5-14-19
L Dowkins
S Morgan
S Thompson

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

RILEY NATURAL GAS COMPANY,
Plaintiff,

v.

Civil Action No. 15-C-405-3
Presiding Judge: Hon. Paul T. Farrell
Resolution Judge: Hon. H. Charles Carl, III

FILED IN 15TH CIRCUIT COURT
2019 MAY 14 P 1: 22

NORTHSTAR ENERGY CORPORATION,
Defendant.

AMENDED ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Riley Natural Gas Company ("RNG"), by counsel, brought on its *Motion for Summary Judgment* for hearing by the Court on January 22, 2019. The Court also heard argument by counsel for Defendant regarding his *Motion for Summary Judgment*. Upon further thoughtful consideration of the cross-motions, the parties' memoranda in support thereof and opposition thereto, the positions of counsel advanced at the hearing, the applicable law, and the entire record in this action to date, the Court has determined that Plaintiff is entitled to the declaratory and monetary relief it seeks; that *Plaintiff's Motion for Summary Judgment* should be, and it is hereby, **GRANTED**; that Defendant is not entitled to the declaratory or monetary relief that it seeks; and that *Defendant's Motion for Summary Judgment* should be, and it is hereby, **DENIED**. In granting the *Plaintiff's Motion for Summary Judgment* and denying the *Defendant's Motion for Summary Judgment*, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

A. RNG and Northstar Energy Corporation are bound by a valid contract.

1. RNG is engaged in the business of buying, selling, and marketing natural gas, including on behalf of natural gas producing companies like Northstar Energy Corporation ("Northstar"). Amended Complaint ("Am. Compl.") ¶8.

2. From 1995 through November 2015 Northstar was engaged in the business of producing natural gas[1]. Am. Compl. ¶9; Def.'s Mot. Summ. J. at p.1.

3. On or about August 1, 2008, Northstar and RNG (collectively, the "Parties") entered into an agreement (the "Agreement") for the purchase, sale, and marketing of Northstar's natural gas by RNG into Dominion Transmission Inc.'s ("DTI") Appalachia Gateway Project Facilities, and for Northstar's corresponding payment to RNG of Gateway Charges. See Exh. 1 to Pl.'s Mot. Summ. J.; Exh. 2 to Pl's Mot. Summ. J.

4. The primary purpose of the Agreement was for RNG to facilitate the purchase, sale, and marketing of Northstar's natural gas at physical points into DTI Gateway ("Delivery Point(s)") up to and requiring a firm transportation quantity on DTI Gateway specified in the Agreement as 3500 dth/day for 10 years. Am. Compl. ¶10; see Exh. 1 to Pl.'s Mot. Summ. J.

5. The Parties subsequently modified Northstar's commitment to include a FT [firm transportation] Rate of $0.495/dt; however, the firm transportation quantity remained as 3500 dth/day. See Exh. 2 to Pl.'s Mot. Summ. J.

6. Prior to Northstar entering into the Agreement, DTI conducted an open season from April 1, 2008, through April 25, 2008, seeking commitments in the form of precedent agreements

[1] Northstar represents that "it is no longer engaged in the business of natural gas production." See Answer ¶6. However, Northstar "still has leases that it has to take care of, and Northstar hires third-party well tenders to take care of wells and take care of Northstar's gathering systems." See Ex. 16 to Pl.'s Mot. Summ. J.

from natural gas shippers, in this case RNG on behalf of Northstar and others, to reserve firm capacity or space ("firm transportation capacity" or "FT") on the DTI Gateway, and to pay the DTI Gateway Charges over a fixed term of years for the reserved firm transportation capacity to be constructed. Am. Compl. ¶13.

7. On April 2, 2008, during DTI's open season, RNG contacted Northstar and other producers to assess interest in purchasing firm transportation capacity on DTI Gateway. Exh. 3 to Pl.'s Mot. Summ. J.

8. This open season request expressly noted the firm transportation service Delivery Point as the Oakford Interconnection with Texas Eastern Transmission, LP, in Pennsylvania. Id. at 2.

