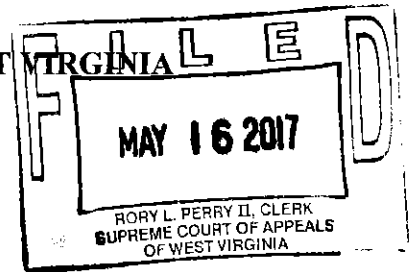


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**ANTERO RESOURCES CORPORATION,**

**Petitioner,**

**vs.**

**Harrison County Circuit Court**

**Civil Action No. 17-C-98-2**

**The Honorable Judge Bedell**

**THE HONORABLE DALE STEAGER,  
West Virginia State Tax Commissioner,**

**THE HONORABLE JOSEPH R. ROMANO,  
Assessor of Harrison County, and**

**THE COUNTY COMMISSION OF HARRISON COUNTY,  
Sitting as a Board of Assessment Appeals and as a  
Board of Equalization and Review,  
Respondents.**

**TO: THE HONORABLE CHIEF JUSTICE**

**MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Petitioner, Antero Resources Corporation ("Antero"), by counsel, John Meadows, Craig Griffith, and the law firm of Steptoe & Johnson, PLLC, respectfully requests the above-styled case be referred to the Business Court Division for all further proceedings. Trial Court Rule 29.04 expressly provides that "complex tax appeals are eligible to be referred to the Business Court Division." W. Va. Trial Ct. R. 29.04. This matter constitutes a complex tax appeal, and involves issues for which specialized treatment will be helpful. For these reasons, the Court should grant Antero's Motion to Refer Case to Business Court Division.

Additionally, the following related actions should be the subject of consolidation and transferred to the Business Court Division, and are currently pending:

- *Antero Resources Corporation, v. The Honorable Dale Steager, et al.*, Civil Action Number 17-AA-1, Tyler County Circuit Court (Judge Cramer).<sup>1</sup>
- *Antero Resources Corporation, v. The Honorable Dale Steager, et al.*, Civil Action Number 17-AA-3, Doddridge County Circuit Court (Judge Sweeney).
- *Antero Resources Corporation, v. The Honorable Dale Steager, et al.*, Civil Action Number 17-AA-2, Ritchie County Circuit Court (Judge Sweeney).
- *Antero Resources Corporation, v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 16-AA-1, Tyler County Circuit Court (Judge Cramer).
- *Antero Resources Corporation, v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 17-AA-1, Doddridge County Circuit Court (Judge Sweeney).
- *Antero Resources Corporation, v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 17-AA-1, Ritchie County Circuit Court (Judge Sweeney).

The above-styled cases present identical claims and issues of law as those in this case. For tax years 2016 and 2017, Antero appealed the West Virginia Department of Revenue, State Tax Department, Property Tax Division's assessment of its wells in Tyler, Harrison, Doddridge, and Ritchie Counties. In the interest of judicial economy, these cases should be consolidated and heard by the Business Court Division. If these cases are not consolidated, four different circuit courts and three different judges will have to hear and decide the same issues, possibly reaching inconsistent results. Thus, not only is this precisely the type of case suited to the Business Court Division, but, here, granting the Motion to Refer will also accomplish the important goal of judicial economy and consistency.

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<sup>1</sup> A Motion to Refer to Business Court Division has already been filed in *Antero Resources Corporation, v. The Honorable Dale Steager, et al.*, Civil Action Number 17-AA-1, Tyler County Circuit Court.

## I. INTRODUCTION AND BACKGROUND

Antero is a producer of natural gas throughout the state of West Virginia, with 168<sup>2</sup> Marcellus wells located in Harrison County. Those wells are appraised by the West Virginia Department of Revenue, State Tax Department, Property Tax Division (the “Tax Department” or “State”) based on a mass appraisal system, state-wide. Antero filed this action, as well as actions in Tyler, Ritchie, and Doddridge Counties, because the Tax Department failed to properly calculate the fair market value of its Marcellus wells for tax years 2016 and 2017.

