

**SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL**

**DODDRIDGE COUNTY
CIRCUIT COURT**

Use this form only for an appeal from a final judgment of a Circuit Court.

FEB 16 2018

ATTACH COPIES OF ALL ORDERS BEING APPEALED

MICHELE D. BRITTON
CIRCUIT CLERK

1. COMPLETE CASE TITLE AND CASE NUMBERS IN CIRCUIT COURT

(Include all party designations, such as plaintiff, intervenor, etc. Use an extra sheet if necessary.)

Consol Energy, Inc. dba CNX Gas Company, LLC, Petitioner, v. The Honorable Dale W. Steager, West Virginia State Tax Commissioner, The Honorable David E. Sponaugle, Assessor of Doddridge County, The County Commission of Doddridge County, Sitting as the Board of Assessment Appeals and Board of Equalization and Review, Respondents.
17-AA-2

2. COUNTY APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

(If the presiding judge was appointed by special assignment, include an explanation of the circumstances on an extra sheet.)

Doddridge County Circuit Court - Business Court, Honorable Judge Christopher C. Wilkes. This case was referred to Business Court by Order entered June 22, 2017 by Chief Justice Allen H. Loughry, II.

3. PETITIONER(S) (List all parties who join in the petition for appeal and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)

The Honorable Dale W. Steager, West Virginia State Tax Commissioner and The Honorable David E. Sponaugle, Assessor of Doddridge County; Represented by L. Wayne Williams, Esq., Assistant Attorney General, WV Attorney General's Office, 1900 Kanawha Blvd E, Room W-435, Charleston, WV 25305, 304-558-2522, L.Wayne.Williams@wvago.gov.

4. RESPONDENT(S) (List all parties against whom the appeal is taken and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)

Consol Energy, Inc., dba CNX Gas Company, LLC; Represented by Craig A. Griffith, Esq., and John J. Meadows, Esq., Steptoe & Johnson, PLLC, P.O. Box 1588, Charleston, WV 25326-1588, 304-353-8190, craig.griffith@steptoe-johnson.com, john.meadows@steptoe-johnson.com

5. NON-PARTICIPANT(S) (List any parties to the lower court action that will not be involved in the appeal and provide the name, firm name, address, telephone number and e-mail address of counsel of record for each non-participant. Provide the name, address and telephone number of any self-represented litigant who was a party to the lower court action but is not participating in the appeal.)

Doddridge County Commission sitting as the Board of Assessment Appeals; Represented by Jonathon Nicol, Esq., and Lindsay Gainer, Esq., Kay Casto & Chaney, P.O. Box 2013, Charleston, WV 25327; Brandy D. Bell, Esq., Kay Casto & Chaney, 1085 Van Voorhis Road, Suite 100, Morgantown, WV, 26505.

SHORT CASE NAME: CNX Gas Company v. Tax Commissioner Steager and Assessor Sponaugle

6. Date of Entry of Judgment: 01 / 17 / 2018

Date of Entry of Judgment on Post-Trial Motions, if any:

(1) _____ / _____ / _____ (2) _____ / _____ / _____ (3) _____ / _____ / _____

7. CRIMINAL CASES:

Defendant's Sentence:

Bail Status: N/A

8. ABUSE AND NEGLECT CASES: On an extra sheet, provide a list of the names, ages, and parent's names of all minor children, a brief description of the current status of the parental rights of each parent as of the filing of the notice of appeal, a description of the proposed permanent placement of each child, and the name of each guardian *ad litem* appointed in the case.

9. Is the order or judgment appealed a final decision on the merits as to all issues and all parties? ☒ YES / ☐ NO

If your answer is no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? ☐ YES / ☐ NO

If your answer is no, you must attach a brief explanation as to why the order or judgment being appealed is proper for the Court to consider.

10. Has this case previously been appealed? ☐ YES / ☒ NO

If yes, provide the case name, docket number and disposition of each prior appeal.

11. Are there any related cases currently pending in the Supreme Court or in a lower tribunal? ☒ YES / ☐ NO

If yes, cite the case, provide the status, and provide a description of how it is related.

12. Is any part of the case confidential? ☐ YES / ☒ NO

If yes, identify which part and provide specific authority for confidentiality.

13. If an appealing party is a corporation, an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable to the appealing party, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

14. Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case?

☐ YES / ☒ NO If yes, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

15. Is a transcript of proceedings necessary for the Court to fairly consider the assignments of error in the case?

☐ YES / ☒ NO If yes, you must complete the appellate transcript request on page 4 of this form.

16. NATURE OF CASE, RELIEF SOUGHT, and OUTCOME BELOW

(Limit to two double-spaced pages; please attach.)

17. ASSIGNMENTS OF ERROR

Express the assignments in the terms and circumstances of the case, but without unnecessary detail. Separately number each assignment of error and for each assignment:

- (1) state the issue;
- (2) provide a succinct statement as to why the Court should review the issue.

Limit to eight pages double-spaced; please attach.