9. While gauging interest from producers for firm transportation on the DTI Gateway, RNG supplied producers, including Northstar, a Memorandum and Questions/Answers about the Gateway Project which expressly stated "The current Project design would allow for [producers' natural gas] to move on a firm basis from points of receipt on DTI's transmission system in West Virginia and southwestern Pennsylvania to a primary delivery point at an interconnection with Texas Eastern at Oakford, PA." See Exh. 4 to Pl.'s Mot. Summ. J.

10. As a pre-requisite to RNG committing to purchase firm transportation capacity on Northstar's behalf, Northstar agreed to reimburse RNG for the DTI Gateway Charges, whereby RNG would pay DTI for the DTI Gateway firm transportation capacity for 10 years that was to facilitate RNG's ability to purchase, market, and sell Northstar's natural gas on a firm basis on the DTI Gateway facilities. Exh. 1 to Pl.'s Mot. Summ. J.

11. On April 24, 2008, Northstar responded to RNG's open season request by submitting its Non-Binding Request Form (the "Form"). See Exh. 5 to Pl.'s Mot. Summ. J.

Notably, Northstar's Form specified the Project's Point of Delivery as "Oakford Interconnection with Texas Eastern Transmission, LP." Id.

12. Northstar's President, James Abcouwer, completed the blank portions of the Form, indicating the Receipt Point would be at "Chelyan, WV" where Northstar's meter connects to Dominion's transmission line TL-263. Id.

13. In July 2008 RNG sent a letter to Northstar that included Dominion's slides from a July 2, 2008, meeting regarding project updates. Exh. 6 to Pl.'s Mot. Summ. J.

14. The July 2008 letter advised Northstar that RNG planned to forward a proposed contract for the purchase of firm capacity by RNG on Northstar's behalf and, in accordance with prior communications tendered to Northstar, the enclosed documents made clear that the Delivery Point for the DTI Gateway Project was DTI's interconnection with Texas Eastern at Oakford. Id. at 4.

15. RNG sent the promised contract proposal to Northstar in July 2008.

16. Simultaneously, RNG supplied Northstar with Dominion's slides from a July 22, 2008 meeting concerning the DTI Gateway Project. Exh. 8 to Pl.'s Mot. Summ. J. Notably, the slides provided to Northstar indicate that TL-263 – the transmission line for Northstar's meter – is Receipt Point in southern West Virginia for the DTI Gateway Project and, more importantly, the slides specify that the "Delivery Point" is "Oakford Interconnect." Id. at 16.

17. On August 1, 2008, RNG sent a letter to Northstar and other producers forwarding the original, executable contract and term sheet for the DTI Gateway project, dated August 1, 2008, requesting that the Agreement be returned by August 29, 2008. See Exh. 9 to Pl.'s Mot. Summ. J.

18. On August 25, 2008, Mr. Abcouwer executed the Agreement and term sheet on Northstar's behalf. Exh. 1 at 5-6 to Pl.'s Mot. Summ. J.

19. The executed Agreement, like the proposed contract, references the Requested Firm Quantity to be reserved and the applicable Management Fee for "any Delivery Point(s) into DTI's Appalachia Gateway Project Facilities." Id. at Exhibit A.

20. The Term Sheet, incorporated into the executed Agreement, estimated the Agreement's 10-year Primary Term would not begin until November 2011 and also made express reference to how to set price for "any Delivery Point(s) into DTI's Appalachia Gateway Project facilities. . . ," by incorporating an Exhibit B to the Agreement. Id. at 2 ¶2(b).

21. Once Northstar signed the Agreement, RNG and DTI subsequently entered into a precedent agreement in which RNG, on behalf of Northstar, purchased FT capacity on DTI Gateway, with the actual implementation of the firm transportation service (the "in-service date" of the pipeline facilities) to begin upon completion of the DTI Gateway facilities. Am. Compl. ¶14; see Exh. 10 to Pl.'s Mot. Summ. J.

22. The Precedent Agreement likewise defines the "Primary Point(s) of Delivery" for the DTI Gateway Project as "the point of interconnection between the facilities of Pipeline and Texas Eastern which is located in Westmoreland County, PA, known as the Oakford Interconnect. . . ." Id. at 6.

