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 REPLY

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

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I. ARGUMENT

A. THE PETITIONER DID INDEED DIRECTLY USE OR CONSUME THE CELLPHONES IN ITS COMMUNICATIONS ACTIVITIES

The Respondent essentially summarizes its position as to the applicability of the direct use exemption as follows:

> Read together, for Shenandoah to claim a direct use exemption (1) it must be engaged in the business of communication and (2) the property must be directly used in the business activity of communication. While Shenandoah is clearly in the business of communication, Shenandoah clearly did not (itself) directly use the cellphones for communications. Shenandoah's customers, of course, used the cellphones to make phone calls; however, their customers are **not** persons engaged in the business activity of communications …
>
> … While Shenandoah has the right to claim the direct use exemption when it **directly** uses goods in its business (e.g. cell phones purchased for its employees who use those phones for work purposes), they cannot claim the exemption based on their customers' use of the phones. And their customers cannot claim it either since they are not engaged in the business activity of communication.

Res. Br. at 15. (no emphasis added). The Respondent is correct that the phones at issue were provided by Petitioner to its customers and that the customers used the phones to make calls, send texts and receive data over the Sprint/Shentel network.[1] However, the Petitioner respectfully replies that the Respondent, in denying the direct use exemption, has not correctly applied the facts of this case to the clear and express text of the governing law.

[1] Petitioner's physical network infrastructure is married to Sprint's spectrum to provide wireless telecommunication services in West Virginia. 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. A.R.37.

1. RESPONDENT'S INTERPRETATION OF THE DIRECT USE EXEMPTION IS CONTRARY TO HOW BUSINESSES ACTUALLY OPERATE, AND PRODUCES AN UNREASONABLE RESULT

The communications business, by its very nature, is a service industry which involves provision of the service to the provider's customers, and communication is designed to primarily occur between customers and whomsoever they choose to communicate with. A company does not engage in the communications business merely to allow communications to occur within the company itself. Such is the case not only for a telephone communications company such as Petitioner, but also cable television providers which by statute also fall within the definition of "communications"[2] for purpose of the direct use exemption. "Motion picture theaters"[3] are also included within the legislative rules' definition of "communication." The same holds true for the transportation industry, for which the direct use exemption also applies, as companies engaged in transportation transport their customers and/or their customers' goods.[4] All of these recognized industries share a similar fact—the services they provide, be it telephone communications, movies, or transportation, are specifically intended to be "used" by third-party customers.

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[2] "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) (emphasis added; W.Va. Code R. §110-15-2.17 (same or substantially similar definition).

[3] The current legislative rules at W.Va. Code R. §110-15-2.17 (2003) define "communication" to mean "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 shall include commercial broadcast radio, commercial broadcast television, cable television and **motion picture theaters**." (emphasis added). "Motion picture theaters" are not, however, mentioned in the statutory definition.

[4] "Transportation" means the "act or process of conveying, as a commercial enterprise, passengers or goods from one place or geographical location to another place or geographical location." W. Va. Code §11-15-2(b)(24).

Application of the Respondent's position (as set forth in the above-quoted language), when applied to these examples, produces unreasonable and unintended results. For example, with respect to a transportation company such as a bus line, the Respondent's position would suggest that purchase by the bus line of new seats for a passenger bus would not be directly used in transportation because only the customers sit in these seats and not the bus line's own employees. Similarly, with respect to a cable television and internet provider, the Respondent's position would suggest that purchases by the provider of cable boxes or modems to be distributed to its customers to allow the cable or internet signal to be received within the customers' homes would not be directly used in communications because these particular boxes are used to allow the customers, and not the company's own employees, to watch cable television or gain internet access. Additionally, with respect to a motion picture theater, the Respondent's position would suggest that purchase by a motion picture theater of such items as seats or 3-D glasses would not be directly used in communications because these items are used by the customers, and not the company's own employees, to watch motion pictures. This is not a reasonable result, and denies the common logic and understanding of how these industries, all of which are expressly included in the direct use exemption, actually operate.