18. ATTACHMENTS

Attach to this notice of appeal the following documents in order:

- (1) extra sheets containing supplemental information in response to sections 1 - 14 of this form;
- (2) a double-spaced statement of the nature of the case, not to exceed two pages, as material required by section 16 of this form;
- (3) a double-spaced statement of the assignments of error not to exceed eight pages as required by section 17 of this form;
- (4) a copy of the lower court's decision or order from which you are appealing;
- (5) a copy of any order deciding a timely post-trial motion; and
- (6) a copy of any order extending the time period for appeal.
- (7) the statutory docket fee of \$200; or a copy of the lower court's granting of the application for fee waiver in this case. The statutory docket fee does not apply to criminal cases, appeals from the Worker's Compensation Board of Review or original jurisdiction actions.

NOTICE:

You must file a separate affidavit and application anytime your financial situation no longer meets the official guidelines or anytime the court orders you to do so.

SHORT CASE NAME: CNX Gas Company v. Tax Commissioner Steager and Assessor Sponaugle

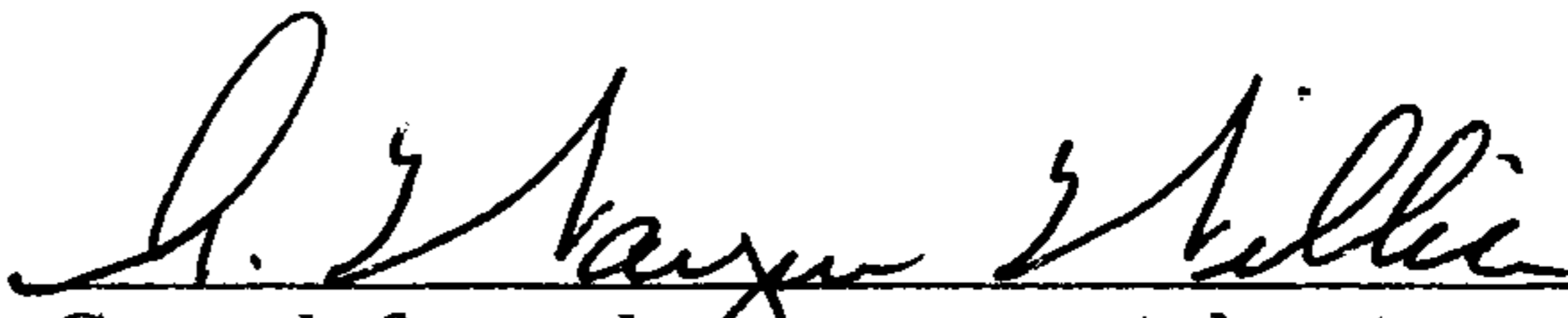
CERTIFICATIONS

STATE OF WEST VIRGINIA

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and that the contents of the Notice of Appeal are accurate and complete.

02 / 15 / 2018

Date


Counsel of record of unrepresented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

02 / 15 / 2018

Date


Counsel of record of unrepresented party

SHORT CASE NAME: CNX Gas Company v. Tax Commissioner Steager and Assessor Sponaule

**SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPELLATE TRANSCRIPT REQUEST FORM**

INSTRUCTIONS

- (1) If a transcript is necessary for your appeal, you must complete this form and make appropriate financial arrangements with each court reporter from whom a transcript is requested.
- (2) Specify each portion of the proceedings that must be transcribed for purposes of appeal. *See* Rule of Appellate Procedure 9(a).
- (3) A separate request form must be completed for each court reporter from whom a transcript is requested. If you are unsure of the court reporter(s) involved, contact the circuit clerk's office for that information.
- (4) Failure to make timely and satisfactory arrangements for transcript production, including necessary financial arrangements, may result in denial of motions for extension of the appeal period, or may result in dismissal of the appeal for failure to prosecute.

Name of Court Reporter, ERO, or Typist: N/A

Address of Court Reporter: N/A

Civil Action No.: 17-AA-2

County: DODDRIDGE

Date of Final Order: 01 / 17 / 2018

Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Portions Previously Prepared
/ /	N/A			
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CERTIFICATIONS

I hereby certify that the transcripts requested herein are necessary for a fair consideration of the issues set forth in the Notice of Appeal.

I hereby further certify that I have contacted the court reporter and satisfactory financial arrangements for payment of the transcript have been made as follows:

- ☐ Private funds. (Deposit of \$ enclosed with court reporter's copy.)
- ☐ Criminal appeal with fee waiver (Attach order appointing counsel or order stating defendant is eligible.)
- ☐ Abuse & neglect or delinquency appeal with fee waiver (Attach order appointing counsel.)
- ☐ Advance payment waived by court reporter (Attach documentation.)

Date mailed to court reporter

Counsel of record or unrepresented party

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: CNX Gas Company v. Tax Commissioner Steager and Assessor Sponaugle

LOWER COURT CASE NO: 17-AA-2

This is a response to SECTION 11: FOR ALL RELATED CASES CURRENTLY PENDING IN THE SUPREME COURT OR IN A LOWER TRIBUNAL, CITE THE CASE(S), PROVIDE THE STATUS OF EACH CASE AND PROVIDE A DESCRIPTION OF HOW EACH CASE IS RELATED.