23. As it pertains to Northstar, the Precedent Agreement defines the "Primary Point(s) of Receipt" as "an existing point of interconnect between Pipeline and Customer" at "TL-263". Id. at 6, 16.

24. Importantly, Mr. Abcouwer, on behalf of Northstar, acknowledged "Northstar'[s] commit[ment] to firm transportation on the pipeline," when he wrote to RNG on December 8, 2011, requesting to discuss the Agreement's pricing mechanism. See Exh. 11 to Pl.'s Mot. Summ. J.

25. On December 21, 2011, RNG responded by letter to Mr. Abcouwer's December 8, 2011 request, reiterating the Agreement's Delivery Point as "*the gas can be delivered to the Oakford Interconnect on Texas Eastern.*" (italics in original). Exh. 12 to Pl.'s Mot. Summ. J.

26. Moreover, RNG's letter stated that "RNG producers [like Northstar] that committed to the Gateway firm are responsible for their applicable Gateway charges." Id.

27. Significantly, Northstar did not challenge these representations.

28. To the contrary, Mr. Abcouwer sent an email to RNG in December 2011, confirming his understanding that the Agreement relates to Northstar's placement of its gas into the DTI Gateway. See Exh. 13 to Pl.'s Mot. Summ. J.

29. In June 2012, RNG offered Northstar the opportunity to modify its FT Rate under the Agreement. See Exh. 14 to Pl.'s Mot. Summ. J.

30. Because Mr. Abcouwer selected Northstar's modification option and returned an executed copy of the memorandum to RNG, the Parties modified their Term Sheet to adjust the FT Rate. Id.

31. On September 1, 2012, Mr. Abcouwer executed another document on Northstar's behalf, this time to release some of its DTI Appalachia Gateway capacity. See Exh. 15 to Pl.'s Mot. Summ. J.

B. Northstar Has Breached Its Contractual Payment Obligations to RNG.

32. At no time prior to being sued in this matter did Northstar assert that the Delivery Point was other than at Oakford, Pennsylvania.

33. Pursuant to the Agreement, Northstar is responsible and liable to RNG for all charges of any kind, including transportation charges such as the DTI Gateway Charges, upstream

or downstream of Delivery Point(s) identified in the Agreement. See Exh. 1, ¶2 to Pl's Mot. Summ. J.

34. On behalf of Northstar, RNG agreed to pay DTI Gateway Charges as a purchaser to facilitate the delivery of Northstar's gas into the DTI Gateway Deliver Point(s). Id.

35. Pursuant to RNG's agreement with DTI, RNG is responsible and liable to DTI for the DTI Gateway Charges incurred on behalf of Northstar, irrespective of whether Northstar tenders natural gas to RNG for purchase and sale at the Delivery Point(s) under the Agreement. See Exh. 1, ¶2 to Pl.'s Mot. Summ. J.; Am. Compl. ¶21

36. Under the Agreement, Northstar is responsible and liable to RNG, and agreed to reimburse RNG, for all DTI Gateway Charges incurred by RNG on behalf of Northstar. See Exh. 1, ¶2 to Pl.'s Mot. Summ. J; Exh. 1 at Exhibit B to Pl.'s Mot. Summ. J.

37. As noted, RNG has invoiced Northstar for DTI Gateway Charges incurred by RNG on behalf of Northstar. Am. Compl. ¶30; Answer ¶25.

38. Northstar never alleged the Delivery Point was anywhere other than into the DTI Gateway until it responded to the Complaint alleging breach of the Agreement.

39. Northstar has wrongfully refused to reimburse RNG for DTI Gateway Charges incurred by RNG on behalf of Northstar as required by the Agreement. Am. Compl. ¶31.

40. Northstar's Answer and Counterclaim erroneously alleges that Northstar is not liable for DTI Gateway Charges because the Delivery Point, according to Northstar, is at Northstar's meter at Chelyan. See generally Answer.