Taken together, both logic and the statutory/regulatory scheme created by the legislature acknowledges that taxpayers seeking the direct use exemption will provide services to third-party customers. While Petitioner maintains that the express language of the scheme favors it (see below), Petitioner also asserts that the "spirit," "purpose," or "intent" of this scheme supports its position, namely that third-party customers may use the cellphones consistent with the direct use exemption. "Where an exemption statute is subject to interpretation, the Court may give effect to the spirit, purpose and intent of the lawmakers, and will not so limit its interpretation as to defeat

the underlying purpose of the statute." *Pennsylvania and West Virginia Supply Corp. v. Rose*, 179 W. Va. 317, 322, 368 S.E.2d 101, 106 (W. Va. 1988) (quoting Syl.Pt. 3, *State ex rel. Hardesty v. Aracoma–Chief Logan No. 4523, V.F.W.*, 147 W.Va. 645, 129 S.E.2d 921 (1963); *see* also Syl.Pt. 6, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984); *Wooddell v. Dailey*, 100 W.Va. 65, 68, 230 S.E.2d 466, 469. Under this precedent, any interpretation of the direct use exemption statute and regulations must be consistent with those statutes and regulations specifically referencing numerous industries that provide services to third-party customers, who ultimately "use" those services. Respondent urges the opposite position, one that contradicts, at a minimum, the "spirit," "purpose," or "intent" of the direct use exception.

2. RESPONDENT'S POSITION ADDS NEW REQUIREMENTS TO THE DIRECT USE EXEMPTION NOT FOUND IN THE STATUTE

Furthermore, Respondent's position reads a new requirement into the direct use statute and regulations that simply is not there. Nothing in the statutory or regulatory text states that the "use" must be by the company seeking exemption, or that customer's use is insufficient. The direct use exemption, as stated in the statute, provides:

> (2) **Sales of services, machinery, supplies, and materials directly used or consumed in the activities of** manufacturing, 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). The regulations cited by the Respondent in its Response provide that:

> 9.4.2 The sale, to be exempt, must be of tangible personal property or taxable services directly used or consumed (as defined in Section

> 2 of these regulations) in the business activity of … communication …
>
> and
>
> 123.1 … Under this concept, the applicability of the sales and use tax depends on the classification of the business purchasing the property or service and the use of the property or service being purchased rather than the type of property or service purchased …
>
> W. Va. Code R. §110-15-9.4.2 and §110-15-123.1.

Accordingly, nothing in the statute or regulations (a) require that the company seeking exemption be the only one to directly use or consume the item, or (b) exclude from the direct use exemption a communications company's purchase of an item that is later provided to its customers to allow communications to occur on its network. The express text merely requires use or consumption in the business activity of communication. W. Va. Code §11-15-9(b)(2). Petitioner is undisputedly in the communications business, and its customers' use of cellular telephones to access Petitioner's wireless telecommunications network and services is part of that communications business, particularly as (a) "communication," by statutory definition, includes "voice communication, computer data transmission or other encoded symbolic information transfers" and (b) the cellphones at issue were only provided to Petitioner's existing customers actually using its wireless network. *See* W. Va. Code §11-15-2(b)(2). Thus, a straightforward application of the facts of this case to the statutory text leads to one result: Petitioner qualifies for the direct use exemption, as explained fully in Petitioner's Brief.

The Respondent, however, desires this Court to look beyond the wording of the statute and impose additional requirements—namely, that **only** the company seeking exemption may use or consume the items. This is contrary to basic principles of statutory construction. It is the long-standing policy for courts in our state to "look first to the statute's language. If the text, 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,* 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). Furthermore, under our state's common law, "[i]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning." Syl. Pt. 1, *Tug Valley v. Mingo Cty. Comm.,* 164 W.Va. 94, 261 S.E.2d 165 (1979).

Applying these statutory construction principles to the direct use exemption in West Virginia Code §11-15-9(b)(2), Respondent's position is untenable. The text merely says the item must be "directly used or consumed" in "the business activity," but not who has to use or consume them. It certainly does not forbid use or consumption by the service providers' customers. The same is true of the regulation defining "directly used or consumed" to mean "used or consumed in those [communication] activities or operations which constitute an integral and essential part of such activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenience or remote to such activities." W. Va. Code R. §110-15-2.27. Therefore, even the regulatory definition of "directly used or consumed" does not expressly limit who may use or consume the items at issue. Thus, Respondent's position impermissibly goes beyond the text of the statute and regulations. In such instances, the West Virginia Supreme Court of Appeals has stated that "[t]he judiciary is the final authority on issues of statutory construction, and we are obliged to reject administrative constructions that are contrary to the clear language of a statute." *See Apollo Civic Theatre, Inc. v. State Tax Com'r*, 223 W. Va. 79, 85, 672 S.E.2d 215, 221 (quoting Syl. Pt. 5, *CNG Transmission,* 211 W.Va. 170, 564 S.E.2d 167). Respectfully, the clear language of the statute requires a finding that the direct use exemption has been properly claimed by Petitioner in this case.