Cases pending in the Circuit Courts:

SWN Production Company v. Steager, et al. Ohio County Civil Action No. 17-C-319

SWN Production Company v. Steager, et al. Marshall County Civil Action No. 18-C-18

Two cases with SWN Production Company are pending in the circuit courts and include the same legal issues and similar fact patterns as the six cases to be appealed by the Tax Department from the Business Court. Both circuit court cases are in the early stages of the appeal cycle from the Board of Assessment Appeals to the circuit courts. SWN Production Company concerns the valuation of producing oil and gas wells for the 2016 tax year.

All eight cases Antero Resources, CNX Gas, and SWN Production Company cases, are represented by the same counsel. Additional cases may be appealed to the circuit courts regarding the ad valorem taxation of producing oil and gas wells for the 2018 tax year and in future years.

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SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: CNX Gas Company v. Tax Commissioner Steager and Assessor Sponaule

LOWER COURT CASE NO: 17-AA-2

This is a response to SECTION 16: LIST NATURE OF CASE, RELIEF SOUGHT, AND OUTCOME (Limit to two double-spaced pages.)

CNX Gas involve the valuation of conventional oil and gas wells for the 2016 tax year. The Property Tax Division of the State Tax Department applied the legislative rule for the valuation of producing wells for the CNX Gas wells in Doddridge County. In valuing CNX's gas wells, the Tax Department allowed a deduction for the Average Annual Industry Operating Expenses in the amount of 30% of gross receipts not to exceed \$5,000 per well. The Tax Department's calculation was based on a survey of natural gas and oil producers conducted during the year 2014 to determine the statewide expense deduction. The legislative rule expressly requires the Tax Department to calculate the Average Annual Industry Operating Expenses every five years and states that it "...shall be deducted..." in valuing all producing oil and gas wells for ad valorem tax purposes. See W. Va. Code St. Rules § 110-1J-4.

The Tax Department included CNX Gas' survey response along with the operating expenses reported by all other conventional gas well producers. The mathematical average for all producers was approximately \$5,000 per conventional well which was equivalent to approximately 30% of reported gross receipts. Therefore, the Tax Department utilized the Average Annual Industry Operating Expenses of 30% of gross receipts not to exceed \$5,000 per well in valuing all conventional wells for the 2016 TY. The Tax Department valued CNX Gas' wells at \$16.9 million for the 2016 TY according to the legislative rule.

☒ Check here if the section above is continued on the next page.

SUPREME COURT OF APPEALS OF WEST VIRGINIA
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SHORT CASE NAME: CNX Gas Company v. Tax Commissioner Steager and Assessor Sponaugle

LOWER COURT CASE NO: 17-AA-2

This is a response to SECTION 16: LIST NATURE OF CASE, RELIEF SOUGHT, AND OUTCOME (Limit to two double-spaced pages.)

CNX Gas challenged the valuation of the gas wells. CNX Gas attempted to claim operating expenses of 37% of gross receipts or \$5,898 per well for the 2016 TY. The legislative rule does not authorize any deduction other than the Average Annual Industry Operating Expense as determined every five years. CNX Gas argued that its conventional wells should be valued at 11.5 million for the 2016 TY. The Board of Assessment Appeals affirmed the Tax Department's valuations for CNX's gas wells.

The Property Tax Division will calculate the Average Annual Industry Operating Expense again during the year 2019 which will be used to value all wells for the following five tax years.

Outcome below: The Business Court reversed the decision of the Doddridge County Commission sitting as a Board of Assessment Appeals. The Business Court specifically rejected a portion of the Tax Department's calculation of the Average Annual Industry Operating Expenses based on the 2014 survey and created an unlimited deduction of 30% of gross receipts per well for use in valuing all conventional gas wells in the State.

Relief Sought: The Tax Department seeks the reversal of the Business Court decisions and the affirmation of the values as originally determined under the legislative rule.

☐ Check here if the section above is continued on the next page.

SUPREME COURT OF APPEALS OF WEST VIRGINIA
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SHORT CASE NAME: CNX Gas Company v. Tax Commissioner Steager and Assessor Sponaugle

LOWER COURT CASE NO: 17-AA-2

This is a response to SECTION 17: ASSIGNMENTS OF ERROR (Express the assignments in the terms and circumstances of the case, but without unnecessary detail. Separately number each assignment of error and for each assignment: (1)State the issue; (2)Provide a succinct statement as to why the Court should review the issue. Limit to eight pages double-spaced.)

Error 1. The Business Court has created its own “Hybrid” Valuation Methodology for producing oil and gas wells contrary to the existing legislative rule and in violation of the Supreme Court’s express decision in *Lee Trace v. Raynes*, 232 W. Va. 183, 751 S. E. 2d 702 (2013).