41. In addition to these allegations, Northstar also seeks early termination of the 10-year term of the Agreement, which is currently set to expire in September 2022, and Northstar

claims that it is entitled to reimbursement of the DTI Gateway Charges it previously paid, as well as damages related to RNG's marketing of its gas. Id.

42. Northstar's refusal to reimburse RNG for DTI Gateway Charges incurred by RNG on behalf of Northstar constitutes a continuing breach of the Agreement, which provides in relevant part:

> In no event whatsoever shall [Northstar] be relieved from its obligations to make payments to [RNG] for all FT [RNG] has reserved for any or all of [Northstar]'s Firm Quantity irrespective of the cause or contingency of such losses and any such failure to make payments shall be a breach under this Agreement.

Exh.1 at Exhibit B ¶iii to Pl.'s Mot. Summ. J.; see also Exh. 1 ¶2 to Pl.'s Mot. Summ. J.

43. RNG has incurred substantial expenses resulting from Northstar's failure to comply with the Agreement.

II. CONCLUSIONS OF LAW

After reviewing the parties' briefs and the relevant law, the Court reaches the following conclusions of law.

A. Legal standard

44. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c).

45. Moreover, "[s]ummary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine disputed issue of a material fact." Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872, 878 (1996).

46. "The mere assertion that there exists a 'genuine issue of material fact' without a corresponding demonstration of what specific factual issues remain to be resolved is insufficient to avoid summary judgment." Reed v. Orme, 221 W. Va. 337, 655 S.E.2d 83, 87 (2007).

47. Further, material facts are only those which might affect the outcome of the action under governing law. Powderidge Unit Owners Ass'n, 474 S.E.2d at 878 n. 11 (citing Williams v Precision Coil, Inc. 194 W.Va. 52, 459 S.E.2d 329, at 337 n. 13).

48. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) . . . ." Williams, 459 S.E.2d at Syl. Pt. 3.

49. When considering a motion for summary judgment, the court "must draw any permissible interference from the underlying facts in the most favorable light to the party opposing the motion." Id.

50. Under the above standard, the Court concludes as a matter of law that no genuine issue of material fact exists regarding Northstar's breach of its payment obligations under the Agreement or the failure of Northstar's purported justifications for such breach, and resulting damages to RNG.

51. Therefore, the Court concludes as a matter of law because no genuine issue of material fact exists regarding Northstar's breach, RNG is entitled to judgment as a matter of law and *Plaintiff's Motion for Summary Judgment* is hereby **GRANTED.** For the same reasons,

Northstar is not entitled to judgment as a matter of law and *Defendant's Motion for Summary Judgment* is hereby **DENIED**.

B. The Court concludes as a matter of law there is no genuine issue of material fact regarding Northstar's breach of the Agreement with RNG.

52. "In a breach of contract action, the plaintiff must make out a complete contract and allege a breach of that contract." McDaniel v. Travelers Property Cas. Inc. Co., 121 F.Supp.2d 508, 511 (N.D.W. Va. 2000) (citing Rhoades v. Chesapeake & O.R. Co., 49 W. Va. 494, 39 S.E. 209, 211 (1901)).

53. A breach of contract consists of active or passive failure to observe a contractual obligation. Holland v. Cline Bros. Min. Co., 877 F. Supp. 308, 316 (S.D.W. Va. 1995). See Thomas v. Board Of Educ. Of McDowell County, 181 W. Va. 514, 383 S.E.2d 318, 322 (1989) (citing Jefferson Cooperage Co. v. Getzendanner, 116 W. Va. 489, 182 S.E. 90 (1935)) ("When a promisor has undertaken to do a particular act and fails to do what he is bound to do, a breach occurs.").

54. The Court concludes that the undisputed evidence shows that the Agreement between RNG and Northstar constitutes a valid contract under West Virginia law.

55. The Court finds that evidence conclusively shows that the Agreement required Northstar to pay all fees, costs, and charges associated with DTI's Appalachia Gateway. Therefore, Northstar's failure to pay these fees, costs, and charges to RNG constitutes a breach of the terms of the Agreement.

