IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CAUSE NO. DA 18-0540

VISION NET, INC.,

Petitioner and Appellant,

vs.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent and Appellees.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable James Reynolds Presiding

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1. *Did the District Court err by ruling that Vision Net, Inc.'s property is subject to centrally assessment under § 15-23-101(2), MCA?*

2. *Did the District Court err by failing to conclude that the Department of Revenue's decision to centrally assess Vision Net, Inc.'s property violates constitutional principles of Equal Protection and Equalization?*

3. *Did the District Court err by allowing the Department of Revenue to continue to classify Vision Net's property under Class 13?*

STATEMENT OF THE CASE

This case arises out of the Department of Revenue's ("Department") erroneous decision to centrally assess Vision Net, Inc. ("Vision Net"). Vision Net is a local Montana company with its principal place of business in Great Falls, which provides a number of services to Montana customers, including video conferencing, technical support, technical consulting, and data transportation services. It uses various means to provide these services. As one of those means—like many other companies across the State including banking institutions, accounting firms, and law firms—Vision Net contracts for access to strands of fiber within fiberoptic cables from telephone companies for the purposes of transporting data. This fiber is the sole property that may be considered intercounty in this matter. While Vision Net uses the fiber to transport data, the

telephone companies continue to own and operate it. Like the other companies that contract to use the fiber, the Department locally assessed Vision Net until 2015.

A. The Department begins to centrally assess Vision Net in 2015.

On May 20, 2015, the Department reversed its prior assessment methodology and subjected Vision Net to central assessment. The Department claimed that Vision Net was subject to central assessment because "Vision Net provides retail telecommunications services in more than one county." App.4, p. 5. As a result of this decision, the Department significantly increased the assessed value of Vision Net's property. It also reclassified Vision Net's property, which drastically increased the tax rate. This resulted in Vision Net's total tax liability ballooning by more than 300 percent.

B. Vision Net files a declaratory judgment action.

After informal discussions with the Department failed, Vision Net filed a petition with the First Judicial District Court on April 4, 2016, for declaratory judgment pursuant to § 15-1-406, MCA, seeking a declaration that the Department's decision to centrally assess Vision Net's property was in violation of Montana statutes and its constitutional rights. The parties filed cross motions for summary judgment on the statutory and constitutional claims.

C. The District Court adopts the Department's position.

The District Court granted the Department's summary judgment motion through its Order on Motions for Summary Judgment ("Order"), dated July 19, 2018. Although it recognizes that "[t]he question is whether the taxpayer operates a single and continuous property across county or state lines," Order at 11 (citation omitted), the Order provides no independent analysis of whether Vision Net meets this standard. Instead, it adopts the Department's position: "The Department's determination that Vision Net operates its owned and leased properties in a single and continuous operation across county and state lines answers this question in the affirmative." *Id.*

The Court also adopted the Department's constitutional arguments. It expressly agreed that Vision was not similarly situated to "banks, law offices, and accounting firms" because these entities "do not provide telecommunication services as described in these statutes and administrative rules." *Id.* Ultimately, the Court concluded that "the Supreme Court held in *Bresnan* that telecommunications companies are properly centrally assessed." *Id.* (referencing *Bresnan Commc'ns, LLC v. Dep't of Revenue*, 2103 MT 357, 373 Mont. 29, 315 P.2d 921).

Given its decisions above, the District Court was silent on the proper classification of Vision Net property. Vision Net then timely appealed the District Court's Order to this Court.

STATEMENT OF THE FACTS

Vision Net is a local Montana company formed in 1995. *See* Vision Net Appendix ("App.")1, p. 2. It was created, primarily, to provide services to rural K through 12 Montana schools for interactive learning. App.9, p. 13. Vision Net is not a telephone company, cooperative, or cable company. App.2, p. 2. Vision Net provides various services to its Montana customers, including network transport services, video conferencing, and technical support. *Id*.

A. Vision Net provides data transportation services to its customers, using property owned and operated by telephone companies.

As part of its network transport services, Vision Net helps customers transfer their data between various locations using wired lines. App.2, p. 2. Vision Net does not provide wireless telecommunications services. *Id*. Vision Net's customers determine what data to transfer on the wired network connection. App.2, p. 5. Vision Net does not control or view the content of the data its customers transfer using its data transport services. *Id*. Nor does Vision Net dictate when, how, or what type of data customers transfer on the network. *Id*.

To provide data transportation, Vision Net sets up point-to-point network connections by contracting with other providers to provide these services (referred

to as "finished services") or by contracting to use "dark fiber" from telephone companies. App.2, p. 3. Dark fiber refers to individual strands of fiber within a fiberoptic cable. *Id.* The fiberoptic cable, including the individual strands of fiber, is owned and operated by telephone companies.

Telephone companies regularly contract with third parties to provide access to the fiber for data transportation. *Id.* at 3. These third-parties include various entities such as banking institutions, accounting firms, law firms, and, of course, as relevant here, Vision Net. *Id*. at 3, 6. While the telephone companies permit these third-party entities to contract for access to their fiber, the telephone companies remain firmly in control of the fiber. The fiber can be thought of as highways, Vision Net's equipment as trucks, and the data transferred by third parties as cargo. The centrally assessed telephone companies own and operate the highways, but Vision Net has the right to send trucks down the highway to transport customer cargo.

B. Vision Net does not own or operate intercounty property.

Telephone companies expressly retain ownership and the operation of the various segments of fiber. The rights between each of the telephone companies and Vision Net are set forth in their respective contractual agreements, which are referred to as Indefeasible Right of Use ("IRU") agreements. *Id.* at 1. As the name implies, the IRU agreements grant Vision Net the "right to use" the dark fiber

within fiberoptic cables to transfer data, not a right to ownership or operation. *Id.* at 1. The Department did not consider these IRU agreements in its decision to centrally assess Vision Net. Instead, it relied on Vision Net's status as a retail telecommunications provider. App.3, p. 83.