Producing oil and gas wells must be valued according to the properly promulgated legislative rule set forth in W. Va. Code St. R. § 110-1J-1 et seq. The legislative rule requires the State Tax Department to calculate the “Average Annual Industry Operating Expense” every five years for use in the ad valorem property tax valuation for producing oil and gas wells. The Tax Department conducted a survey of all natural gas and oil producers in West Virginia during the year 2014 (2014 Survey) and calculated the Average Annual Industry Operating Expense for conventional gas wells of \$5,000 per well which was approximately 30% of gross receipts as reported by the industry. Therefore, the Tax Department allowed a deduction of 30% of gross receipts per well not to exceed \$5,000 per well for conventional gas wells. The Business Court erroneously construed the absolute dollar amount based on the survey data provided to the Tax Department by oil and gas producers as a “cap” when the \$5,000 amount was the actual dollar calculation from the survey. The Business Court rejected the not to exceed dollar amount and authorized an unlimited deduction of 30% of gross receipts despite the fact that the absolute dollar amount as calculated from the industry survey was \$5,000 per well. CNX Gas claimed operating expenses of 37% of gross receipts or \$5,898 per well for the 2016 TY.

Furthermore, the Hybrid Rule created by the Business Court is internally inconsistent. For example, the Business Court rejected the absolute dollar calculation of \$5,000 per well as calculated by the Tax Department based on the survey response while adopting an unlimited deduction of 30% of gross receipts which was based on the exact same survey responses. The Business Court’s “Hybrid” Rule erroneously concluded that the legislative rule “...contemplates a single average...” (emphasis in Business Court Decision) despite the fact that the Tax Department expressed the same deduction as both an absolute dollar amount and as a percentage of gross receipts.

☒ Check here if the section above is continued on the next page.

SUPREME COURT OF APPEALS OF WEST VIRGINIA
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The Hybrid Rule is premised on a statement by the Business Court that expenses are related to volume not gross receipts; however, the Hybrid Rule created an unlimited deduction based explicitly on 30% of gross receipts and not tied to volume.

The “Hybrid” Rule adopted by the Business Court conflated provisions from different legislative rules into the valuation of natural resource property. For example, the Business Court enlarged the deduction, at least in part, based on “impairment testing” which is similar to economic obsolescence. However, while economic obsolescence is a factor in valuing industrial personal property, economic obsolescence is not a factor for valuing natural resource property under the existing legislative rule. In addition, the Business Court conflated facts from the 2017 TY into the decision which only concerned the 2016 TY. Several findings of fact in the Business Court decision are not supported by evidence in the record.

The Business Court erroneously construed additional terms from the legislative rule and also expanded the “Average Annual Industry Operating Expense” beyond the language found in the legislative rule. The Business Court erroneously rejected a portion of the results of the 2014 Survey based upon information from the 2016 calendar year which did not exist when CNX Gas responded to the 2014 Survey and, obviously, was not included in CNX Gas’ response to the survey.

Error 2. The Tax Department correctly applied the Yield Capitalization Model set forth in the legislative rule.

The legislative rule requires the Tax Department to determine the Average Annual Industry Operating Expense every five years and requires the Tax Department to deduct the Average Annual Industry Operating Expense prior to applying the Yield Capitalization Model.

☒ Check here if the section above is continued on the next page.

SUPREME COURT OF APPEALS OF WEST VIRGINIA
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The Tax Department conducted a survey in 2014, included expenses reported by CNX Gas in the calculation, included the expenses as reported from all other producers, and determined the Average Annual Industry Operating Expense of 30% of gross receipts not to exceed \$5,000 per well for conventional gas wells. The Business Court erroneously characterized the Average Annual Industry Operating Expense of \$5,000 per well based on actual survey responses as a “cap”.

The Business Court premised its decision on CNX Gas’ claimed expenses of 37% of gross receipts or \$5,898 per well for the 2016 TY. CNX Gas failed to demonstrate by clear and convincing evidence that its alleged “actual expenses” exceeded the Average Annual Industry Operating Expense contrary to the Business Court decision. Furthermore, the legislative rule does not authorize any alternative deduction such as alleged “actual expenses”; the legislative rule mandates the standard deduction for Average Annual Industry Operating Expense in valuing producing gas wells. In addition, the Business Court adopted a deduction based on allocated expenses; the testimony of CNX Gas’ witnesses clearly stated that CNX does not track expenses on an individual well basis.

In addition, on numerous issues the Business Court erroneously concluded that the Tax Department did not properly apply the legislative rule. Furthermore, the valuation as determined by the Property Tax Division is supported by substantial evidence in the record contrary to the conclusions of the Business Court. The Business Court decision failed to properly apply the existing legislative rule as required and to provide deference to the State Tax Department’s application of the legislative rule as required by *Collett v. Eastern Royalty, LLC*, 232 W. Va. 126, 751 S.E. 2d 12 (2013).



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SUPREME COURT OF APPEALS OF WEST VIRGINIA
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Error 3. The Business Court erroneously concluded that the Tax Department violated the equal and uniform clause of the West Virginia Constitution.