3. RESPONDENT HAS TAKEN A SIMILAR POSITION BEFORE IN *CNG TRANSMISSION*, AND BEEN REJECTED

The Respondent's position in this case is reminiscent of its position taken in *CNG Transmission v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002), which the West Virginia Supreme Court of Appeals soundly rejected. In *CNG Transmission*, the State Tax Department assessed CNG, a pipeline company and the taxpayer, for purchases of goods and services used in the "transmission" of natural gas through its pipelines. *See* 211 W.Va. at 172, 564 S.E.2d at 169. CNG defended against the assessment by claiming the statutory exemption for materials, supplies, and services directly used or consumed in the activities of the transmission of natural gas. *Id.* The facts indicated that from 5% to 13% of the natural gas flowing through CNG's pipelines was owned by CNG, while the remaining 87% to 95% of the natural gas belonged to other companies. *Id.* Despite the statute defining "transmission" as "the act or process of causing . . . natural gas . . . to pass or be conveyed from one place or geographical location to another place or geographical location through a pipeline or other medium for commercial purposes,"[5] the Tax Commissioner took the position that the pipeline company was not engaged in "transmission" for purposes of the sales and use tax exemption when it moved natural gas owned by CNG (and not by others) through its pipeline, and, as a result, only allowed a portion of the purchases by CNG to be exempt. *Id.*

The Tax Commissioner's position was allegedly supported by language in the legislative rule, which defined "transmission" as "the act or process of causing . . . natural gas . . . to pass or be conveyed **for others** for consideration from one place or geographical location through a pipeline or other medium for commercial purposes **but does not include the passage or conveyance of . . . natural gas . . . by the owner thereof**." *See* 110 C.S.R. 15, § 123.4.4 (1992) (emphasis added); 211 W.Va. at 174, 564 S.E.2d at 171. CNG argued that the Tax Commission

[5] W. Va. Code § 11-15-2(r)(1987).

and its regulation ignored the statutory definition of "transmission" and "altered that definition through regulations and interpretation." *See* 211 W.Va. at 174, 564 S.E.2d at 171. The Court agreed with CNG. *Id.*

The Court looked at the statutory exemption and definition of transmission, and found that they were clear and unambiguous. *See* 211 W.Va. at 175, 564 S.E.2d at 172. Under their text, "[s]o long as the conveying of natural gas is being done for some commercial purpose, any purchases of goods and services directly used to support the conveyance are exempt from taxation." *See* 211 W.Va. at 174, 564 S.E.2d at 171. Given its understanding of the clear and unambiguous statute, the Court declared that the Tax Commissioner's legislative rules, including the one it was relying upon to deny CNG's exemption request, were unenforceable because they were "contrary to legislative command" and "substantially modified the statutory definition of 'transmission' to limit the application of the exemption. *See* 211 W.Va. at 176, 564 S.E.2d at 173. In short, the Tax Commissioner cannot import their interpretation into legislative rules in a manner inconsistent with statutory text or excessive of their statutory authority.

