

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

PACHIRA ENERGY LLC,

OCT 29 2018

Plaintiff,

v.

Case No. 18-C-369
Judge Russell M. Clawge, Jr.

NORTHEAST NATURAL ENERGY LLC, and
NNE WATER SYSTEMS LLC,

Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND REQUEST FOR EXPEDITED HEARING**

On September 19, 2018, Plaintiff Pachira Energy LLC ("Plaintiff"), by counsel, and Defendants Northeast Natural Energy LLC ("NNE") and NNE Water Systems LLC ("NNE WS") (collectively "Defendants"), by counsel, appeared for a noticed hearing on Plaintiff Pachira Energy LLC's Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Request for Expedited Hearing (the "Motion"). The Court heard no testimony, but considered proffered facts by counsel, statements in Plaintiff's verified complaint, the affidavits of Benjamin Statler and Mike John, and the arguments of counsel. At the hearing, the Court requested that Defendants provide additional detail as to the damages they would suffer if an injunction should issue. On September 24, 2018, Defendants submitted a letter to the Court regarding those damages. Plaintiff submitted a response to that letter on September 26, 2018.

Having reviewed Plaintiff's Motion and Defendants' Response as well as Defendants' letter regarding damages and Plaintiff's response thereto, and having heard the arguments of

counsel at the hearing held on September 19, 2018, the Court **GRANTS** the Motion in part and **DENIES** the Motion in part based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 20, 2011, Plaintiff and NNE entered into an Area of Mutual Interest and Exploration Agreement (“AMI Agreement”) establishing the Blacksville Area of Mutual Interest—the geographical focus of their business operations—which includes oil and gas interests in Monongalia County, West Virginia as well as parts of Greene County, Pennsylvania (the “Blacksville AMI”).

2. Plaintiff and NNE agreed that all leases taken within the Blacksville AMI in which both Plaintiff and NNE participated would be taken with NNE owning a 75% working interest and Plaintiff owning a 25% working interest.

3. The rights and obligations of Plaintiff and NNE concerning the drilling and operation of the wells drilled in the Blacksville AMI are set forth in a separate Operating Agreement (the “JOA”).

4. NNE constructed and Plaintiff participated in the cost of constructing certain water line and handling facilities (the “Water Line and Handling Facilities”) inside the Blacksville AMI.

5. There is no written agreement governing the construction, operation, or maintenance of the Water Line and Handling Facilities.

6. NNE and Plaintiff shared the direct cost of construction, operation, and maintenance of the Water Line and Handling Facilities using the same 75%/25% ratio used in the AMI Agreement and the JOA.

7. NNE assigned its interest in the Water Line and Handling Facilities to NNE WS.

8. Defendants constructed another water line to connect the Monongahela River to the Water Line and Handling Facilities (the "Monongahela River Trunk Line").

9. The Monongahela River Trunk Line is located outside of the Blacksville AMI.

10. Plaintiff has no interest in and did not share in the cost of construction, operation, or maintenance of the Monongahela River Trunk Line.

11. Defendant NNE WS intends to charge working interest owners such as Plaintiff their proportionate share of \$0.50 per barrel for water transported through the Monongahela River Trunk Line to the boundary of the Blacksville AMI.

12. As part of the Water Line and Handling Facilities, NNE also constructed and Plaintiff participated in the cost of constructing a pipeline that connects to the Monongahela Trunk Line at the edge of the Blacksville AMI to bring water sourced from the Monongahela River into the Blacksville AMI, known as the Mon River Extension.

13. Plaintiff had knowledge of the construction of the Mon River Extension and knowledge of its intended purpose to facilitate using water from the Monongahela River inside the Blacksville AMI.

14. The Mon River Extension is part of the Water Line and Handling Facilities and is located completely inside the Blacksville AMI.

15. Because the Mon River Extension is part of the Water Line and Handling Facilities, the cost and ownership of the Mon River Extension is also 75%/25%.

16. There were ongoing negotiations between the parties regarding the Water Line and Handling Facilities.

17. On September 4, 2018, NNE and NNE WS began testing the Monongahela River Trunk Line to transport water to the Mepco wells, which are located within the Blacksville AMI.

18. NNE and Plaintiff jointly own the Mepco wells using the same 75%/25% ratio set forth in the AMI Agreement and the JOA.

19. On September 12, 2018, NNE began hydraulically fracturing the Mepco wells by blending produced water with the fresh water from the Monongahela River that was transported to the Mepco well pad through the Monongahela River Trunk Line and the Mon River Extension.

20. Defendants intend to use the Water Line and Handling Facilities to transport water from the Monongahela River Trunk Line to wells located outside of the Blacksville AMI in which Pachira holds no interest.

21. Defendants also advised Plaintiff of the possibility of using the Water Line and Handling Facilities to sell water to third parties for use outside of the Blacksville AMI.

22. Any damage that Plaintiff may suffer stemming from the use of the Water Line and Handling Facilities to transport Monongahela River water for use inside the Blacksville AMI can be calculated and reduced to monetary damages.