The Tax Department's calculation of the Average Annual Industry Operating Expense of \$5,000 per well based on data provided by the oil and gas producers in West Virginia does not violate the equal and uniform clause of the West Virginia Constitution. Applying the survey responses based on actual data reported by oil and gas producers is not a "cap". In addition, the decision by the Business Court in Denex Petroleum Company v. Matkovich, Barbour County, Civil Action No. 16-AA-1 contradicts the decisions in Antero Resources and CNX Gas. The failure of the Business Court to consistently apply the same legislative rule creates an equal and uniform problem under the West Virginia Constitution.

Error 4. The Business Court erroneously concluded that the Tax Department violated the Equal Protection Clause of the United States Constitution.

The Tax Department's calculation of the Average Annual Industry Operating Expense of \$5,000 per well based on data provided by the oil and gas producers in West Virginia does not violate the Equal Protection Clause of the United States Constitution. The legislative rule created a standard deduction for every producing oil and gas well. The survey result based on actual data is not a "cap" and does not treat similarly situated taxpayers differently. By adopting an unlimited deduction of 30% of gross receipts, the Business Court has created an equal protection issue where none existed. According to the Business Court's Hybrid Rule, for example, CNX Gas may now deduct \$15,000 per well on large wells (30% x \$50,000) when the actual expense based on the survey data was \$5,000. According to the Business Court decision, the vast majority of CNX Gas' wells will be entitled to exceed the actual results from the 2014 Survey contrary to the legislative rule.

Furthermore, the legislative rule is economic regulation and passes constitutional muster.

☐ Check here if the section above is continued on the next page.

**IN THE CIRCUIT COURT OF DODDRIDGE COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

**CONSOL ENERGY INC.
DBA CNX GAS COMPANY LLC,**

Petitioner,

v.

**Civil Action No. 17-AA-2
The Honorable Christopher C. Wilkes**

**THE HONORABLE DALE STEAGER,
West Virginia State Tax Commissioner,**

**THE HONORABLE DAVID E. SPONAUGLE,
Assessor of Doddridge County, and**

**THE COUNTY COMMISSION OF DODDRIDGE COUNTY,
Sitting as a Board of Assessment Appeals,**

Respondents.

**ORDER REVERSING THE DECISION OF THE DODDRIDGE COUNTY BOARD OF
ASSESSMENT APPEALS UPHOLDING THE VALUATION OF CONSOL ENERGY
INC. DBA CNX GAS COMPANY LLC'S GAS WELLS FOR THE 2016 TAX YEAR**

This matter came before the Court pursuant to Petitioner Consol Energy Inc, dba CNX Gas Company LLC's (hereinafter "CNX") appeal of its producing natural gas wells in Doddridge County for tax year 2016, as appraised by the West Virginia State Tax Commissioner and assessed by the Assessor. The parties have fully briefed the issues before the Court. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the Court, and argument would not aid the decisional process. So, upon full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

Procedural Background

1. On February 17, 2016, CNX submitted to the Assessor and County Commission of Doddridge County, sitting as a Board of Assessment Appeals (the "BAA"), an Application for Review of Property Assessment with regard to its gas wells.
2. CNX appeared on October 20, 2016, by counsel, before the BAA (the "Hearing") in order to protest the Tax Department's valuation of its producing wells, as adopted by the county Assessor.
3. The BAA made no adjustment to the State Tax Department's valuation of CNX's gas wells for the 2016 tax year.
4. The Doddridge County BAA Order was dated December 22, 2016, and received on January 4, 2017.
5. CNX timely petitioned the Circuit Court for relief from the BAA's erroneous determination within thirty (30) days of the date of service of the Order denying relief, (*See* W. Va. Code § 11-3-25).

Findings of Fact

6. CNX operated 521 producing conventional wells in Doddridge County for purposes of tax year 2016.
7. The Tax Department determines fair market value for producing natural gas wells through a net income approach to valuation.
8. Producers for natural gas wells file gross receipts information with the Tax Department, and the Tax Department reduces the receipts by a production decline rate. WV CSR § 110-1J-4.2, 4.6.

9. After application of the production decline rate, the Tax Department calculates a net working interest income series by reducing the gross receipts by the annual average industry operating expenses and then applying a capitalization rate to determine market value for the working interest of the natural gas well, including personal property. WV CSR § 110-1J-4.6.1

10. For tax year 2016, the Tax Department calculates operating expenses by multiplying the reported gross receipts for a well by 30%, and “caps” the amount of allowable operating expense per well at \$5,000 for conventional wells.

11. CNX’s actual operating expenses for calendar year 2014, the year used by the Tax Department for calculating operating expenses for tax year 2016, was 37% of gross receipts, or \$5,898 per well.

12. CNX provided its actual operating expense information to the Tax Department via e-mails, including spreadsheets breaking down operating expenses, charts demonstrating increases in operating expense percentages from 2012-14, SEC Form 10K information for CNX, and results of impairment testing.

13. The actual operating expense percentage as a function of gross receipts fluctuates as gas prices fluctuate. Operating expenses correlate with volume, not price of gas.

14. The State’s imposition of a “cap” of operating expenses of \$5,000 per well results in certain wells receiving the full 30% operating expense allowance, while other wells receive far less than 30%.