The Respondent is, in effect, using the same impermissible tactic against Petitioner that it tried to use in *CNG Transmission*.[6] To be clear, Petitioner meets the statutory requirements for the direct use exemption. It clearly engaged in the "communications" business and, as discussed in Petitioner's Brief, the cellphones at issue fall within several statutory examples of goods "directly used or consumed" for purposes of the exemption. Now, however, the Respondent has

[6] Respondent also made a similar argument in *Antero Res. Corp. v. Steager*, 244 W. Va. 81, 86, 851 S.E.2d 527, 532 (2020), and was rejected by the West Virginia Supreme Court of Appeals. For the reasons listed in Petitioner's Brief, *Antero* is persuasive authority, alongside *CNG Transmission*, on proper interpretation of tax statutes. See Petitioner's Brief at Section D(3)(d) for more discussion of the *Antero* case and its similarities to this case at bar. Respondent attempts to sweep *Antero* aside claiming it is all about employee use, but that is a misdirection and mischaracterization of the facts and holding, which speak for themselves.

denied the exemption to Petitioner by once again looking beyond the constraints of his legal authority and outside the express statutory provisions—Respondent is asserting that, in order to be exempt, the cellphones at issue must be exclusively used by Petitioner's employees (and not its customers) to make calls and send text messages. This restriction is found nowhere in the statute. Once again, the Respondent is ignoring the statutory command by substantially modifying the application of the direct use exemption, as explained above. This was soundly rejected in *CNG Transmission*, and should be soundly rejected here too.[7]

4. CONCLUSION ON DIRECT USE EXEMPTION

Respondent's Response puts forth only an impermissible interpretation of the direct use exemption, one that adds new requirements that are not found in the actual language of the statute and regulations. Under both basic principles of statutory construction and prior case law like *CNG Transmission*, such an interpretation is impermissible. This leaves only Petitioner's position, which is that a straightforward application of these facts to the plain and unambiguous language of the statute and regulations demonstrates Petitioner qualifies for the direct use exemption. Both Respondent and the Final Order erred to conclude otherwise.

[7] Notably, in *CNG Transmission*, Respondent had an on-point legislative rule to support its position, but even that was struck down as unenforceable; in this case, Respondent has no such legislative rule to rely upon, as all statutes and regulations uniformly lack any language supporting its position that only Petitioner's employees may "use or consume" the cellphones. Thus, Respondent has even less legal support for its position than it had in *CNG*, which still ultimately resolved in the taxpayer's favor.

B. THE PETITIONER DID NOT USE THE PHONES FOR MARKETING

The Respondent misinterprets the facts of the case and their application to the issue of whether Petitioner was engaged in marketing or retail sales.[8] The evidentiary record in this case, when read as a whole, indicates that Petitioner purchased the rights to all nTelos customers and that those customers "would be automatically switched to" the Sprint/Shentel network when the transaction became effective. A.R.37; A.R.333. For those customers with cellphones which were not compatible with the Sprint/Shentel network, their cellphones would simply stop working when their service switched from nTelos to Sprint/Shentel. 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). Those customers (with cellphones which were not compatible) who agreed to sign a long-term service contract would be provided a compatible phone free of charge. A.R.328; A.R.332-333; A.R.384. This was done to make sure that the customers receiving the compatible phone planned to keep their cell service with Petitioner, and were not 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. As discussed in detail in the Petitioner's Brief, these facts do not evidence "marketing" as the 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. A.R.345-346; A.R.384. Other desirable equipment was not offered, only the cellphone needed to connect to the Petitioner's wireless

[8] Respondent argues that Petitioner does not qualify for the direct use exemption because it engaged in retail sales, without acknowledging that (a) Petitioner can engage in both retail sales and communication business, though the cellphones at issue were the latter, and (b) that its insistence that Petitioner engaged in "retail sales" is directly contrary to its later position that no "sale" of the cellphones occurred. Simply put, Respondent cannot maintain two diametrically opposed positions, in an attempt to deny both of the exemptions at issue. At minimum, Respondent's reasons for denying the direct use exemption, if taken as true (which it is not), only further cements that a sale occurred and Petitioner qualifies for the "sale for resale" exemption. Respondent's Response was again silent on reconciling its diametrically opposed positions.

telecommunications network, and even those were limited to in stock options with customer orders forbidden and "higher level" cellphones not guaranteed. *Id.* Perhaps the fact most clearly differentiating the provision of cellphones from marketing is this: **all** former nTelos customers had the option to migrate their services to Petitioner or cancel their contracts; however, the cellphones were not provided to **all** former nTelos customers—they were **only** provided to those who migrated and lacked a compatible cellphone. If "marketing" were the goal, surely Petitioner would have used its "marketing" to target all the former nTelos customers it may lose, not just a small subset? Thus, taken together, the record as a whole demonstrates there were many limitations on the provisions of cellphones to a particular, small subset of former nTelos customers, which establish that it was not "marketing"—particularly as that term is not defined in the tax code.