56. Therefore, *Plaintiff's Motion for Summary Judgment* on this element of its claims is **GRANTED.** For the same reasons, *Defendant's Motion for Summary Judgment* is **DENIED.**

C. The Court concludes as a matter of law the express terms of the Agreement establish that the Delivery Point is into DTI's Appalachia Gateway Facilities at Oakford, Pennsylvania.

57. "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 2, Orteza v. Monongalia County Gen. Hosp., 173 W. Va. 461, 318 S.E.2d 40 (1984) (citation omitted).

58. Further, "[w]hen a written contract is clear and unambiguous[,] its meaning and legal effect must be determined solely from its contents[,] and it will be given full force and effect according to its plain terms and provisions. Extrinsic evidence of the parties to such contract, or of other persons, as to its meaning and effect will not be considered." Syl. Pt. 4, Capitol Chrysler-Plymouth, Inc. v. Megginson, 207 W. Va. 325, 532 S.E.2d 43 (2000) (citation omitted).

59. In the case at bar, the Agreement's terms are clear.

60. It is undisputed that RNG and Northstar entered the Agreement for the purchase, sale, and marketing of Northstar's natural gas by RNG into DTI's Appalachia Gateway Project Facilities, and for Northstar's corresponding payment to RNG of Gateway Charges. Exh. 1 to Pl.'s Mot. Summ. J; Exh. 2 to Pl.'s Mot. Summ. J.

61. Likewise, it is undisputed that the Delivery Point for purposes of the Agreement is "into DTI's Appalachia Gateway Facilities." Pl.'s Mot. Summ. J., Exh. 1 at 5-6 at Exhibit A. Accordingly, the Court rejects Northstar's contention that the Delivery Point is at its meter at Chelyan. This unsupported theory is contradicted by the following language in the Agreement:

a. Paragraph 2(b) expressly provides that charges downstream of any Delivery Point(s) shall be borne as follows:

> for any Delivery Point(s) into DTI's Appalachia Gateway Project facilities, the terms set forth in Exhibit B, "ADDITIONAL TERMS FOR ANY DELIVER POINT(S) INTO DTI'S APPALACHIA GATEWAY PROJECT FACILITIES SHALL ALSO APPLY". Pl.'s Mot. Summ. J., Exh. 1 at ¶ 2(b).

b. Exhibit B provides "additional terms for any delivery point(s) into DTI's Appalachia Gateway Project Facilities." Id. at Exh. B.

c. Exhibit A references an estimated "in service date" for the beginning of the Primary Term, which coincides with the completion date for the DTI Gateway Project. Id. at Exh. A.

d. Exhibit A contains an express provision "For any Delivery Point(s) into DTI's Appalachia Gateway Project Facilities," and it specifies "Delivery Point(s)" as "Dominion Transmission." To the contrary, it separately identifies Northstar's Meter number. Id.

e. Exhibit A also specifies "DTI's transmission facilities that are part of DTI's Appalachia Gateway Project Facilities...," and specifies a Management Fee directly tied to the reserved FT on the Gateway. Id.

Thus, as a matter of law, the Court concludes the Agreement is not ambiguous.

62. The Parties' inclusion of Exhibits A and B confirms their intention that the Delivery Point for purposes of the Agreement is "into DTI's Appalachia Gateway Facilities." Pl. Mot. Summ. J., Exh. 1 at p.1 ("With respect to any particular transaction, the Agreement consists of this letter agreement and its Exhibits and the applicable executed Term Sheet.") If the Parties' did not intend for the Delivery Point to be "into DTI's Appalachia Gateway Facilities," then there would be no need to include Exhibit B as part of the Agreement. Nor would there be a need for Exhibit A to reference the "in service date," the FT-related Management Fee, or the Requested Firm Quantity into the DTI Appalachian Gateway Project Facilities.

63. Therefore, *Plaintiff's Motion for Summary Judgment* on this element of its claims is **GRANTED.** For the same reasons, *Defendant's Motion for Summary Judgment* is **DENIED**.

D. The Court concludes as a matter of law that the parties' course of performance confirms the Delivery Point is DTI's Appalachia Gateway Facilities at Oakford, Pennsylvania.