By their plain terms, the IRU agreements expressly contemplate that "ownership, operation, and maintenance" of the fiber will lie with the telephone companies. App.5, p. 13. The agreements provide that the respective telephone company "in its . . . operation" of the fiber "will comply with all applicable local municipal, state or federal laws, orders and regulations" and warrants that it will "operat[e]" the fiber in accordance with industry specifications and standards. *Id.*

Vision Net does not choose or have any right to any specific strand of fiber. The particular strand that Vision Net uses is within the discretion of the telephone companies and these companies remain free to reassign strands as provided in the agreements. *Id.* at 1, 5, 17. The telephone companies are also vested with the authority to "reroute the [fiber] through their facilities to accommodate changes in [their] operating requirements." *Id.* at 5, 13.

The telephone companies design and physically control the fiber. *Id.* at 5-13. Under the IRU agreements, the telephone companies are responsible for "design[ing], engineer[ing], install[ing], and construct[ing]" the fiberoptic system.

Pursuant to the express terms of the IRU agreements, "maintenance and repair" of the fiber "shall be performed by the telephone companies." *Id.* at 23. The telephone companies are required to perform both "[r]outine" and "[n]on-routine maintenance and repair" of the fiber, including "emergency" and "[n]on-emergency unscheduled maintenance." *Id.* at 23-24. The telephone companies must provide a "twenty-four hours per day, seven days a week" dispatch center to allow the reporting of any issues with the fiber. *Id.* at 23. The telephone companies are responsible for all fiber failures and are responsible to restore any outages with priority to those lines carrying traffic. *Id.* at 24.

Not only are the telephone companies vested with all of the above authority, the authority is exclusive. Vision Net is prohibited from maintaining, repairing, and rerouting the fiber. *Id.* at 2, 23. The agreements exclude any "right of Vision Net to own or maintain" or "to encumber" or "interfer[e]" in the telephone companies' "operations" of the fiber. *Id.* at 2.

Finally, Vision Net not does own, operate, provide, or maintain the distribution panels, which connect its equipment to the fiber. *Id.* at 4. While Vision Net is permitted an exclusive right of use, the right to use does not apply to any particular strand of fiber. *Id.* at 4, 7. Vision Net is limited to accessing the dark fiber for data transportation, and this access is limited. *Id.* at 1.

Vision Net does not use any other property that crosses county boundaries. *Id.* at 5. The only other property used by Vision Net to deliver services is property that it owns. Vision Net owns real property, including two buildings in Great Falls; short segments of fiberoptic cable in Yellowstone County, Lewis & Clark County, and Flathead County, respectively; and computing equipment in various locations around the State. *Id*. None of this property crosses county lines. *Id*.

C. The Department assesses and taxes the fiber to the telephone companies, not Vision Net.

1. The Department, Vision Net, and the respective telephone companies' treat the fiber as telephone company property.

The Department, Vision Net, and the telephone companies all treat the fiber within a fiberoptic cable as the operating property of the telephone companies for purposes of assessment and taxation. Dist. Ct. Reg. Doc. No. 23, Ex. G, p. 7; App.3, pp. 80-81, 85. The telephone companies report the fiber as their operating property; Vision Net does not. App.3, pp. 86-87; App.2, p. 6. The Department assesses and taxes the fiber to the telephone companies as their operating property. App.3, pp. 80-81, 85. Even after the Department began centrally assessing Vision Net's property, the Department specifically removed the fiber from Vision Net's assessment. *Id.*; Dist. Ct. Doc. No. 23, Ex. G, p. 7. The Department includes the fiber to the telephone companies' centrally assessed value as their operating property and the telephone companies are taxed on the fiber. App.3, pp. 80-82, 85.

2. The Department's "theoretical" claims contradict reality.

In deposition testimony, the Department agreed that it assessed and taxed the fiber Vision Net uses to telephone companies as the telephone companies' operating property. App.3, pp. 80-81, 85. This property was not taxed or assessed to Vision Net. *Id.*

The Department claimed that "theoretically" the fiber could be viewed as "operating property" to Vision Net. App.3, p. 84. It also claimed the telephone companies did not operate the fiber. *Id.* at 83-84. However, this is not because of any control or actual operation of the fiber by Vision Net—but rather because the telephone companies "don't use that property to provide telecommunication services." *Id.* The Department's theoretical position notwithstanding, for purposes of assessment and taxation under Montana law, it is undisputed that the fiber is the telephone companies' operating property. App.3, pp. 80-82, 85; Dist. Ct. Reg. Doc. No. 23, Ex. G, p. 7

D. Other entities use dark fiber, similar to Vision Net, but are not centrally assessed.

As mentioned above, Vision Net is not alone in using fiber within fiberoptic cables to transport data. A number of other entities including banking institutions, accounting firms, and law firms lease access to dark fiber to transfer data between locations in Montana. App.2, p. 6. Just like Vision Net, these companies use fiber to transport data to perform video conferencing, technical support, and network

monitoring, among other services. *Id.* at 6-7. These companies further own and operate computing equipment in counties around the State. *Id.* at 7.

The Department does not centrally assess the property of these other entities. App.4, p. 7. Even though these other entities transfer data over fiber, the Department does not centrally assess these entities because they do not "offer[] a ***retail*** telecommunication service." App.3, p. 101 (emphasis added).