23. Plaintiff seeks to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water from sources located outside of the Blacksville AMI, (ii) transport water to locations outside of the Blacksville AMI, or (iii) sell water to third parties for use outside of the Blacksville AMI.

CONCLUSIONS OF LAW

1. Pursuant to W.Va. Code § 55-5-1, et. seq., and Rule 65 of the West Virginia Rules of Civil Procedure, Circuit Courts have authority, prior to the final adjudication of a case, to issue a preliminary injunction, if a party establishes the necessity for such an injunction.

2. Under case law from the West Virginia Supreme Court of Appeals:

'The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.' Point 4, syllabus, State ex rel. Donley v. Baker, 112 W.Va. 263 (1932).

Jefferson Cty. Bd. of Educ. v. Educ. Ass'n, 183 W. Va. 15, 24, 393 S.E.2d, 653, 662 (1990), citing Syllabus Pt. 2 of Severt v. Beckley Coals, Inc., 153 W. Va. 600, 170 S.E.2d 577 (1969).

3. The West Virginia Supreme Court expanded on the analysis a circuit court should apply in determining whether or not to issue a preliminary injunction, stating:

Under the balance of hardship test the district court must consider, in 'flexible interplay,' the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. (Citation omitted).

Jefferson supra, citing Merril Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1054 (4th Cir. 1985).

4. Therefore, in evaluating a motion for a preliminary injunction, West Virginia law directs the circuit courts to look toward a balancing of a hardship caused to each party were the court to grant the injunction, and, in doing so, to specifically look at four (4) factors: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

5. After applying the balance of hardship test, and reviewing each factor, the Court finds that the Motion is **GRANTED** in part and **DENIED** in part.

6. The balance of hardship favors granting the Motion to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water to locations outside of the Blacksville AMI or (ii) sell water to third parties for use outside of the Blacksville AMI.

(a) The Court finds that Plaintiff has established that it is likely to suffer immediate and irreparable harm before the Court makes its final ruling on Plaintiff's request for permanent injunctive relief if Defendants are not enjoined from (i) transporting water to locations outside of the Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI.

(b) The Court finds that Plaintiff has established that there is a likelihood of success on the merits of its claim to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water to locations outside of the Blacksville AMI or (ii) sell water to third parties for use outside of the Blacksville AMI.

(c) The Court finds that enjoining Defendants from (i) transporting water to locations outside of the Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI is in the public interest.

7. The balance of hardship favors denying the Motion to enjoin Defendants from using the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE.

(a) The Court finds that Plaintiff has failed to meet its burden to establish that it is likely to suffer irreparable harm in the absence of injunctive relief with regard to the use of the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE.

(b) The Court finds that any damage that Plaintiff may suffer stemming from the use of the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE can be calculated and reduced to monetary damages.

(c) The Court finds that there is no public interest served by enjoining Defendants from using the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE.

ORDER

The Court hereby ORDERS as follows:

1. Plaintiff's Motion is **GRANTED** in part and **DENIED** in part.
2. The Court **GRANTS** the Motion and Defendants NNE and NNE WS are enjoined from using the Water Line and Handling Facilities (i) to transport water to locations outside of the Blacksville AMI or (ii) to sell water to third parties for use outside of the Blacksville AMI.
3. The Court **DENIES** the Motion to the extent it seeks to enjoin Defendants' use of the Water Line and Handling Facilities to transport Monongahela River water for use at wells located within the Blacksville AMI that are jointly owned by Plaintiff and NNE.
4. Nothing in this Order shall be construed to impair the parties' ability to transport water from Dunkard Creek through the Water Line and Handling Facilities for use at wells located within the Blacksville AMI.
5. This Order is binding on the officers, agents, servants, employees, and attorneys of NNE and NNE WS and on other persons who are in active concert or participation with NNE and/or NNE WS.

6. This preliminary injunction shall continue in effect throughout the pendency of the above-captioned case unless modified by further Order of this Court.

7. Within five (5) days from entry of this Order, Plaintiff shall post a bond with the Clerk of the Circuit Court of Monongalia County, West Virginia in the form of a law firm check or certified money order in the amount of ten thousand dollars (\$10,000.00) paid to the order of the Clerk of the Circuit Court of Monongalia County, West Virginia (the "Bond"). The Bond shall be held by the Clerk until an order of Court is entered directing further action.

The Court directs the Circuit Clerk to provide certified copies of this order to all parties and counsel of record.

ENTER: October 25, 2018

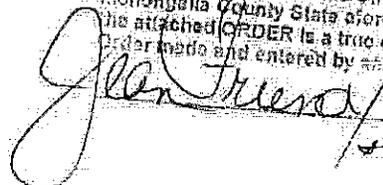


Russell M. Clayges, Jr., Judge
17th Judicial Circuit, Division II

ENTERED: Oct 25, 2018
DOCKET LINE 39, Jean Friend, Clerk

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit/Family Court of Monongalia County State of West Virginia do hereby certify the attached ORDER is a true copy of the original order made and entered by said Court.



Jean Friend, Clerk