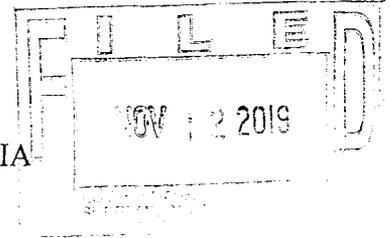


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 19-0535

NORTHSTAR ENERGY CORPORATION,

Defendant Below, Petitioner

(On Appeal From Harrison)
(County Circuit Court)
(Business Court Division)
(Civil Action No. 15-C-405-3)
(Honorable Paul T. Farrell)

RILEY NATURAL GAS COMPANY,

Plaintiff Below, Respondent

PETITIONER'S REPLY BRIEF

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Dated: November 8, 2019

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COMES NOW the Petitioner and for its Argument in Reply to those set forth in the *Brief of the Respondent* would say and assert unto the Court as follows¹:

IV. ARGUMENT

A. NORTHSTAR DID NOT BREACH THE AGREEMENT

Respondent contends in its *Brief* that the Petitioner breached the Agreement between these parties when it failed to pay the transportation charges imposed by the Respondent under color of the authority set forth in the Agreement.

The authority for such charges flows directly from the location of the “Delivery Point” for the sale of the natural gas produced and sold by the Petitioner, and its point of purchase by the Respondent.

The Circuit Court erroneously found that point of sale, the point which is stated as the “Delivery Point” in the August 1, 2008, Agreement is not at the location named in the Term Sheets prepared by the Respondent as being a delivery meter in Chelyan, Kanawha County, and is instead at a point in western Pennsylvania, some 175 miles from where the delivery of the natural gas actually occurs.

Petitioner will demonstrate to the Court both how this constitutes error by the Circuit Court, and how it absolves Petitioner from any claimed breach of the Agreement.

1. The Parties’ Agreement Designates The “Delivery Point” And Entitles Petitioner To Recovery Of Transportation Charges

Respondent Riley Natural Gas Company continues to assert before this Court, as it did below, that the parties’ August 1, 2008 “Agreement unambiguously” “demonstrates” that the Delivery Point for the natural gas produced and sold by Petitioner Northstar to Respondent is at

¹ The Petitioner is filing this *Reply Brief* only to respond to the Argument, Part IV, and Conclusion, Part V, of the matters set forth in the *Brief of the Respondent*, and not to the matters set forth in Parts I through III of the *Brief of the Respondent*, except as specifically noted.

Dominion Transmission, Inc.'s Oakford Interconnection with Texas Eastern Transmission, L.P., in Western Pennsylvania, as the Circuit Court found. App. 13-14, ¶70.

Respondent also wrongly contends that "every document which RNG supplied to Northstar established the Delivery Point(s) 'into the DTI Gateway Facilities' 'at the Oakford Interconnection with Texas Eastern Transmission, L.P.'" *Brief of Respondent*, 17.

Respondent, and the Circuit Court below, ignored the very clear terms of the parties' Agreement. Paragraph numbered 4 of the parties' Agreement specifies the "Delivery Point" for the natural gas produced and sold by Petitioner, and purchased and accepted by Respondent.

The Agreement says as follows:

The point of sale and Delivery Point(s) shall be the Meter(s) as set forth in the applicable Term Sheet. Title to the Gas shall pass to and vest in purchaser at the point of sale. As between the parties hereto, Seller shall be deemed to be in exclusive control and possession of Seller's Gas . . . until the same shall have been delivered to Purchaser at the point of sale and Delivery Point(s) referenced in this Paragraph 4, after which Delivery Point(s) Purchaser shall be deemed to be in exclusive control and possession thereof. . .

App. 74, ¶ 4, "Delivery Point."

Each of the Term Sheets prepared by the Respondent specified by number the very same Meter: Meter Number 2155301, which is the Carbon Fuel Interconnection into Dominion Transmission Pipeline TL-263 at Chelyan, Kanawha County, West Virginia. App. 78; 317-31; 374-449.

Under the Agreement the Delivery Point is the "Point of Sale" of the natural gas, and the Point where "[t]itle to the gas shall pass to and vest in [the Respondent]." App. 74; Agreement 4.

The parties' Agreement is clear and unambiguous as to the place where the gas is delivered. "When 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.” *Capitol Chrysler-Plymouth, Inc v. Megginson*, 207 W. Va. 325, 532 S.E.2d 43 (2000), Syl. Pt. 4.