E. The Department's decision to centrally assess Vision Net increased its property tax value and tax liability burden.

In 2015, the Department centrally assessed Vision Net for the first time, after locally assessing Vision Net's property for more than 20 years. App.2, p. 5. This decision had a number of results that increased Vision Net's tax burden. The Department began using central assessment methodology to value Vision Net's property for property tax purposes, which increased its value substantially. *Id.* at 6. In 2014, Vision Net's property was locally assessed at $8,417,720. *Id.* In 2015, the Department used central assessment valuation methodology to increase Vision Net's property tax value to $24,893,375. *Id.* Through the informal review process, the Department agreed to reduce the value to $9,357,064. *Id.*

The Department's decision to centrally assess Vision Net also resulted in the Department reclassifying Vision Net's property from property tax Classes 4 and 8 to Class 13, which includes "allocations of centrally assessed telecommunications companies." § 15-6-156, MCA. This increased Vision Net's tax rate from a tiered

system of 0%, 1.5%, and 3% on personal property and 1.8% on real property, to a tax rate of 6% on all of its property. *See id.* §§ 15-6-134, -138, & -156.

Ultimately, the Department's decision to centrally assess Vision Net resulted in a substantial overall increase in Vision Net's tax burden. Vision Net's property tax liability increased from $103,963 in 2014 to $367,718 in 2015, an increase of more than 300 percent. App.2, p.6.

STANDARD OF REVIEW

On appeal from summary judgment, the Court "review[s] a case *de novo* based on the same criteria applied by the district court." *Counterpoint, Inc. v. Essex Ins. Co.*, 1988 MT 251 ¶ 7, 291 Mont. 189, 967 P.2d 393. Construction of a tax statute is a question of law. *Omimex Canada, Ltd. v. Dep't of Revenue*, 2008 MT 403, ¶ 21, 347 Mont. 176, 201 P.3d 3. Tax statutes are to be "strictly construed against the taxing authority and in favor of the taxpayer." *Id*.

SUMMARY OF THE ARGUMENT

The Court should reverse the District Court's Order and hold that Vision Net is not subject to central assessment. This case should have been a straight-forward analysis of whether the Department may centrally assess Vision Net under § 15-23-101, MCA. This statute provides the threshold analysis for any central assessment. Pursuant to § 15-23-101(2), MCA, the Department is prohibited from

centrally assessing a taxpayer's property unless the taxpayer is "operating" a "single and continuous" property crossing county boundaries.

Vision Net does not operate any intercounty property. The only property Vision Net uses that may be considered a single and continuous intercounty property is fiber within fiberoptic cables owned and operated by telephone companies. Vision Net does not operate that property within the meaning of the statute, and it should not be treated differently for property tax purposes than any other customer of the telephone companies. Therefore, Vision Net's property is not subject to central assessment.

The District Court erred by adopting the Department's argument that Vision Net is centrally assessable simply because Vision Net provides retail telecommunications services in more than one county. The Department's argument that Vision Net's property is centrally assessable simply because Vision Net provides retail telecommunication services in more than one county is without any merit. Nothing in the statutory language of § 15-23-101(2), MCA, supports the Department's interpretation. The statute makes no mention of retail telecommunication providers. The lodestars of the statute are "operating" and "a single and continuous property." The statute provides for the assessment of property, not services. The Department's actions, which were approved by the

District Court, rewrite the statute in violation of Montana law. The Department has never asserted the essential statutory factors for central assessment.

Moreover, the extra-statutory authorities relied on by the Department are not applicable to the present inquiry. The Department's "retail telecommunications provider" interpretation serves only to circumvent the language of § 15-23-101(2), MCA.

The District Court's failure to provide any meaningful analysis of the statutory requirements of § 15-23-101, MCA permits the Department's flawed analysis to proceed unchecked. Although the District Court acknowledges the plain language § 15-23-101(2), MCA, it bypasses the language of the statute to adopt the Department's determination. This is prohibited by Montana law. Therefore, this Court should reverse the District Court's Order.

The District Court also erred by failing to conclude that the Department's disparate treatment of Vision Net and the other entities using the fiber is a violation of the Montana Constitution. By its terms, the purpose of § 15-23-101(2), MCA, is to impose central assessment on entities "operating" a "single and continuous property." Vision Net and the other entities using fiber are identical in all respects relevant to § 15-23-101(2), MCA. Yet, the Department centrally assesses Vision Net, while locally assessing other taxpayers. There is no rational basis for this arbitrary treatment. If this Court reaches the constitutional issue, it should

conclude that the Department's conduct violates the Montana Constitution as applied to Vison Net.

Finally, the District Court also erred by failing to restore Vision Net to the classifications the Department has assigned it has held for more than 20 years. This classification includes "allocations of **centrally assessed** telecommunications services companies." § 15-6-156(1)(d), MCA (emphasis added). Since Vision Net cannot be centrally assessed, its property must not be classified under Class 13.

ARGUMENT

I. THE COURT SHOULD REVERSE THE DISTRICT COURT BECAUSE THE DEPARTMENT'S ACTIONS VIOLATE § 15-23-101, MCA, WHICH GOVERNS CENTRAL ASSESSMENT.

Vision Net is not subject to central assessment. It does not operate a single and continuous intercounty property, which Montana law requires for central assessment. The authority to centrally assess is set forth in § 15-23-101, MCA, which provides in relevant part:

> The department shall centrally assess each year . . . property owned by a corporation or other person **operating a single and continuous property operated in more than one county** or more than one state[.]

(Emphasis added). The statute is unambiguous. It unequivocally requires that the taxpayer must be "operating" a single and continuous intercounty "property" as a condition precedent to central assessment. If a taxpayer does not operate such property, the Department cannot centrally assess.

