not receive consideration for the cellphones, as they were provided for free. A.R.42. In doing so, the Circuit Court failed to contemplate that the service contracts were consideration for the cellphones. This is an odd oversight, given the importance the Circuit Court gives its assessment that Petitioner was engaged

in "marketing."[10] Entering into a service contract absolutely constitutes consideration for the cellphones under the common law of our state, as it creates a contractual right to certain monthly payments, and were expressly found to be "valuable consideration" in the Washington state case quoted by the Circuit Court. Therefore, consideration is present and there is no basis for denying the sale for resale exemption.

In short, there is consideration for the cellphones in the form of service contracts, regardless of whether the that transaction constituted marketing. A sale for consideration therefore occurred within the statutory definition and regulations, and Petitioner qualifies for the sale for resale exemption. The Circuit Court's denial of this exemption due to lack of consideration is therefore an error, clearly wrong, contrary to substantial evidence, and an abuse of discretion.

VI. CONCLUSION

This case presents largely undisputed facts applied to clear statutory language about use tax, the direct use exemption, and the sale for resale exemption. Despite that clear statutory language, the Circuit Court impermissibly adopted its own definitions of what constitutes "communication" activities and "direct use" of cellphones, and supported its new definitions with an out of state case that applies to a vastly different set of fact and tax code. That is perhaps part of the reason why internal inconsistencies plague the decision, most notably in the Circuit Court's holdings that Petitioner offered free cellphones to induce customers to enter into service contracts as a "marketing" ploy (and thus direct use exemption could not apply) yet there was no valuable

[10] This is a final note of inconsistency. How can the Circuit Court simultaneously hold that Petitioner used its cellphones to entice customers to sign new service contracts as a marketing ploy, but received no consideration for the provision of cellphones? The Circuit Court does not acknowledge or explain this paradox.

consideration for the cellphones (and thus the sale for resale exemption could not apply). Based on the foregoing, Petitioner respectfully requests that this Honorable Court:

1. reverse the decision of the Circuit Court;
2. remand this case for reassessment of Petitioner's request for refund consistent with this Court's opinion; and
3. grant such other and further relief as this Court deems just and proper.

SHENANDOAH PERSONAL COMMUNICATIONS, LLC

By counsel,
Spilman Thomas & Battle PLLC

/s/ Alexander Macia

Alexander Macia (WV Bar # 6077)
Paul G. Papadopoulos (WV Bar # 5570)
Chelsea E. Thompson (WV Bar # 12565)
Spilman Thomas & Battle PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
304-340-3800
amacia@spilmanlaw.com
ppapadopoulos@spilmanlaw.com
cthompson@spilmanlaw.com

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

SHENANDOAH PERSONAL COMMUNICATIONS, LLC,

Petitioner Below, Petitioner,

vs.) **No. 23-ICA-235**

MATTHEW IRBY, State Tax Commissioner of West Virginia,

Respondent Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 5th day of September 2023, the foregoing ***PETITIONER'S BRIEF*** was electronically filed with the Clerk of the Court using the File&Serve Xpress system which will send a Notice of Electronic Filing to, and constitutes service on, counsel of record.

/s/ Alexander Macia
Alexander Macia (WV Bar # 6077)