In factual statement portion of its *Brief* the Respondent’ continues to rely upon a series of documents produced by Dominion Transmission regarding its proposed pipeline system upgrades as support for the Circuit Court’s finding that the Delivery Point for the sale of the Petitioner’s natural gas to the Respondent was in Western Pennsylvania and not at the “Meter” designated in the Term Sheets, and referenced in the Agreement as being the “Delivery Point.” App. 74, ¶ 4, “Delivery Point,” App. 78; *Brief of Respondent*, 3-6.

The pre-contract documents provided by Dominion Transmission and others included a lot of information, including timelines and projections. Northstar responded to the inquiry as to its interest in obtaining transportation for the natural gas it produced by signing a **Non-Binding Request Form** supplied by Respondent. App. 150. At no time did Northstar enter into any agreement with Dominion Transmission for the transportation of natural gas upon its pipeline system.

In the **Non-Binding Request Form** Northstar was asked to, and did, insert upon the form that point where it would deliver the natural gas into the Dominion Transmission pipeline system. It stated that the delivery point would be in Chelyan, West Virginia, then and now the location of Meter Number 21553011 located upon Dominion Transmission’s Pipeline TL-263. App. 150

When the final form for the purchase and sale of the natural gas from Petitioner to Respondent was transmitted to the Petitioner’s representative for signature it bore the same

Meter Number, 21553011, as the Delivery Point for the sale of the natural gas by the Petitioner to the Respondent. App. 78.

The Petitioner's representative testified that he did not recall seeing any of the pre-contract presentations, or reviewing any of the pre-contract documents other than the Non-Binding Request Form, during the period prior to the actual review and signing of the August 1, 2008 Agreement. App. 268, p. 130, ll. 3-18, p. 131, ll. 22-23, p. 132 l. 3, p. 133. L. 2, Deposition of James Abcouwer, February 10, 2017. As a result, the Circuit Court could not impute to the Petitioner any knowledge whatsoever as to what these documents might show, and the Court's reliance in its Order upon the parties' pre-contract negotiations as support for the Delivery Point being other than as set forth in the Term Sheets, is misplaced.

The only document which the Circuit Court could properly rely upon to establish the location of the Delivery Point for the natural gas sold by Petitioner and purchased by Respondent was the Agreement itself, and its accompanying Term Sheets whose terms were incorporated by reference into paragraph numbered 4 of the Agreement.

The location of this Delivery Point beyond any doubt was Meter Number 21553011 at Chelyan, Kanawha County, into Dominion Transmission's unimproved and pre-existing pipeline TL-263.

For the Circuit Court to rely upon the pre-contract documents as Respondent outlines in its *Brief* to support the Western Pennsylvania Delivery Point, was clearly error. “[P]arol testimony is not admissible to contradict or vary the terms of a written instrument, either by attempting to show prior negotiations or a contemporaneous oral agreement. The rule is not one of evidence merely, but strictly speaking is one of substantive law [citation omitted].” *Jones v. Kessler*, 98 W.Va. 1, 16, 126 S.E. 344,350 (1925).

The Circuit Court erred in finding that the Delivery Point for the gas produced and sold by Petitioner to the Respondent was in Western Pennsylvania. The Circuit Court multiplied this error by relying upon pre-contract negotiations as the foundation for its decision.

Because of the Court's finding and decision that the Delivery Point for the gas produced and sold by the Petitioner to the Respondent was in Western Pennsylvania, as urged by the Respondent, the Circuit Court also agreed with Respondent that Petitioner was liable for the transportation charges imposed by Respondent in the Agreement. App. 15-16, ¶¶ 82-83.

Such a finding could only be supported if the Delivery Point for the gas was in Western Pennsylvania, and not into Dominion Transmission Pipeline TL-263 at Meter Number 2155301 in Chelyan, Kanawha County, West Virginia, as set forth in the parties' Agreement and each of the Term Sheets. App. 73, Agreement ¶ 2(b).

The Respondent's contention that the language of the agreement "sets forth" that the Delivery Point is into the Appalachia Gateway Project Facilities is a recitation of the apportionment of the transportation charges and not a statement of fact. *See Brief of Respondent*, text at n. 91.

Clearly, based upon the Delivery Point as defined in the Agreement as being upon the old, unimproved Dominion Transmission Pipeline TL-263, the Circuit Court erred in failing to find that Petitioner owed no transportation charges to the Respondent.

The Court should reverse the decision of the Circuit Court, apply the unambiguous terms of the Agreement to find that the Delivery Point was at the pre-existing connection designated in the Term Sheets at Meter Number 2155301 near Chelyan in Kanawha County, and not in Western Pennsylvania, and direct the Respondent to return the transportation charges imposed upon the Petitioner.