Any other interpretation would render these terms meaningless in violation of Montana canons of statutory construction. "Every word of a statute must be made operative," and "no word in a statute is to be deemed meaningless" under Montana law. *Daley v. Torrey*, 71 Mont. 513, 515, 230 P. 782, 784 (1924) (internal citations omitted). To be subject to central assessment, the statute clearly contemplates that there must be not only a "single and continuous property" spanning from county to county, but that the taxpayer must be the one "operating" that property. For the word "operating" to have any meaning at all, the taxpayer must "operat[e]" a single and continuous intercounty property.

The District Court and the Department agree. In its Order, the District Court twice took notice of the plain language, concluding that "[c]ritical to the determination of central assessment is whether the taxpayer is operating a single and continuous property crossing county or state lines," Order, p. 6, and that the statutory "question is whether the taxpayer operates a single and continuous property across county or state lines." Order, p. 11. Similarly, the Department concedes that the plain language ensures that "a company has to operate a single and continuous property across state or county lines in order to be centrally assessed[.]" App.3, p. 23:9-14. This governing law is undisputed.

A. Vision Net does not operate intercounty property within the meaning of § 15-23-101(2), MCA.

Vision Net simply does not operate any intercounty property. The term "operate" is not defined under the statute or any applicable administrative rule. Under Montana law, undefined terms must be given "their usual and ordinary meaning." *Landemo v. Mont. Rail Link, Inc.*, 2001 MT 273, ¶ 22, 307 Mont. 293, 38 P.3d 782 (quotation marks omitted). The usual and ordinary meaning of the term "operate" is to "control the functioning of (a machine, process, or system)" and "to manage and run." The Oxford English Dictionary (2d ed. 1989). *See also Dep't of Revenue v. Priceline.com, Inc.*, 2015 MT 241, ¶ 10, 380 Mont. 352, 354 P.3d 631 (relying on definition of "operate" as "[t]o run or control the functioning of" for purposes of defining the undefined term). This requires much more than simple "use" of the property. To use means to "take, hold, or deploy (something) as a means of accomplishing or achieving something; employ." The Oxford English Dictionary (2d ed. 1989).[1]

Here, Vision Net does not do anything that can reasonably be construed as operating a single and continuous intercounty property. None of the property Vision Net owns or operates crosses county lines. Although Vision Net uses fiber owned by telephone companies to provide some of its services, its use is limited to

[1] This same Oxford Dictionary definition of the term "operate" is available online at https://en.oxforddictionaries.com/definition/us/operate, and the same definition of "use" is available at https://en.oxforddictionaries.com/definition/us/use.

those activities necessary to transfer data. It does not equate with operation. Vision Net does not "control the functioning" of the fiber or otherwise "manage or run" the fiber, as set out in the IRU agreements.

Telephone companies perform all of the actions required to control, manage, and run the fiber, and Vision Net is prohibited from doing these things. The IRU agreements expressly state that the "ownership, operation, and maintenance" of the fiber is performed by each respective telephone company, "in its . . . operation" of the fiber "will comply with all applicable local municipal, state or federal laws, orders and regulations." The telephone companies warrant that they will "operat[e]" the fiber in accordance with industry specifications and standards.

The telephone companies are responsible for "design[ing], engineer[ing], install[ing], and construct[ing]" the fiberoptic system. They own and operate the equipment that attaches to the fiber to make it available for data transfer. They choose the fiber that Vision Net is permitted to use for data transfer. They may reassign Vision Net to different fiber or reroute the fiber through their facilities to accommodate their operating requirements. They monitor, perform maintenance, and repair of the system and provide twenty-four hour dispatch center for Vision Net to report issues. They are responsible for fiber failures and must restore outages.

By contrast, Vision Net is expressly prohibited from performing any of the tasks. The IRU agreements exclude Vision Net from maintaining, encumbering, or interfering in the telephone companies' operations of the fiber. Vision Net does not maintain, repair, reroute, relocate, protect, or secure the fiber it uses. It is not responsible for securing the proper permitting, government or third-party approvals, or any other necessary actions for regulation of the fiber it uses. Nor does Vision Net own, provide, maintain, or repair the distribution panels that connect to the fiber it uses.

Vision Net cannot choose and has no control over the strands of fiber it may use. It does not have control over the route the data it transports may take, which is subject to the control and operation of the telephone companies. Moreover, Vision Net does not control or view the content of the data its customers transfer using its data transport services. Nor does it dictate when, how, or what type of data customers transfer on the network.

At most, Vision Net's actions amount to "use." Vision Net deploys the fiber to accomplish the transfer of data—nothing more. It does not control the functioning of the fiber. It does not manage or run the fiber. There can be no reasonable argument that the fiber could be operated by doing solely what Vision Net does. Without the many actions performed by the telephone companies, the

fiber could not begin to function. Vision Net's use of the fiber does not render it "operating" the fiber.

Finally, no party treats the fiber as the operating property of Vision Net under Montana law. The Department assesses the property to the telephone companies as their operating property, not Vision Net. It is taxed to the telephone companies, not Vision Net. Likewise, the telephone companies report the fiber as their operating property; Vision Net does not. Even after its decision to centrally assess Vision Net, the Department makes an express reduction to Vision Net's assessment to remove the value of this fiber. The actions of all parties further demonstrate that the telephone companies operate the fiber.

B. The Department does not, and cannot, claim that Vision Net operates the fiber and has not identified a single and continuous intercounty property as the statute requires.

