

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #3

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WEST VIRGINIA
STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: State Tax Department TITLE NUMBER: 110

CITE AUTHORITY: W. Va. Code § 11-10-23

AMENDMENT TO AN EXISTING RULE: YES NO

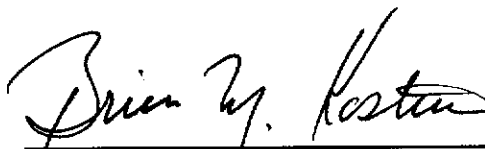
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 10G

TITLE OF RULE BEING PROPOSED: Alternative Resolution of Tax Disputes

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Brian M. Kastick, Secretary of Tax & Revenue

STATEMENT OF CIRCUMSTANCES

110 C.S.R. 10G

ALTERNATIVE RESOLUTION OF TAX DISPUTES

West Virginia Code § 11-10-23 requires the Tax Commissioner to file by December 31, 2002, a proposed legislative rule that adopts and implements an alternative dispute resolution mechanism that offers taxpayers a voluntary and cost-efficient method of resolving tax disputes. This rule accomplishes that requirement.

RULE SUMMARY

110 C.S.R. 10G

ALTERNATIVE RESOLUTION OF TAX DISPUTES

The rule provides a procedure for resolving tax disputes without going through the administrative hearing procedure. Under the rule, a taxpayer, subsequent to receipt of an assessment issued pursuant to a field audit, may petition the Tax Department for resolution through conciliation. The rule establishes the requirements and procedures necessary for the alternative resolution of tax disputes.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Alternative Resolution of Tax Deposits

Type of Rule: Legislative Interpretive Procedural

Agency: State Tax Division
 Address: P.O. Box 1005
Charleston, WV 25324-1005

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	52,000	0	30,000	52,000	52,000
PERSONAL SERVICES	52,000	0	30,000	52,000	52,000
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

The above cost reflects the estimated cost of hiring a Taxpayer Rights Advocate.

3. Objectives of these rules:

This rule provides a procedure for the alternative resolution of tax disputes.

Rule Title: Alternative Resolution of Tax Disputes

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Expenditures of the Tax Department will increase \$30,000 in FY 2003, to \$52,000 in FY 2004 and then continue at \$52,000 thereafter.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

None

C. Economic Impact on Citizens/Public at Large.

None

Date: February 7, 2003

Signature of Agency Head or Authorized Representative


Rebecca Melton Craig – State Tax Commissioner

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule.)

DATE: 18, AM
February 7, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) State Tax Division, P.O. Box 1005, Charleston, WV
25325-1005 558-5330

LEGISLATIVE RULE TITLE: Alternative Resolution of Tax Disputes

1. Authorizing statute(s) citation W. Va. Code § 11-10-23

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

December 27, 2002

b. What other notice, including advertising, did you give of the hearing?

N/A

c. Date of Public Hearing(s) or Public Comment Period ended:

January 27, 2003

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received _____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

18, AM
February 7, 2003

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Keith Larson, Attorney, Legal Division

State Tax Department, P.O. Box 1005, Charleston, WV 25324-1005

Phone: 558-5330, FAX 558-8728,

e-mail KLarson@tax.state.wv.us

- g. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Keith Larson, Attorney, Legal Division

State Tax Department, P.O. Box 1005, Charleston, WV 25324-1005

Phone: 558-5330, FAX 558-8728,

e-mail JMontgomery@tax.state.wv.us; KLarson@tax.state.wv.us

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

- b. Date of hearing or comment period:

N/A

- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

- d. Attach findings and determinations and reasons:

Attached _____

GEORGE & LORENSEN P.L.L.C.

ATTORNEYS AT LAW ▲ PROFESSIONAL LIMITED LIABILITY COMPANY

1526 KANAWHA BOULEVARD, EAST
CHARLESTON, WEST VIRGINIA 25311

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SHAWN P. GEORGE
CHARLES O. LORENSEN

January 27, 2003

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JAN 28 2003

WEST VIRGINIA TAX DEPT
LEGAL DIVISION

The Honorable Rebecca Melton Craig
State Tax Commissioner
c/o Legal Division
P.O. Box 1005
Charleston, West Virginia 25324-1005

**RE: Comments Regarding Proposed Legislative Rule Title 110, Series 10G,
Alternative Resolution of Tax Disputes**

Dear Commissioner Craig:

These are my initial comments upon reviewing the proposed West Virginia Legislative Rule regarding Alternative Resolution of Tax Disputes filed by the State Tax Department December 27, 2002 (110 C.S.R., Series 10G) ("Proposed Rule").