64. When language in a contract is not clear, it is considered ambiguous. Berkeley County Public Service Dist. v. Vitro Corp. Of America, 152 W. Va. 252, 267, 162 S.E.2d 189, 200 (1968).

65. "When a contract is ambiguous and of doubtful and uncertain meaning, and the parties have by their contemporaneous or subsequent conduct placed a construction upon it which is reasonable, that construction will be adopted by the court." Syl. Pt. 4, State v. Janicki, 188 W. Va. 100, 422 S.E.2d 822 (1992).

66. The "[m]ere fact that parties do not agree to the construction of a contract does not render it ambiguous, but the question as to whether a contract is ambiguous is one of law to be determined by the court." Berkeley County Public Service Dist., 152 W. Va. At 267, 162 S.E.2d. at 200, at Syl. Pt. 1.

67. Here, the Court has ruled, *supra*, that the Agreement is not ambiguous.

68. However, even assuming *arguendo* the Agreement is ambiguous, the Court concludes RNG's and Northstar's course of performance resolves any alleged ambiguity and supports RNG's position that the Delivery Point is into DTI's Appalachia Gateway Facilities at Dominion Transmission, Inc.'s Oakford Interconnection with Texas Eastern Transmission, LP.

69. The Agreement's purpose is for RNG to assure FT capacity for Northstar's gas into the DTI Gateway. Exh. 1 to Pl.'s Mot. Summ. J.

70. It is undisputed that, in conformance with the purpose of the Agreement, every document RNG supplied to Northstar established the Delivery Point(s) "into the DTI Gateway

Facilities" "at the Oakford Interconnection with Texas Eastern Transmission, LP." See Exh. 1 at 2¶2(b), Exhibit A and Exhibit B to Pl.'s Mot. Summ. J.

71. Additionally, it is undisputed that, after entering into the Agreement, Northstar's President exchanged emails with RNG representatives regarding the Delivery Point(s) remaining at Dominion South Point and the Oakford Interconnect on Texas Eastern – the same as prior to Northstar contracting for FT on the Gateway Facilities.

72. In addition to acknowledging this Delivery Point via its course of performance with RNG, Northstar also specified its Receipt Point is its Meter at Chelyan, West Virginia. See Exh. 5 to Pl.'s Mot. Summ. J.

73. Finally, it is undisputed that, prior to responding to RNG's complaint, Northstar never suggested to RNG that it believed the Delivery Point was anywhere other than into the DTI Gateway.

74. The Court finds the overwhelming and uncontroverted evidence conclusively demonstrates that, from the inception of the Agreement, RNG consistently has used the Delivery Point at the Oakford interconnect to put Northstar's gas into DTI's Gateway, and Northstar has confirmed such Delivery Point by allowing RNG to deduct costs from Northstar's revenue and, subsequently, charge Northstar for the fees incurred by RNG on Northstar's behalf for space on DTI's Appalachia Gateway. Therefore, even assuming the language of the Agreement is ambiguous, based upon the Parties' course of performance Northstar breached the Agreement by failing to pay all amounts due to RNG.

75. Therefore, *Plaintiff's Motion for Summary Judgment* on this element of its claims is **GRANTED.** For the same reasons, *Defendant's Motion for Summary Judgment* is **DENIED.**

E. The Court concludes as a matter of law that, whether the Agreement is treated as unambiguous or as having an ambiguous term, Northstar breached the Agreement, thereby damaging RNG.

76. It is undisputed that the Agreement obligates Northstar to pay RNG, that Northstar has failed and refused to do so.

77. It is undisputed that, by virtue of Northstar's breach, Northstar remains in default of the Agreement. See Exh. 1 at 4 ¶14 to Pl.'s Mot. Summ. J.

78. Northstar's failure to pay the amount due to RNG constitutes a breach of the Agreement. See Bare v. Victoria Coal & Coke Co., 73 W. Va. 632, 80 S.E. 941, 943 (1914) (a party's failure to make payments due under a contract has been recognized as a material breach). See Chittim v. Texas Pac. Coal & Oil Co., 317 F.2d 81, 85 (10th Cir. 1963) (failure to pay drilling costs constitutes a breach of contract).