The Department argues Vision Net is centrally assessable because it is a retail telecommunications company that offers services in more than one county. As a result, the Department has never taken the position that Vision Net is centrally assessable because it is operating the fiber within the meaning of § 15-23-101(2), MCA. Though the Department claims the statute has been satisfied—making superficial and conclusory references to operating property and the leasing of the

fiber—the Department, at no point, has ever asserted Vision Net is "operating" the fiber within the meaning of the statute.[2]

Nor could the Department reasonably do so. The Department continues to assess and tax the fiber to the respective telephone companies that own and operate it. App.3, p. 81-82. The Department only began centrally assessing Vision Net in 2015. App.2, p. 5. As part of that assessment, the Department expressly removes the value of the fibers from Vision Net's property calculation during the audit process. Therefore, it cannot properly argue that Vision Net operates the fiber and has abandoned the language of the statute. This Court must require the Department to apply statutory requirements to central assessment and bar the Department from centrally assessing Vision Net.

Moreover, this cannot be the Department's position because the Department does not centrally assess the other entities that contract to use the fiber. As stated above, banking institutions, accounting firms, and law firms all lease access to fiber. If Vision Net is "operating" fiber, then these other entities are too. But the Department does not centrally assess the others. Therefore, the Department cannot

[2] For example, at one point the Department claims the fiber is Vision Net's "operating property," under the Department's administrative rule because without it "Vision Net would not be able to provide retail telecommunications." App.7, p. 4-5. However, this rule includes all property "owned, leased, or used," not operated, by the taxpayer. It says nothing about the actual operation of the property, and the Department provides no further analysis of how the Vision Net operates intercounty property within the meaning of § 15-23-101(2), MCA.

argue that Vision Net is operating the fiber within the meaning of the statute. The Department has recognized these internal contradictions and been careful not to take this position.

Similarly, the Department never identifies the single and continuous property it claims Vision Net is operating. Instead, the Department repeatedly claims Vision Net is subject to central assessment because "Vision Net is a telecommunications services provider that offers retail telecommunications." App.7, p. 9. Neither the Department nor the District Court have provided any basis for the Court to rule in the Department's favor.

Given these considerations, Vision Net's property is not subject to central assessment under § 15-23-101(2), MCA. The Court should prohibit the Department from centrally assessing Vision Net and reverse the District Court's Order.

C. The Department's actions violate § 15-23-101, MCA and cannot be justified through other authority.

The Department has repeatedly asserted that Vision Net's property is subject to central assessment because "Vision Net is a telecommunications services provider that offers retail telecommunications and operates in more than one county." App.7, p. 1. The District Court adopted this conclusion in its Order. Order, pp. 4, 11.

In the Department's view, the central assessment inquiry involves two steps. First, the Department examines whether the company is operating in more than one county or state. App.7, p. 8. Second, "[o]nce the Department determines that a company is operating in more than one county and/or more than one state, the Department must then determine if that property's use and productivity fits the definition of a 'telecommunications services provider.'" *Id*. If the company fits this test, the Department concludes that the company is "properly subject to central assessment." *Id*.

The Department's analysis is without any merit. It is completely unsupported by any statutory language whatsoever and violates Montana's principles of statutory construction. Montana courts must interpret a statute "consistent with the statute's plain language and will not interpret a statute beyond its plain language if the language is clear and unambiguous." *Hines v. Topher Realty, LLC*, 2018 MT 44, ¶ 15, 390 Mont. 352, 413 P.3d 813. In doing so, the court is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA. To that end, this Court has made clear that it will not "read into a statute what is not there." *Hines*, ¶ 15.

1. The Department's statutory interpretation violates the plain language of § 15-23-101, MCA by omitting the terms "operating" and "single and continuous property" and inserting the terms "retail telecommunications provider."

The Department's interpretation completely rewrites § 15-23-101(2), MCA. As discussed above, the statute provides, in relevant part:

> The department shall centrally assess each year . . . property owned by a corporation or other person **operating a single and continuous property operated in more than one county or more than one state**[.]

§ 15-23-101(2), MCA. (Emphasis added.) Nothing in the statute mentions retail telecommunications or anything else to support the Department's analysis. The Department's interpretation simultaneously reads something into the statute—"retail telecommunications provider"—that is *not* in the statute, and reads something out—"operating a single and continuous property"—that *is* in the statute. The Court must not permit the Department to redraft the statute in this manner.

To further its claim that all telecommunications companies must be centrally assessed, the Department goes so far as to claim the "proper analysis" is "not the *operation* of the leased fiber but Vision Net's *use* of the leased fiber." App.8, p. 2 (emphasis in original). This is the opposite of what the statute requires. The Department's actions are a blatant violation of the statutory language.

The same is true for the District Court's Order, which is based entirely on the Department's determination that an entity is operating such property simply by virtue of being a retail telecommunications provider in more than one county. By accepting the Department's argument, the "single and continuous property" operated by Vision Net remains unknown. Contrary to the District Court's Order, the statutory criteria in § 15-23-101, MCA are not satisfied by the Department's baseless determination, and the Order should be reversed.

2. The Department's reliance on authority other than § 15-23-101, MCA to justify its "retail telecommunications provider" interpretation is misplaced.

Instead of citing § 15-23-101, MCA to support its analysis, the Department attempts to advance a number of other authorities independent of § 15-23-101(2), MCA. These authorities do not support the Department's proffered interpretation.

(a) The Court should reject the Department's use of the classification statute § 15-6-156, MCA as the basis to centrally assess Vision Net.

The Department first relies on the classification statute at § 15-6-156, MCA. This statute provides in relevant part:

> (1) . . . class thirteen property includes:
> . . .
> (d) allocations of centrally assessed telecommunications services companies.

§ 15-6-156(1), MCA.