The Proposed Rule is filed pursuant to West Virginia Code § 11-10-23 requiring the Tax Department to propose regulations that would "adopt and implement alternative dispute resolution mechanisms which offer taxpayers voluntary and cost-effective methods of resolving tax disputes in order to encourage voluntary settlements and minimize the number of disputes that require litigation to resolve the controversy."

The legislation contemplates that the Tax Department's proposal would involve more than one "mechanism" but a review of the Proposed Rule reveals that the Department proposes only one method, called *conciliation*.¹ The Tax Commissioner directly employs or hires a "conciliator." No specific credentials or training are specified in the Proposed Rule concerning the conciliator. The process contemplates (1) a taxpayer who received a "notice of proposed assessment" initiates the process by filing a form with an office of the Tax Department within 30 days; (2) the conciliator is assigned to the case by the conciliation coordinator; (3) the conciliator or someone else "approves" (or disapproves) the request; (4) the conciliator notifies the taxpayer and presumably someone "representing" the Tax Commissioner (audit division or internal auditing?) of a conference within a

¹ The literature I scanned generally breaks down alternative dispute resolution into two recognized categories (1) arbitration and (2) mediation. The conciliation approach sketched out in proposed rule (§ 110-10G-4) appears to be a mediation process (negotiating) as opposed to a non-binding arbitration (summary trial like) procedure. The IRS, in its recent foray into alternative dispute resolution methods, uses the established terms *arbitration* and *mediation* and its approach is very different than the Proposed Rule. See Rev. Proc. 2002-44, 2002-26 I.R.B. 10 (mediation) and Announcements 2000-4, 2000-3 I.R.B. 317 and 2002-59, 2002-26 I.R.B. 28 (arbitration).

The Honorable Rebecca Melton Craig

January 27, 2003

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prescribed timeframe;² and (5) the conciliator holds a conference, the aim of which is to provide the parties an opportunity to resolve disagreements on facts and issues in dispute. If "successful," the result would be a final agreement resolving the matter, but at any time either party may without cause terminate the process by notice.

The Proposed Rule makes reference to another alternative dispute resolution mechanism, called *mediation*. The Proposed Rule does not directly "adopt and implement" a mediation mechanism, but instead (1) defines the term *mediation* (§ 110-10G-2.6), (2) references *mediation* activities to be undertaken by the "Board [sic] of Tax Appeals" (§ 110-10G-2.1) and (3) directs the *independent* Office of Tax Appeals to promulgate rules to adopt and implement a mediation program (§ 110-10G-3.2.1)!³

The Proposed Rule limits the use of the conciliation procedure in at least four ways that appear to be inconsistent with the concept of resolving tax disputes without the need for litigation: (1) conciliation is initiated only after the issuance of a "notice of proposed assessment" but the Tax Department is not required to provide a taxpayer such a document; (2) conciliation can be initiated only in the narrow timeframe between the notice of proposed assessment and the next 30 days; (3) there appears to be an approval process as to whether a timely notice will be "accepted;" and (4) the Proposed Rules create a number of self-imposed "jurisdiction" and "scope" limits (§§ 110-10G-3.3 and -3.4) to exclude (a) issues for which "authoritative resolution" is "needed for precedential value," (b) issues for which "formal resolution" is "needed" to avoid variation in treatment of taxpayers, (c) issues where a "formal proceeding" is otherwise in the "public interest or sound tax administration," (d) financial hardship claims, (e) collection cases, (f) disputes already in litigation, (g) constitutional issues, (h) licensing laws administered by the Commissioner, (i) jeopardy assessments, and (j) assessments made pursuant to interstate taxing agreements. Given that the Tax Department (a "voluntary" party to the conciliation procedure) can at any time (and without cause) withdraw and terminate a conciliation procedure, there is little justification for such a long laundry list of severe limitations on the use of the procedure.

The Proposed Rule is filed to comply with legislation creating the Office of Tax Appeals. In that new law, the Legislature declared that an important aim of tax dispute resolution is to maintain public confidence in the state tax system. W.Va. Code § 11-10A-1. The law recognizes that too many tax disputes are litigated. Any limitations on the use of a resolution procedure should be

² Throughout the Proposed Rule, despite a definition in § 110-10G-2.8, it is unclear who the "parties" are. Clearly the taxpayer is a party. Is the other party a division director? Who *signs* for the Tax Department?