**2. Because the Delivery Point Was Not into
Newly-constructed Appalachia Gateway Facilities
There Was No Breach By the Petitioner of the Agreement**

Respondent commenced the underlying civil action in the Circuit Court of Harrison County for the purpose of collecting from the Petitioner unpaid “DTI Gateway Charges” which it claimed to be due and owing under the Agreement. App. ¶¶ 30-32, 35, 38.

The basis for the assertion that such charges are due, owing and unpaid is rooted in Section 2 of the Agreement, whereby Petitioner agreed to pay the transportation costs for its gas delivered via the Appalachia Gateway Facilities. *Id.*, ¶¶ 28, 29. The Respondent’s Amended Complaint mirrored these allegations as well. App. 63-71.

When the Circuit Court made its findings that the Delivery Point for the sales of the natural gas from the Petitioner to the Respondent were into the Appalachia Gateway Facilities this also served as a basis for finding that the Petitioner had breached the Agreement.

However, because the overwhelming evidence supports this Court reversing those findings of fact below as clearly erroneous in light of the written contract between the parties that the location of the Delivery Point was at Chelyan, Kanawha County, and not in western Pennsylvania as found by the Circuit Court, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996), pt 1, syllabus, this Court must also reverse the Circuit Court’s findings and decision that the Petitioner was in breach of its obligations under the Agreement.

**3. Because the Delivery Point Was Not into
Newly-constructed Appalachia Gateway Facilities
The Petitioner Was Entitled to Terminate the Agreement**

Although Respondent’s *Brief* does not address head-on the argument of Petitioner that it is entitled to terminate the Agreement, Respondent’s position is subsumed within the argument it

makes, and the Circuit Court's findings, that the Petitioner's natural gas deliveries are into the DTI Appalachia Gateway Facilities.

As shown above, the Respondent's position, and the Circuit Court's Order making such a finding, essentially results in the finding that the Petitioner cannot terminate the Agreement. Such a finding is, as Petitioner has shown above, clearly wrong and contrary to the plain reading of the Agreement.

This Court, upon concluding that the Circuit Court was clearly wrong in its findings that the Petitioner's deliveries of natural gas were made into the DTI Appalachia Gateway Facilities, must also allow the Petitioner to terminate its obligations under the Agreement effective as of March 31, 2016, as it gave notice to the Respondent under the Agreement.

**B. THE AGREEMENT WAS A SALES CONTRACT
AND WAS NOT A MARKETING AGREEMENT**

The Respondent continues to urge this Court that the Circuit Court was correct in its finding that the Agreement between these parties was a marketing agreement and not a sales contract.

The only "marketing" which would have occurred under the Agreement would have been for the benefit of the purchaser of Petitioner's natural gas, and that would be the Respondent.

The Respondent had no incentive to market and sell the Petitioner's natural gas for the highest price obtainable. It received no commission or other form of payment for doing so, because the sale price of Petitioner's natural gas was determined as of the beginning of each month or other cycle for the remainder of that cycle. The amount which Respondent would receive was a fixed sum for each dekatherm of natural gas which it delivered and sold to the Respondent. App. 78, Management Fee.

The Agreement established a sales price by means of reference to the various Term Sheets, App. 73, ¶ 2, the volume, App. 74, ¶ 6, and the quality of title to the natural gas to be sold and purchased. App. 75, ¶ 8.

Moreover, nowhere in the Agreement is there any detail as to what marketing efforts are to be undertaken by the Respondent. Such an omission is consistent with Petitioner's *Counterclaim*, wherein it asserted that Respondent failed to market its gas when it obtained a "release" from the Agreement of a portion of its gas from sales to Respondent. App. 52-53, ¶¶ 17-22; App. 95-96, ¶¶ 17-22.

Unfortunately, the entry of its Order granting Summary Judgment to Respondent has prevented the Petitioner from fully litigating this claim.

However, the real harm in the Court's entry of judgment on this point is the failure to understand that the essence of the Agreement was for the sale, by Petitioner, and purchase, by Respondent, of the natural gas produced by the Petitioner. *Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803 (1921).

This Court should rectify that error by reversing the findings and the decision of the Circuit Court and enter judgment for the Petitioner.

**C. PETITIONER DID NOT UNDULY DELAY WHEN
CONTESTING ISSUES ARISING UNDER THE AGREEMENT**

Respondent wrongly asserts that nearly a decade passed before Petitioner challenged the Delivery Point as interpreted by the Respondent under the Agreement, and the charges imposed upon it by the Respondent. The facts demonstrate this is not so.

The improvements to the Dominion Transmission pipeline system which constituted the Appalachia Gateway Project Facilities were completed in September of 2012. The Term Sheet

for September of 2012 issued by the Respondent was the first which reflected the charges for transportation. App. 140.