Based in part on this statute, the Department claims "Montana law requires the Department to centrally assess telecommunication service companies." This argument fails for the following reasons.

First, the plain language of the statute proves that some telecommunications companies should not be centrally assessed. By limiting Class 13 to only "centrally assessed telecommunications service companies," the statute necessarily implies that some telecommunications companies are not subject to central assessment. Otherwise, the words "centrally assessed" would be meaningless, in violation of Montana law. *Daley,* 71 Mont. at 515, 230 P. at 784. The fallacy of Department's position may be best illustrated through analogy. If the statute classified all blue houses as Class 13, the Department would then argue that all houses are blue. This simply is not the case. Likewise, simply because centrally assessed telecommunications companies are mentioned in § 15-6-156, MCA does not mean that all telecommunications companies must be centrally assessed. The Department reliance on the classification statute to centrally assess Vision Net is improper, and its arguments must be rejected.

Furthermore, the Department ignores longstanding Montana Supreme Court precedent that prohibits the use of classification statutes to justify central assessment. The Department must first determine whether Vision Net is locally or centrally assessed, pursuant to § 15-23-101, MCA, before turning to classification.

Title 15 of Montana Code provides a sequenced, two-step process for the taxation of property. *Zinvest, LLC v. Gunnersfield Enterprises, Inc*., 2017 MT 284, ¶¶ 14, 17, 389 Mont. 334, 405 P.3d 1270. The first step is assessment, which is "the process by which persons subject to taxation are listed, their property described, and its value ascertained and stated." *Hiland Crude, LLC v. Dep't of Revenue*, 2018 MT 159, ¶¶ 8, 13, 392 Mont. 44, 421 P.3d 275 (brackets omitted). As part of that process, the Department must initially determine *how* to assess, i.e., either through local assessment or central assessment, which is governed by § 15-23-101, MCA. *Omimex*, ¶ 11.

The second step is classification, which is the process by which the Department categorizes "the property according to statutory definitions," which "determines the rate of the tax levy." *Hiland*, ¶¶ 8, 13. The classification statutes are set forth in Title 15, Chapter 6 of Montana Code. This Court has made clear that the "classification statutes first become operative when assessment is complete." *Id.* ¶ 13 (brackets and internal quotation marks omitted). Put simply, "the classification statute has nothing whatever to do with the assessment of property." *Butte Elec. Ry. Co. v. McIntyre*, 71 Mont. 21, 22, 227 P. 61, 62 (1924). Accordingly, the Department's reliance on a classification statute for assessment is improper. The Department should have determined whether Vision Net can be

centrally assessed under § 15-23-101, MCA and then classified its property. It erred when it failed to do so.

The plain language of § 15-6-156, MCA confirms the Department committed this error. The statute assumes the Department has followed the proper process and made the assessment determination before turning to classification. The statute sets the tax rate for "allocations of **centrally assessed** telecommunications service companies." § 15-6-156(1)(d), MCA (emphasis added). Section 15-6-156, MCA can be applied only after the Department has made the decision whether to centrally assess; it does not tell the Department whether to centrally assess.

(b) Bresnan Communications v. Department *offers no support for the Department's position.*

The Department next relies on this Court's decision in *Bresnan Communications LLC v. Department of Revenue*, 2013 MT 357, 373 Mont. 29, 315 P.3d 921. *Bresnan* is inapposite. Nothing in that case holds that the Department is required to centrally assess all telecommunication companies. In that case, the Court considered whether the district court had properly classified portions of Bresnan's property. *Id.* ¶ 25. As part of that analysis, the Court also addressed, as an undisputed secondary issue in two paragraphs, whether Bresnan should have been centrally assessed under § 15-23-101, MCA. *Id.* ¶¶ 46-47.

Significantly, the issue of whether Bresnan was "operating" a "single and continues property" was not even in dispute. Bresnan "operate[d] a single transmission line" to deliver services around the State. *Id.* ¶ 47. It had centrally reported a portion of its assets for years before the decision was issued. *Id.* ¶ 16. In fact, the issue of whether a company is operating a single and continuous intercounty property for purposes of § 15-23-101, MCA issue has not been thoroughly examined by this Court in any matter. *Bresnan* does not support the Department's "retail telecommunications provider" interpretation.

(c) The Department's reliance on ARM 42.22.101(15) is erroneous.

ARM 42.22.101 does not support the Department's argument in this matter. It supports Vision Net. The Department cites to ARM 42.22.101(15) as evidence it is required to centrally assess telecommunication companies. App.7, pp. 4-5. That rule defines "operating property" as "all real and personal property, owned, leased, or used, which is reasonable and necessary to the maintenance and operation of a centrally assessed company's interstate or inter-county business." ARM 42.22.101(15).

First, ARM 42.22.101 is not intended to define "operating" for purposes of § 15-23-101(2), MCA. Just like with the classification statute addressed above, the rule presumes that the central assessment determination has already been made, before its provisions become operative. It states that "operating property" is

certain property "of a **centrally assessed** company's interstate or inter-county business." (Emphasis added).

The rule is designed to identify the pieces of property the Department will include the assessment, after the decision regarding central assessment has been made. The "operating property" of a centrally assessed company is to be included within the company's assessment, while the "nonoperating property" of the centrally assessed company is not to be included. *See* ARM 42.22.102(2). The rule does not tell the Department whether to centrally assess a taxpayer.