³ The Proposed Rule suggests that the Tax Department has ongoing authority to order the independent Office of Tax Appeals around, and the coordinated filing of the proposed procedural rules (which propose a mediation of sorts before the Office of Tax Appeals, *see* proposed procedural rules §§ 121-1-230 through -258) does little to refute this suggestion.

The Honorable Rebecca Melton Craig
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reviewed in light of the Legislature's clear intent. I urge the Tax Department to fully employ every available technique and mechanism available to avoid losing public confidence in the system. The Tax Department is challenged to "think outside the box" and avoid inventing and applying formalistic "jurisdiction" and "scope" limitations to flexible dispute resolution procedures designed to provide fair and cost-effective remedies to taxpayers.

The Proposed Rule filing contains unintended inaccuracies, including:

1. The "Rule Summary" implies that the conciliation procedure is only available (a) "subsequent to receipt of an assessment" and (b) the assessment must be issued pursuant to a field audit.
2. The definition of the term *Code* at § 110-10G-2.3 contains errors.
3. § 110-10G-3.1 erroneously implies that conciliation is an *alternative to* an appeal of an assessment, rather than a process undertaken before an assessment is ever issued.

I appreciate this opportunity to comment upon the Proposed Rule and request that the Department adopt changes and incorporate them into the Agency Approved Rule. If you have any questions or need any additional information, please feel free to contact me.

Very Truly Yours,



Charles O. Lorensen

110 C.S.R. 10G
Alternative Resolution of Tax Disputes
Agency Response to Public Comments

Following are the comments received during the Public Comment Period for 110 C.S.R. 10G, Alternative Resolution of Tax Disputes and responses to those comments.

Comment: Given that the Tax Department (a “voluntary” party to the conciliation procedure) can at any time (and without cause) withdraw and terminate a conciliation procedure, there is little justification for such a long laundry list of severe limitations on the use of the procedure.

Response: Either party may terminate the conciliation procedure. The list of items proposed to be excluded has been narrowed to allow a more inclusive application of early resolution. However, the remaining items are specifically identified to alert a taxpayer that conciliation is not available and the reason.

Comment: It is unclear who the “parties” are in the conciliation process. See footnote 2 of comments.

Response: Generally, the parties are the Tax Department through the State Tax Commissioner or authorized representative and the taxpayer or the authorized representative of the taxpayer.

Comment: The filing of procedural rules governing the practice and procedure before the Office of Tax Appeals and the Alternate Dispute Rules of the State Tax Department occurred close in time, suggesting a coordination between these agencies.

Response: The Tax Department filing is governed by the provisions of West Virginia Code 11-10-23. This agency has no knowledge of the decision process of the Office of Tax Appeals related to the timing of filing its procedural rule. The Tax Department filed comments with the Office of Tax Appeals during the public comment period. This suggests that the objective of independence from the Tax Department has been maintained.

The proposal to place a mediation program under the authority of the Office of Tax Appeals through a legislative rule is provided for in West Virginia Code 11-10A-8 (6). The logic of placing the more formal process of mediation in the Office of Tax Appeals and the subsequent adoption within their procedural rule suggests their agreement. If there is disagreement, the legislative process that must take place prior to passage of a rules bill permits public debate and amendment.

Comment: The literature I scanned generally breaks down alternative dispute resolution into two recognized categories (1) arbitration and (2) mediation. ... The IRS, in its recent foray into alternative dispute resolution methods, uses the established

terms arbitration and mediation and its approach is very different that the Proposed Rule.

Response: The Tax Department reviewed the IRS procedures, including the Federal Mediation and Conciliation Service. The IRS procedures, contained in voluminous pamphlets and directives, were not considered as flexible as the New York State program for conciliation. If your research is expanded beyond the IRS, you will find that "conciliation" is very much a form of alternate dispute resolution.

Comment: The proposed rule filing contains unintended inaccuracies.

Response: The clerical errors have been corrected.

AGENCY APPROVED
TITLE 110
LEGISLATIVE RULE
STATE TAX DEPARTMENT
SERIES 10G

FILED
2003 FEB 18 2 3 16
OFFICE OF THE CLERK OF THE SENATE
WEST VIRGINIA
OFFICE OF STATE

ALTERNATIVE RESOLUTION OF TAX DISPUTES

§ 110-10G-1. General.

1.1 **Scope** -- This rule adopts and implements alternative dispute resolution mechanisms in order to encourage taxpayers to resolve tax disputes through voluntary settlements rather than litigation. If there is a conflict between this rule and other rules which have been previously promulgated, this rule governs.

1.2 **Authority** -- W. Va. Code § 11-10-23.