C. THE "SALE FOR RESALE" EXEMPTION ALSO APPLIES

The Petitioner's Brief explains in detail how and why it qualifies also for the "sale for resale" exemption.[9] In its Response, the Respondent oversimplifies and misinterprets West Virginia Code Rule § 110-15-9.3.4.3 by asserting that no "sale" took place because the phones were given by Petitioner to the customers needing compatible phones who desired to continue their wireless service with Petitioner. The applicable regulation states, in applicable part:

[9] Respondent's Response, in Footnote no. 4 on page 23, asserts that Petitioner has waived Assignment of Error No. 7, which states in full "The Circuit Court erred when it claimed that Petitioner "admits that there was no sale of the phones to the former nTelos customers."" Petitioner has consistently asserted that a sale occurred, and that the "sale for resale" exemption—which is entirely predicated upon such a sale occurring—applies in this case. These points were argued in Petitioner's brief. *See* Petitioner's Brief p.6 ("This again disregards language in the statute that presumes a sale occurs when possession changes hands, as it undisputedly did here."); p. 31-36. Thus, Petitioner has not waived any assignment of error. To be clear, Petitioner will restate what it considered to be obvious: The Final Order's conclusion that Petitioner admitted no sale occurred is contrary to the Petitioner's arguments, put forth consistently in briefing and at hearing, that a sale occurred and the "sale for resale" exemption applies.

> 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.
>
> *See* W.Va. Code R. §110-15-9.3.4.3.

If Respondent's position was the proper interpretation of Regulation 9.3.4.3, there would be no need for the regulation at all. The regulation's mention of possession by the final consumer or end user, as well as it's example of dry cleaning bags and hangers, would be of no use or benefit if the Respondent's theory of the case were correct. The clear and obvious purpose of this regulation is to make it clear that the "sale for resale" exemption extends to items of personal property which are included along with the sale (for consideration) of a service or good, <u>but where there is no separately stated consideration</u>. That is logically why the regulation speaks only to <u>possession</u> and not <u>consideration</u>.

Respondent cannot sustain its interpretation of this regulation, where no sale occurs absent separate consideration, because it would render meaningless the regulation presuming a sale occurred when possession is transferred. In this state, it is presumed that "the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective" and, as a result, "an interpretation of a statute which gives a word, phrase or clause thereof no function to perform . . . must be rejected as being unsound." *See Osborne v. United States*, 211 W. Va. 667, 673, 567 S.E.2d 677, 683 (2002) (quoting Syl. pt. 7, *Ex parte*

Watson, 82 W.Va. 201, 95 S.E. 648 (1918)). In creating the regulation, it was intended to have an effect of capturing within a "sale" those items for which possession transferred without separately stated consideration. Respondent cannot moot it with a contrary interpretation.

In this case, a cellphone was provided by Petitioner to a specific subset of customers—former nTelos customers purchasing long term service contracts who lacked compatible cellphones. The customers paid for the service —thereby creating consideration for the transaction—but there was no separate price charged for the phones. Because possession of the cellphones was provided to the customers purchasing wireless services, the regulation operates to confirm that the "sale for resale" exemption still applies. In the alternative, consideration was paid for the cellphones in the form of fees and charges associated with the service contract. Either way, the "sale for resale" exemption applies.

II. CONCLUSION

Respondent's Response does not meaningfully combat the argument and supporting legal authority in Petitioner's appeal Brief. Respondent offers only impermissible interpretations of the applicable tax statutes and regulations, ones that either impose new requirements not supported by the text, or render the entire regulation moot. Neither is permitted under long-standing principles of statutory interpretation, and similar attempts have been rejected in the *CNG Transmission* and *Antero* cases. Thus, Respondent's Response does not alter or contest the analysis, legal authority, and conclusions of Petitioner's Brief. Petitioner qualifies for both the direct use exemption and "sale for resale" exemption. Either is sufficient, on its own, for Petitioner to prevail.

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

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CERTIFICATE OF SERCICE

I, Alexander Macia, do hereby certify that on this 8th day of November, 2023, the foregoing **Petitioner's Reply** 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)