Use of ARM 42.22.101 to define operation would be inconsistent with the plain language of § 15-23-101(2), MCA. By its own terms, ARM 42.22.101 includes intercounty property that is "leased" and "used" property. It is clear, however, that § 15-23-101(2), MCA, requires more than simply "leas[ing]" or "us[ing]" property. If leasing or using intercounty property were sufficient, a number of entities across the State would be subject to central assessment, including every single entity that leases or uses the fiber. This would result in significant statewide impacts. Such an interpretation of the word "operating" within § 15-23-101(2), MCA, is absurd and must be rejected. Had the Montana Legislature wanted to apply central assessment to everyone using or leasing intercounty property, it could have easily done. It chose not to.

To the extent the rule applies, it supports only Vision Net's position, as demonstrated by the facts in this matter. The Department did not include the fiber in Vision Net's "operating property." Instead, the Department included the fiber in the "operating property" of the telephone companies that own it. It expressly removes the fiber from Vision Net's central assessment. The rule does nothing to justify the Department's actions, and the Department's theoretical positions of what could be do not overcome the reality of its assessments.

D. The District Court does not provide any analysis to justify central assessment under § 15-23-101, MCA.

The District Court's Order simply adopted the Department's erroneous positions described above. The District Court correctly states that § 15-23-101(2), MCA governs whether the Department may centrally assess Vision Net. Order at 11. However, the Court performs no independent analysis. Instead, the Court states "[t]he Department's determination that Vision Net operates its owned and leased properties in a single and continuous operation across county and state lines answers this question [of § 15-23-101(2), MCA] in the affirmative." *Id.*

This very statement demonstrates the Department violated § 15-23-101, MCA. The statute requires that Vision Net operate a single and continuous intercounty property, not that it "operate . . . properties in a single and continuous operation." The Order provides no valid evidentiary or legal basis to conclude that Vision Net's property satisfies the statutory requirements. It provides no

meaningful analysis of any of the key terms in the statute. In short, the District Court's wholesale adoption of the Department's position fails to hold the Department to its legal obligation to comply with Montana law. By doing so, the District Court improperly allowed the Department to violate the statute, as explained above, and Constitution, as explained below.

For these reasons, the Court should reverse the District Court's Order. The Department's arguments and the District Court's conclusions lack any legal merit and must be rejected.

II. THE COURT SHOULD REJECT THE DEPARTMENT'S DECISION TO CENTRALLY ASSESS VISION NET BECAUSE IT VIOLATES THE EQUAL PROTECTION CLAUSE AND EQUALIZATION.

The Department has violated Vision Net's constitutional right to equal protection and equalization by treating Vision Net differently than other similarly situated entities, which lease and use fiber to transport data. The Department has provided no rational basis for its actions.

Article II, § 4 of the Montana Constitution provides that "[n]o person shall be denied the equal protection of the laws." This Court has explained that the purpose of Montana Constitution's Equal Protection Clause is to "ensure that Montana's citizens are not subject to arbitrary and discriminatory state action." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 15, 382 Mont. 256, 368 P.3d 1131.

Under Article VIII, § 3 of the Montana Constitution the "state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law." This later constitutional provision reinforces the mandates of equal protection by requiring that "[u]niformity of taxation among like taxpayers on like property [be] a constitutional necessity." *Dep't of Revenue v. Puget Sound Power & Light Co.*, 179 Mont. 255, 270, 587 P.2d 1282, 1291 (1978). Pursuant to § 15-9-101, MCA, the Legislature has implemented the constitutional mandate of equalization by requiring that the "department shall adjust and equalize the valuation of taxable property . . . between individual taxpayers, and shall do all things necessary to secure a fair, just, and equitable valuation of all taxable property . . . between individual taxpayers."

Taken together, these two constitutional provisions make clear that the Department's actions violate a taxpayer's rights when the Department causes the taxpayer "to bear a disproportionate share of Montana's tax burden." *Roosevelt v. Dep't of Revenue*, 1999 MT 30, ¶ 40, 293 Mont. 240, 975 P.2d 295. When presented with an equal protection challenge, this Court engages in a two-part inquiry. *Caldwell v. MACo Worker's Comp. Trust*, 2011 MT 162, ¶ 16, 361 Mont. 140, 256 P.3d 923. The Court first considers "whether the governmental action creates classes of similarly situated persons and treats them in an unequal manner." *Id.* Next the Court determines whether the disparate treatment is justified under

the appropriate level of scrutiny, which in tax equalization cases is rational basis. *Kottel v. State*, 2002 MT 278, ¶ 52, 312 Mont. 387, 60 P.3d 403 (citations omitted).

A. The Department's decision creates classes of similarly situated taxpayers and treats them differently.

By centrally assessing Vision Net, while locally assessing the other entities using the fiber, the Department has created two classes of similarly situated taxpayers: (1) banking institutions, law firms, and accounting firms who use the fiber and finished services to transfer data; and (2) Vision Net who also uses the fiber and finished services to transfer data.

1. Vision Net is similarly situated to the other taxpayers for purposes of central assessment.

As to the threshold question, this Court determines whether the two classes are similarly situated by considering the "'the statute's purpose,'" as this Court requires. *Caldwell*, ¶ 19 (citation omitted). The purpose of § 15-23-101(2), MCA, is clear. The statute is designed to ensure that entities "operating" a "single and continuous" intercounty property are subject to central assessment. § 15-23-101(2), MCA.

Viewed in this context, Vision Net and banks, accounting firms, and law firms are similarly situated. Just as Vision Net does, all of other entities lease access to dark fiber to transfer data between locations. Similarly, just like Vision Net, the use of dark fiber allows these entities to accommodate video conferencing,

wide area network management, technical support, network and equipment monitoring, among other activities, the same as Vision Net. There is no relevant discernable difference between the two classes for purposes of determining the location for assessment.