1.3 **Effective Date** --

1.4 **Filing Date** --

§ 110-10G-2. **Definitions.** For the purposes of this rule, the following terms used in this rule have the meanings set forth in this section, unless a different meaning is clearly indicated in the context in which the term is used.

2.1 **“Alternative dispute resolution”** means an alternative to courtroom litigation or agency adjudication, including conciliation with the Tax Department and mediation and hearings before the Office of Tax Appeals.

2.2 **“Commissioner”** or **“Tax Commissioner”** means the Tax Commissioner of the State of West Virginia or his or her delegate.

2.3 **“Code”** or **“this Code”** means the Code of West Virginia, one thousand nine hundred thirty-one, as amended.

2.4 **“Conciliation”** means a method of dispute settlement in which parties clarify issues and narrow differences through the aid of an individual called a “conciliator”.

2.5 **“Department”** or **“Tax Department”** means the West Virginia State Tax Department.

2.6 **“Mediation”** means a method of dispute resolution in which parties use an impartial third person called a “mediator” to assist the parties to negotiate a settlement.

2.7 **“Office of Tax Appeals”** means the West Virginia Office of Tax Appeals created by W. Va. Code § 11-10A-1 et seq. as an independent, quasi-judicial agency that is in the Department of Tax and Revenue for administrative purposes only.

2.8 **“Party”** means the Tax Department or the taxpayer seeking to resolve a tax dispute through alternative dispute resolution.

2.9 “Tax” means any tax administered by the Tax Department to which the alternative dispute resolution mechanisms set forth in this rule applies, and includes within its meaning any applicable interest, additions to tax and penalties.

2.10 “Taxpayer” means any person liable for payment of, or required to file a return for, any tax administered under W. Va. Code § 11-10-1 et. seq.

§ 110-10G-3. Jurisdiction and Scope of Alternative Dispute Resolution.

3.1 A taxpayer may request alternative dispute resolution after receipt of notice of proposed assessment. Unsuccessful alternative dispute resolution shall not preclude a subsequent appeal to the Office of Tax Appeals if it is timely filed.

3.1.1 Conciliation resulting in a final agreement shall be conclusive and binding on both parties and unless there is fraud, malfeasance or misrepresentation of a material fact, the agreement shall preclude any subsequent appeal of the matters agreed to in the final agreement and the matters so agreed upon shall not be reopened or the agreement modified.

3.2 A taxpayer may petition either the Tax Department for conciliation, or the Office of Tax Appeals for mediation.

3.2.1 The mediation program of the Office of Tax Appeals is set forth in the procedural rule for the Rules of Practice and Procedure Before the West Virginia Office of Tax Appeals, §§ 121-1-1 et. seq.

3.2.2 The Tax Department shall promulgate any procedural rules, forms, instructions, and publications necessary or useful to implement the conciliation program adopted in this rule.

3.3 Alternative dispute resolution shall not apply to financial hardship claims, collection cases, disputes already in litigation, constitutional issues, licensing laws administered by the Commissioner, jeopardy assessments or assessments made pursuant to interstate taxing agreements. However, participation in alternative dispute resolution shall not prevent the Commissioner from making jeopardy assessments in accordance with W. Va. Code § 11-10-7(b).

3.4 Alternative dispute resolution shall not be available if authoritative resolution of an issue is needed for precedential value, if formal resolution is needed to avoid variation in treatment of taxpayers, or if a formal proceeding before the Office of Tax Appeals is otherwise in the public interest or sound tax administration.

3.5 When alternative dispute resolution is applicable and available, the Department shall send a taxpayer to whom a notice of assessment would otherwise be sent a notice of proposed assessment. A taxpayer shall file the request for alternative dispute resolution within thirty calendar days after the date the taxpayer received written notice of proposed assessment. If the request is not timely received, the Department shall send the taxpayer a notice of assessment and the time limitations set forth in the Code for filing a petition for hearing in the Office of Tax Appeals shall commence to run.

3.5.1 Notice of proposed assessment shall be served in the same manner that notice of assessment is served under W. Va. Code § 11-10-5e.

3.6 Conciliation shall not suspend the accrual of any amount which may be due for interest, additions to tax and penalties.

§ 110-10G-4. Conciliation.

4.1 The Tax Commissioner shall appoint a conciliation coordinator, an assistant conciliation coordinator and conciliators from available staff of the Tax Department.

4.1.1 If funds are available, the Tax Commissioner may enter into contracts with individuals and organizations to conduct conciliation.