79. As a matter of the express Agreement, RNG is entitled to recover from Northstar the amounts still owed under the Agreement. Exh. 1 to Pl.'s Mot. Summ. J.

80. Therefore, *Plaintiff's Motion for Summary Judgment* on this element of its claims is **GRANTED.** For the same reasons, *Defendant's Motion for Summary Judgment* is **DENIED**.

F. The Court concludes as a matter of law there is no genuine issue of material fact regarding the failure of Northstar's defenses for its breach of the contract.

81. Despite Northstar's contentions, Northstar is not entitled to damages either because of the Delivery Point location or because RNG allegedly failed to adequately market Northstar's gas.

82. Under the terms of the Agreement, Northstar is obligated to pay its full, contractually-agreed Gateway charges because the Delivery Point is into DTI's Appalachia Gateway Facilities. Am. Compl. ¶28.

83. Northstar owes RNG damages because of its breach of the Agreement.

84. RNG did not breach the Agreement and, therefore, does not owe damages to Northstar.

85. Northstar has, without legal basis for doing so, withheld payment of the full amount it owes under the Agreement. Am. Compl. ¶33.

86. Northstar has provided no supporting material fact that RNG failed to market its gas. Moreover, it has provided no supporting material fact that it does not owe the Gateway Charges. Thus, it has failed to demonstrate that it is entitled either to reimbursement of those charges and marketing fees or to early termination of the contract.

87. Therefore, *Plaintiff's Motion for Summary Judgment* on this element of its claims is **GRANTED.** For the same reasons, *Defendant's Motion for Summary Judgment* is **DENIED**.

III. CONCLUSION

Based upon and incorporating all of the foregoing findings and conclusions, it is hereby **ORDERED** and **ADJUDGED** that **Summary Judgment is hereby GRANTED in favor of the Plaintiff** with respect to all of the claims asserted in Plaintiff's Amended Complaint and the Counterclaim asserted by the Defendant, and the Plaintiff shall recover against the Defendant all losses incurred by RNG from Northstar's breach of the Agreement, including pre-judgment and post-judgment interest, all as more particularly detailed and set out above.

The parties are further **ORDERED** to meet and confer and to submit to the Court brief of the agreed-upon damages based on the grant of Summary Judgment in favor of the Plaintiff within forty-five (45) days of entry of this Order. If the parties are not in agreement on any portion of the damages, they shall additionally each submit a brief, limited to a maximum of five (5) pages in length, setting forth their position on the disputed amount.

It is further **ORDERED** and **ADJUDGED** that *Defendant's Motion for Summary Judgment* is hereby **DENIED**, that the Defendant shall recover nothing and shall be assessed its own costs to be assessed by the Clerk of the Court. It is further **ORDERED** and **ADJUDGED** that Northstar's Counterclaim is dismissed with prejudice.

Any and all motions by the parties shall be filed within the period(s) prescribed by the West Virginia Rules of Civil Procedure after entry of this Order. The objections by the Defendant to this Order are noted for the record.

This Order constitutes a final judgment as the same is defined in Rule 54(b) of the West Virginia Rules of Civil Procedure regarding decrees from which an appeal may lie, as the decision and Order of the Court completely disposes of at least one substantive claim. *Province v. Province,* 196 W.Va. 473, 473 S.E.2d 894 (1996). There is no just reason for delay and the Court directs the entry of judgment as set forth herein.

The Clerk of the Court is directed to provide a copy of this Order upon entry to Counsel for the parties as identified below.

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Entered this 10th day of May, 2019.

Paul T. Farrell, Circuit Judge

STATE OF WEST VIRGINIA,
COUNTY OF HARRISON, TO-WIT;

I, Albert F. Marano, Clerk of the 15th Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 10 day of May, 2019

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of this Court this the 14 day of May, 2019

Albert F. Marano
15th Judicial Circuit & 18th Family Court Circuit Clerk
of Harrison County, West Virginia