15. Upon receipt of its tentative valuations from the Tax Department, CNX objected to the values via a December 2015 e-mail, and noted the allowed operating expenses resulted in an overvaluation of its wells.

16. At the Hearing, detailed charts and documentation of actual operating expenses, with numbers specific to Doddridge County, were submitted to the Board.

17. The Tax Department's final valuation variables for tax year 2016 allow operating expenses based on 30% of gross revenue with a cap of \$5,000 per well.

18. The Tax Department increased the average annual industry operating expense percentage for typical producing wells from 30% to 45% for tax year 2017 because of the precipitous drop in gas prices from calendar year 2014 to calendar year 2015. However, the cap of \$5,000 is still in place.

19. The Independent Oil and Gas Association of West Virginia ("IOGAWV"), in response to the tentative valuation variables produced by the Tax Department for tax year 2017, provided public comments in a letter dated August 1, 2016.

20. IOGAWV urged the Tax Department to consider actual operating expenses in order to ensure accurate appraisal.

21. The West Virginia Oil and Natural Gas Association ("WVONGA"), in response to the tentative valuation variables produced by the Tax Department for tax year 2017, provided public comments in a letter dated July 29, 2016.

22. WVONGA's letter included information provided by approximately 65% of oil and natural gas producers in the State of West Virginia.

23. WVONGA's calculated the average actual expense per conventional well of 41% of gross receipts.

24. Applying CNX's operating expense percentage of 37% for tax year 2016, with no "cap" on the amount of operating expense per well, results in a value for its conventional wells in

Doddridge County of \$11.5 million, far below the Tax Department's value of \$16.9 million. Hr'g Ex. 1.

Conclusions of Law

This matter is before the Court for consideration of CNX's appeal of the tax assessment valuation of its producing natural gas wells in Doddridge County. "[J]udicial review of a decision of a board of equalization and review regarding a challenged tax assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A." *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 255, 539 S.E.2d 757, 762 (2000). "In such circumstances, a circuit court is primarily discharging an appellate function little different from that undertaken by [the West Virginia Supreme Court of Appeals. . . .]"; the Circuit Court's review of the Board's decision, under W. Va. Code § 11-3-25, is therefore *de novo*.

The taxpayer's burden before the Board is to show by clear and convincing evidence that its valuation, and assessment, of its property is erroneous. Syl. pts. 5-6, *Stone Brooke Limited Partnership v. Sisnni*, 224 W. Va. 691, 688 S.E.2d 300 (2009). However, "there must be a proper assessment before there can be a presumption that the assessment is correct, and where it appears that there was no proper assessment there can be no presumption in favor of the correctness of the assessment." *In Re Pocahontas Land Co.*, 172 W. Va. 53, 61, 303 S.E.2d 691, 699 (1983). Furthermore, "[p]ursuant to *In Re Pocahontas Land Co.*, [citation omitted] once a taxpayer makes a showing that tax appraisals are erroneous, the Assessor is then bound by law to rebut the taxpayer's evidence." *Mountain Am., LLC v. Huffman*, 224 W. Va. 669, 786 n.23, 687 S.E.2d 768, 785 n.23 (2009).

In considering this appeal, the Court relies on the record developed before the Board and determines whether the challenged property valuation is supported by substantial evidence. An assessment made by a board of review and equalization will not be reversed when supported by substantial evidence unless plainly wrong. *See* W. Va. Code § 58-3-4; syl. pts. 1-2, *Stone Brooke*, 224 W. Va. 691, 688 S.E.2d 300.

Here, the Court finds that the assessment of CNX's producing gas wells in Doddridge County for Tax Year 2016 was improperly applied and is not supported by substantial evidence. For the reasons explained below, the evidence demonstrates that the Tax Department failed to assess CNX's producing gas wells at their true and actual value, and the Board's decision must therefore be reversed.

First, CNX contends that the Tax Commissioner's use of an operating expense of 30% of gross receipts with a "cap" of \$5,000 in assessing the value of producing oil and natural gas wells violates the West Virginia Code, Constitution, and the legislative rule used to value producing oil and natural gas for property tax purposes. The Court agrees.

For purposes of valuing producing operating oil and gas properties throughout the state, the Tax Commissioner is required to "every five (5) years, determine the average annual industry operating expenses per well. The average annual industry operating expenses shall be deducted from working interest gross receipts to develop an income stream for application of a yield capitalization procedure." WV CSR § 110-1J-4.3. The Rule contemplates a single average, which the Tax Department has calculated as 30% of gross receipts for conventional wells. However, the Tax Department imposes two "averages," a percent of gross receipts and a "cap" or "maximum amount" of \$5,000 per conventional well for tax year 2016. This cap unduly restricts the amount

of operating expenses that should be allowed for each well, and the imposition of a "cap" is not supported by the Rule.