4.2 A taxpayer who has received notice of proposed assessment pursuant to a field or internal desk audit may request conciliation by filing a written request with the conciliation coordinator. The notice shall inform the taxpayer of the right to request conciliation or mediation and the requirements that must be met by the taxpayer in order to file a request.

4.2.1 The conciliation coordinator or assistant conciliation coordinator shall assign a date, time and place for a conciliation conference when a request for conciliation is approved, and shall notify the parties by written notice at least twenty calendar days in advance of the conference date, which shall be within forty-five calendar days after the request is received, unless continued for good cause.

4.3 A conciliator assigned to a particular case may have no financial or personal conflict of interest with respect to the taxpayer or issue in controversy in that case.

4.4 A conciliator shall conduct conciliation impartially and informally, without regard to the rules of evidence, in a conference where the parties are afforded the opportunity to resolve their disagreements on the facts and issues in dispute. The conciliator's role is to guide the parties to mutual agreement, rather than imposing an agreement on the parties. The goal of the conciliator shall be, where possible, in whole or in part, to eliminate the need for a hearing at the Office of Tax Appeals or to narrow the scope of the facts and issues in dispute if there is a hearing.

4.5 The Tax Department shall develop a form requesting the following information and any other information deemed relevant.

4.5.1 The name and address of the taxpayer;

4.5.2 The name and address of the taxpayer's representative, if any;

4.5.3 The type and amount of tax in controversy and all applicable taxable periods involved;

4.5.4 The action or decision being protested and the operating unit or division taking that action or making that decision;

4.5.5 The facts and law which the taxpayer believes to be relevant to the controversy;

4.5.6 The signature of the taxpayer or the taxpayer's representative, beneath statements to the effect that the facts set forth in the request are truthful and accurate; that no relief has previously been granted for the same controversy; that the running of time limitations on making assessments is suspended during conciliation; and that the taxpayer acknowledges and waives any potential conflict of interest the conciliator may have as an employee of the Department.

4.5.7 A legible copy of the notice of proposed assessment that is at issue; and

4.5.8 An original copy of a power of attorney, if applicable.

4.6 The Tax Department may at any time prior to or during conciliation request that the taxpayer supply additional information in order to process the request for conciliation or resolve the issues in the request.

4.7 Taxpayers requesting conciliation may represent themselves, or may be represented by an attorney, accountant, enrolled agent or any other person.

4.7.1 A partnership may act through one of its general partners without filing a power of attorney, and may act through one of its limited partners or employees if a power of attorney is filed.

4.7.2 A corporation may act through one of its officers without filing a power of attorney, and may act through one of its employees if a power of attorney is filed.

4.7.3 A limited liability company may act through one of its officers or managers without filing a power of attorney, and may act through one of its employees if a power of attorney is filed.

4.7.4 An individual requesting conciliation may be represented by a friend or member of the family who is not an attorney only if a power of attorney is filed, unless the individual is present during conciliation or permission is received by the individual from the conciliation coordinator or assistant conciliation coordinator.

4.8 The conciliation coordinator may reject a request for conciliation that is frivolous or that is filed for the purpose of delaying collection of tax.

4.9 Because conciliation is a voluntary process, both parties are required to agree in order to reach a settlement or other agreement. Either party may withdraw from conciliation for any reason at any time prior to the termination of conciliation by notifying the conciliator and the other party in writing.

4.10 In order to expedite the prompt resolution of disputes, the Tax Commissioner may delegate to the conciliator in advance of the conciliation conference the right to waive or modify interest, penalties, additions to tax and such other matters the Commissioner deems appropriate, in accordance with the Commissioner's authority under the Code.

4.11 If the parties reach an agreement, one of the parties or the conciliator shall memorialize the agreement in writing, and the taxpayer shall sign, date and return it.

4.11.1 The agreement shall include a waiver of the right to petition for a hearing before the Office of Tax Appeals.

4.11.2 The agreement shall have no precedential value or estoppel effect in any other proceeding.

4.12 The conciliator may not be called as a witness in any litigation or mediation involving the parties in any way relating to the dispute that is the subject of conciliation.

§ 110-10G-5. Confidentiality.

5.1 The provisions of W. Va. Code § 11-10-5d, concerning confidentiality and disclosure of tax returns and information are applicable to all aspects of conciliation.

5.2 Confidentiality shall not be interpreted to require the exclusion at a subsequent hearing of any information otherwise available or discoverable merely because the information was presented in the course of conciliation.

5.3 All aspects of conciliation shall be exempt from the requirements of W. Va. Code §§ 6-9A-1 et seq. "Open Government Proceedings" and 29B-1-1 et seq. "Freedom of Information."