In support of its contention that Vision Net is not similarly situated to these entities, the Department advances two interrelated arguments. Neither withstands scrutiny. First, the Department argues that the entities are not similarly situated because "Montana law authorizes the central assessment of telecommunications services companies, but not the central assessment of banking institutions, law firms, or accounting firms." App.8, p. 16. The Department reasons that Vision Net "fixates" on operation of a single and continuous property, but "ignores" the requirement that the company "be one Montana law authorizes to be centrally assessed." App.8, p. 15. The Department cites the example of a ski hill that is located in more than one state and claims it is not subject to central assessment because "Montana law does not authorize the central assessment of ski resorts." *Id*.

The Department's argument contradicts the plain language of § 15-23-101, MCA and only further demonstrates that its actions are arbitrary. On its face, § 15-23-101(2), MCA makes clear that entities "operating" a "single and continuous" property are subject to central assessment. This is so, even if the

entity is a ski resort, an accounting firm, a law firm, a bank, or any other type of company. The statute does not say anywhere that telecommunication companies must be centrally assessed while ski resorts are exempt from central assessment, because the statute does not mention either type of property. The purpose of the statute is to centrally assess entities operating single and continuous intercounty property, not companies that the Department disfavors. For purposes of § 15-23-101(2), MCA, the Department provides no reason why Vision Net, a ski hill, a law firm, an accounting firm, and a banking institution are not the same. The Department's argument that Vision Net is not similarly situated to the other entities must be rejected.

The Department next argues that Vision Net is not similarly situated to banking institutions, law firms, or accounting firms because, despite the fact all use the same type of property to transfer data between locations, "unlike Vision Net, they do not provide retail telecommunications services." App.6, p. 13.

The Department's argument is again misplaced for two reasons. First, under settled constitutional law, the factor the Department uses to create the disparate treatment cannot be used to argue that the entities are not similarly situated. *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 29, 374 Mont. 453, 325 P.3d 1211. The Department has decided to centrally assess Vision Net because it "provides retail telecommunication services." This is the factor the Court must "isolate and test

against a rational basis." *Goble*, ¶ 29. Therefore, it must be disregarded for purposes of the similarly situated analysis. *Id.*

Second, the Department's argument fails because the does not concern the statute's purpose. The statute is unconcerned with whether the taxpayer provides retail telecommunication services or provides telecommunications as a law firm, accounting firm, or a bank without direct charges to its customers for these services. The statute's focus is whether the taxpayer is operating a single and continuous property. The statute is a property assessment statute, not a service assessment statute, and its terms govern its purpose.

In sum, Vision Net and other entities using the fiber are in all relevant respects similar for purposes of central assessment under § 15-23-101, MCA. Accordingly, Vision Net has demonstrated that the two classes are similarly situated for purposes of the statute.

2. It is undisputed that Vision Net is subject to disparate treatment.

Due to the Department's decision to centrally assess in 2015, Vision Net has suffered negative impacts unlike any similarly situated taxpayer. In 2014, before central assessment, the Department valued Vision Net at $8,417,720. In 2015, the Department used central assessment methodology to value Vision Net at $24,893,375, which was later reduced to $9,357,064.

The Department's decision to centrally assess Vision Net also resulted in the Department reclassifying Vision Net's property. This increased Vision Net's tax rate from a tiered system of 0, 1.5%, and 3% on personal property and 1.8% on real property, to a tax rate of 6% on all of its property. *See* §§ 15-6-134, -138, & -156, MCA.

Overall, the Department's decision to centrally assess Vision Net resulted in a significant increase in Vision Net's tax burden. Vision Net's property tax liability increased from $103,963 in 2014 to $367,718 in 2015, which is an increase of more than 300 percent. No bank, law firm, or accounting firm is centrally assessed, despite using fiber for the same purposes as Vision Net. None of these taxpayers has suffered any of these impacts of the Department's decision.

B. The Department's unequal treatment of Vision Net does not withstand scrutiny.

Neither the District Court nor the Department offer *any* justification in support of treating companies using fiber differently. Although the Department claims its decision meets rational basis scrutiny, the Department does not identify a single "governmental interest"—legitimate or otherwise—that its actions serve. A legitimate government interest is essential under rational basis review. *Caldwell*, ¶ 23. Without it, the Department's actions necessarily violate Vision Net's equal protection and equalization rights. There is no valid reason to subject Vision Net to central assessment and the resulting damage, while allowing other similarly

situated taxpayers to remain unaffected. Therefore, if the Court reaches the constitutional question, it should reverse the District Court's Order and hold that the Department's actions violate Equal Protection and Equalization, as applied to Vision Net.

III. THE COURT SHOULD ORDER THE DEPARTMENT TO RETURN VISION NET'S PROPERTY TO CLASS 4 AND CLASS 8.

The Department changed the classification of Vision Net's property classification to Class 13 because of its decision to centrally assess Vision Net. As stated above, Class 13 includes "allocations of centrally assessed telecommunications companies." It does not include locally assessed telecommunications companies.

There is no dispute regarding this point. The Department admitted the same during discovery:

> Q. So a telecommunications company would have to be centrally assessed in order to fit into Class 13 property; is that correct?
>
> A. Yes, I believe that is correct.

App.3, p. 24:8-12.

Since Vision Net should not be centrally assessed, it must not be classified as Class 13. The Court should reverse the District Court's Order and require the Department to return Vision Net's property to Classes 4 and 8, as they were classified for the last 20 years.

CONCLUSION

For the foregoing reasons, Vision Net requests that this Court reverse the District Court and rule in favor of Vision Net.

Dated December 21, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word 2007, is 8,468 words including footnotes.

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CERTIFICATE OF SERVICE

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