CNX contends that the Tax Commissioner violated the West Virginia Constitution by failing to "equally and uniformly" value all producing conventional oil and gas wells throughout the State of West Virginia. The Court finds that the Tax Department's approach to calculating and applying operating expenses to producing natural gas wells through use of a "maximum amount" or "cap" violates the requirements under Article X, section 1 of the West Virginia Constitution that taxation be "equal and uniform throughout the state" and that both real and personal property "be taxed in proportion to its value to be ascertained as directed by law."

The Supreme Court has held that "[t]he equal and uniform clause of Section 1 of Article X of the West Virginia Constitution requires a taxpayer whose property is assessed at true and actual value to show more than the fact that other property is valued at less than true and actual value. To obtain relief, he must prove that the undervaluation was intentional and systematic." Syl. Pt. 1, *Kline v. McCloud*, 174 W. Va. 369, 326 S.E.2d 715 (1984); see also Syl. Pt. 1, *In re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. 229, 210 S.E.2d 641 (1974) (Where it is clear that the assessment has systematically discriminated against property owners and violated the equal and uniform provision, such assessments are illegal and cannot stand.)

The Supreme Court has further held,

Where there is intentional discrimination against a taxpayer by knowingly applying a different formula to the computation of his taxes from that generally used for all other taxpayers in similar circumstances, such discrimination cannot be excused as a sporadic deviation and the aggrieved taxpayer is entitled to have its taxes computed in same manner and on same basis as the favored taxpayers.

Syl. Pt. 2, *Town of Burnsville v. Cline*, 188 W. Va. 510, 425 S.E.2d 186 (1992) (Quoting Syl. Pt. 3, *Matter of U.S. Steel Corp.*, 165 W. Va. 373, 268 S.E.2d 128 (1980)), "The constitutional

requirement of equal and uniform taxation means that as to classes of property, businesses, or incomes there shall be uniformity of taxation and tax upon all businesses of same class which is uniform as to that class of business is not unconstitutional." *Capitol Cablevision Corp. v. Hardesty*, 168 W. Va. 631, 285 S.E.2d 412 (1981). The Court noted that "[c]ourts have implemented this rule of equal treatment by invalidating taxes falling unequally on business competitors who make the same product or offer the same service." *Id.* at 642.

It is uncontroverted that the Tax Department applies a different formula for calculating operating expenses depending on the amount of gross receipts for a particular well. For certain producers, a 30% "average annual industry operating expense" percentage is used for tax year 2016, whereby 30% of gross receipts for a particular well is used to calculate the operating expenses for the well. For other producers, the "maximum amount" or "cap" used by the Tax Department results in a much lower operating expense percentage being used. The Tax Department's methodology of applying a 30% operating expense allowance for certain conventional well producers, while applying a much lower percentage for other conventional well producers, is intentional and systematic. This methodology is reflected in the Tax Department's final valuation variables for tax year 2016 and in Tax Department Administrative Notices 2016-08. The evidence presented demonstrates that the Tax Department's methodology results in overvaluation of certain conventional well producers (those with gross receipts per well of over \$16,666 for tax year 2016) that produce the same product as other producers (those with gross receipts per well of \$16,666 or less for tax year 2016). Of the 521 conventional wells appealed by CNX in Doddridge County, only 136 of them receive the benefit of the 30% operating expense allowance. The rest of CNX's wells were subject to the "cap." Accordingly, the Court concludes that the methodology violates the "equal and uniform" requirement of Article X, Section 1 of the

West Virginia Constitution, as it essentially singles out CNX and other conventional well producers with wells that generate higher gross receipts on an annual basis by limiting operating expenses to \$5,000 per well for tax year 2016.

CNX also contends that the Tax Commissioner violated the Equal Protection Clause of the United States Constitution by treating similarly situated taxpayers differently, and that the Tax Department's application of the Rule results in gross disparities in the assessed value of generally comparable property, which violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The United States Constitution guarantees citizens equal protection of the laws. U.S. Const. amend. XIV § 1. As noted by the West Virginia Supreme Court of Appeals in *Town of Burnsville*, supra:

It is well recognized in both State and federal law that tax rates, although different for different classes, must be equal and uniform within the individual class. In *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989), the United States Supreme Court ruled that the Equal Protection Clause of the United States Constitution is applicable in some taxation cases: "The Equal Protection Clause 'applies only to taxation which in fact bears unequally on persons or property of the same class.' " *Id.* at 343, 109 S.Ct. at 637, 102 L.Ed.2d at 697 (citations omitted). "The equal protection clause ... protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Id.* at 343, 109 S.Ct. at 637, 102 L.Ed.2d at 698 (citations omitted). The Court concluded that the Equal Protection Clause allows the state to divide different types of property into different classes, which are each assigned an appropriate tax burden. The differing tax rates are proper as long as the division and resulting tax burdens are not arbitrary or capricious.

Town of Burnsville v. Cline, 188 W. Va. at 512, 425 S.E.2d at 188 (Footnote omitted).