Respondent commenced this collection action in October of 2015, App. 23-34. Petitioner filed its *Answer*, and then filed its *Counterclaim*, in December of 2015. App. 44-55.

This *Counterclaim*, which appears within the Appendix at pages 49-54, makes it clear that Northstar clearly and unambiguously contested that the Delivery Point for the sale of the natural gas it produced and sold to the Respondent was **not** delivered into the DTI Appalachia Gateway Project Facilities, and asserted that the Respondent was imposing, and collecting, Gateway fees and other charges which it was not entitled to collect or receive.

The basis for Petitioner's *Counterclaim* was that the Delivery Point under the Agreement was, as has been continuously asserted by Petitioner at all times, into Dominion Transportation's existing, and unimproved even to the present day, Pipeline TL-263 at Meter number 2155301 referenced in each of the Term Sheets. App. 51-52, ¶¶ 8-15.

Although Petitioner had been delivering and selling to the Respondent in accordance with the parties' Agreement the natural gas it produced for a period of years, there was no way for Petitioner to know that Respondent would wrongfully charge it for transportation before it actually did so. The first charges imposed by the Respondent for transportation were not made until the fall of 2012.

Even upon learning that it was being charged for transportation there was no way to know how and why those charges were being made without Petitioner investigating the basis for them.

When Respondent commenced the underlying litigation against Petitioner in the fall of 2015 the Petitioner took a careful look at the Agreement and realized that the charges imposed

by the Respondent were wrongful based upon the plain language of the Agreement as to the Delivery Point.

When it realized that it did not owe the charges to the Respondent it promptly gave notice of its dispute by the filing of a *Counterclaim* to recover them, and to seek relief from future charges.

The underlying facts gave rise to this dispute—the fact that the Respondent was imposing charges which it had no right to do under the Agreement. It is certainly true that the economic stability of the Petitioner was at grave risk, and the burden of paying transportation charges which should not have been imposed upon it merely compounded that risk to the point that the Petitioner's very existence was threatened.

For the Respondent to argue, and for the Court below to find, that the Petitioner unduly delayed for a decade to assert its disagreement with the Respondent's interpretation of the Agreement is simply not so. Quite simply, Petitioner could not have known how the Respondent would interpret the Agreement, and that it would impose transportation charges which are not properly imposed, until the charges were actually made. That knowledge only came to the Petitioner when the Respondent began to impose transportation charges, at the end of 2012. When the Petitioner became aware of the charges, and inspected the Agreement and understood, roughly three years had passed.

The Legislature of West Virginia has imposed statutes which require that parties aggrieved by the conduct of a counter-party to a contract or agreement assert those claims timely. The shortest of these statutes requires that such claims arising under a written contract must be asserted within a period of ten years after the cause of action first accrues. *W.Va. Code*, §55-2-6. Here, the cause of action would not have accrued until the first transportation charges were made

by the Respondent in the fall of 2012. That means that the Petitioner had until the fall of 2022 within which to assert its claims.

As a result, the Petitioner's claims for breach of the Agreement made in the fall of 2015 were asserted well within the applicable limitations period.

Moreover, because these were merchants, the Petitioner had until five years after the cessation of their dealings within which to assert its claims. *Id.*

The shortest possible limitation period appears in the Uniform Commercial Code. W.Va. Code, §46-1-101, *et seq.* The limitations period for any action for breach of a contract for the sale of goods is four years after the cause of action accrues, W.Va. Code, §46-2-725(1), and a cause of action is deemed to accrue when the breach occurs. W.Va. Code, §46-2-725(2).

Here, the breach would be deemed to occur when the Respondent imposed its first transportation charges to the Petitioner for gas purportedly delivered through the DTI Appalachia Gateway Project Facilities in the month of September, 2012.

Therefore, any action asserted by the Petitioner within four years of that date would be a timely-filed cause of action.

Because the Petitioner did not engage in a "decade long delay" before asserting its claims, and did so within the shortest of any applicable limitations period for the filing of such a claim, the decision of the Circuit Court upon this portion of the decision must be reversed.

V. CONCLUSION

This matter should be remanded to the Circuit Court with this Court finding that the Agreement was a sales contract and not a marketing agreement between these parties. This Court must simply apply the unambiguous terms of the Agreement to find that the Delivery Point for the natural gas sold to the Respondent was at a pre-existing pipeline connection designated

by the Respondent in its documents as being in Kanawha County, West Virginia, and not into newly-constructed facilities in Western Pennsylvania, thereby relieving the Petitioner of improper transportation charges imposed upon it by the Respondent, and allowing it to terminate the Agreement when its terms become uneconomical as the Agreement gave it a right to do.

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