The Tax Department's methodology of applying the "net receipts" model under the Rule violates the Equal Protection Clause under the Fourteenth Amendment of the United States Constitution, since it creates two disparately taxed groups within the same class of taxpayers, i.e., conventional well producers. The Tax Department calculates operating expenses for certain conventional well producers based on 30% of gross receipts. For others, an operating expense percentage much less than 30% is used. The Tax Department has offered no plausible explanation for the application of its "net receipts" model whereby producers are treated so disparately. The Court therefore finds that application of different operating expense percentages to these producers, through the use of the Tax Department's \$5,000 "cap," violates the equal protection clause of the United States Constitution.

WHEREFORE, it is ORDERED and ADJUDGED that the decision of the Doddridge County Board of Assessment Appeals upholding the valuation of CNX's gas wells for the 2016 tax year is hereby REVERSED, OVERRULED, and SET ASIDE. Because the case before the court has an inadequate record, this court cannot set the fair market value. Accordingly, the appeal is hereby REMANDED back to the County Commission to set the fair value of CNX's Doddridge County gas wells for the 2016 tax year based on application of the Tax Department's 30% average annual industry operating expense percentage by CNX's gross receipts without the imposition of a cap. The Petitioner's and Respondents' exceptions are noted for the record. The Court directs the Circuit Clerk to enter the foregoing and forward an attested copy to all counsel of record and the Business Court Division Central Office, Berkeley County Judicial Center, Suite 2100, 380 West South Street, Martinsburg, WV 25401. This being a FINAL ORDER, the Clerk is directed to remove the above captioned case from the active docket and place it amongst those causes ended.

ENTERED: January 17, 2018


CHRISTOPHER C. WILKES, JUDGE
BUSINESS COURT DIVISION

I hereby certify that the annexed instrument is a true
and correct copy of the original on file in this office.
Attest MICHELE D. BRITTON
Circuit Court Doddridge County of West Virginia

Michele D. Britton
Clerk

**IN THE CIRCUIT COURT OF DODDRIDGE COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

CONSOL Energy Inc. dba CNX Gas Company LLC,

Petitioner,

**Civil Action No. 17-AA-2
Doddridge County**

vs).

**The Honorable DALE STEAGER, WV State Tax Commissioner;
The Honorable DAVID SPONAUGLE, Assessor of Doddridge County;
and the COUNTY COMMISSION OF DODDRIDGE COUNTY, sitting
as the Board of Assessment Appeals,**

RECEIVED

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Respondents.

**Attorney General Office
Tax Division**

ORDER DENYING MOTION TO ALTER OR AMEND

This matter comes before the Court pursuant to the Motion of the County Commission of Doddridge County to Alter or Amend or to otherwise provide it relief from the Court's Judgment Order of January 17, 2018, Pursuant to Rule 59(e) and/or Rule 60(b). The motion asserts that the Doddridge County Commission was denied an opportunity to put forth its position prior to the Court's ruling because its counsel of record was facing federal charges following his arrest on December 8, 2017.

As the motion states,

[O]n October 20, 2017, the Court entered an Order setting forth a briefing schedule on the issues in these matters. In said Order, the Court directed the parties to submit their respective memoranda of argument and proposed orders by November 20, 2017. Any memorandum in rebuttal were to be submitted by December 4, 2017, after which time the Court would either rule upon the filings or set a hearing if it deemed oral argument necessary. Petitioner, Artero Resources Corporation, filed its Appeal Brief on November 27, 2017. The West Virginia Tax Department and the Honorable David Sponaugle filed their Proposed Order Dismiss Appeal [sic] on November 20, 2017, and their Rebuttal Brief opposing Petitioner's Appeal on December 4, 2017. No memorandum or filing was submitted by the Commission. The Court entered its Order ruling on the filings set forth by the parties on January

17, 2018.

The Court notes that many counties involved in these tax appeals chose to rely on the briefing of the state tax commissioner whose interests are closely aligned with its own. The Court does not presume that Attorney Sluss was incompetent during the time he represented the Commission simply because a memorandum was not filed and any incapacity due to criminal charges did not arise until after the applicable deadlines had passed.

Here, if the Commission feels that Attorney Sluss had "abandoned representation," its recourse is a claim for malpractice. What is presented to the Court here is simply not sufficient to alter or amend the Order of January 17, 2018, under either Rule 59(e) or 60(b) or the West Virginia Rules of Civil Procedure. The Court finds no change in the law, new evidence, error of law, incompetency, or obvious injustice. Furthermore, the case had been fully briefed and adjudicated on the merits. Accordingly, the Motion of the County Commission of Doddridge County to Alter or Amend or to otherwise provide it relief from the Court's Judgment Order of January 17, 2018, Pursuant to Rule 59(e) and/or Rule 60(b) must be DENIED and the Court's Order of January 17, 2018, stands as written.

The Court directs the Circuit Clerk to enter the foregoing and forward an attested copy to all counsel of record and the Business Court Division Central Office, Berkeley County Judicial Center, Suite 2100, 380 West South Street, Martinsburg, WV 25401.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in this office.
Attest: MICHELE D. BRITTON
Circuit Court Doddridge County of West Virginia

Michele D. Britton
Clerk

ENTER this 7 day of February, 2018.


CHRISTOPHER C. WILKES, JUDGE
BUSINESS COURT DIVISION