Certain variables are used by the State to value producing oil and natural gas wells, including, operating expenses. Specifically, the Tax Department periodically circulates a survey by which it solicits data from oil and natural gas producing taxpayers regarding operating expenses for their wells, and based on that, the Tax Department determines the operating expense variables used in its mass appraisal system. The amount of operating expenses applied to a well using the mass appraisal system is based on a percentage of the well’s gross receipts not to exceed a maximum amount, and the percentage and maximum vary by the type of well (typical or conventional, Marcellus, etc.). The operating expense calculations are included in a natural resources “valuation variables” document that the Tax Department releases annually.

In addition to the valuation variables document, the Tax Department releases an annual administrative notice that lists the percentages and maximum amounts for operating expense calculations. In prior years, the Tax Department invited taxpayers to submit actual operating expenses that exceed the percentages and maximum amounts listed in the valuation variables document. The 2016 and 2017 administrative notices, unlike administrative notices from 2000 through 2015, however, did not include language that invites taxpayers to submit actual expenses, despite no changes to the West Virginia Code or the Tax Department’s Legislative

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<sup>2</sup> Antero had 169 wells located in Harrison County for tax year 2016.

Rule that governs the valuation of producing natural gas wells. The 2016 administrative notice was released several months after Antero had already submitted actual operating expenses to the Tax Department, consistent with the procedure from prior years.

For tax year 2016, the Tax Department calculated operating expenses at the lesser of 20% of gross receipts or \$150,000 for Marcellus wells. For tax year 2017, the Tax Department calculated operating expenses at the lesser of 20% of gross receipts or \$175,000 for Marcellus wells. These caps<sup>3</sup> unduly restrict the amount of operating expenses that should be allowed for each well, and the imposition of a “cap” is not supported by the Tax Department’s legislative rule regarding the valuation of producing oil and natural gas properties. The legislative rule, instead, requires that the Tax Department use “average annual industry operating expenses per well” in valuing producing wells, and does not authorize the Tax Department to “cap” operating expenses at a certain amount.

Antero evaluated its actual operating expenses for calendar years 2014 and 2015,<sup>4</sup> and determined that for Marcellus wells in the county, the amount of operating expenses that it was incurring significantly exceeded the percentages and maximum amounts set by the State.

Antero, like many mineral producers, generally reports its operating expenses to the Tax Department on a state-wide basis. For 2014, Antero’s average operating expense for all well types was approximately 23% of revenue, or \$648,000, which includes all operating expenses, gathering and compression expenses, processing expenses, and transportation expenses necessary to get the gas to the point of sale. For 2015, Antero’s average operating expense per

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<sup>3</sup> The “maximum amount” (\$150,000 for 2016 and \$175,000 for 2017) of operating expenses per Marcellus well will be referred to alternatively as the “maximum amount” or “cap.”

<sup>4</sup> For property tax purposes, the operating expense data from calendar year 2014 is used to value the wells for tax year 2016, and operating expense data from calendar year 2015 is used to value the wells for tax year 2017.

Marcellus well was 36% of revenue, or \$817,000.<sup>5</sup> Antero reports its gross receipts based on the point of sale, and the allowed operating expenses should reflect the expenses incurred to get the gas to the point of sale. The goal of the State's calculation is to determine the value of the reserves. Under the current system, if two producers have the same production/reserves but one sells at the wellhead and the other sells to a market further away, the reserves of the producer who sells to a further market are valued substantially higher, which undermines the goal of the State's calculation. In sum, the Tax Department incorrectly and unfairly ignored the actual operating expenses and instead relied on the maximum calculations found in its valuation variables document and administrative notice. By failing to consider Antero's actual operating expenses, the Tax Department overvalued Antero's wells and did not assess them at their true and actual value.

On October 27, 2016, Antero protested the Tax Department's 2016 valuation (as adopted by the Harrison County Assessor) to the Harrison County Commission sitting as the Harrison County Board of Assessment Appeals. (Certified Transcript of October 27, 2016 Hearing before the Harrison County Board of Assessment Appeals, Attached as Exhibit A to Petitioner's Complaint, (hereinafter "2016 Hr'g Tr.")). On February 3, 2017, Antero protested the Tax Department's 2017 valuation (as adopted by the Harrison County Assessor) to the Harrison County Commission sitting as the Harrison County Board of Equalization and Review.<sup>6</sup> (Certified Transcript of February 3, 2017 Hearing before the Harrison County Board of Equalization and Review, Attached as Exhibit B to Petitioner's Complaint, (hereinafter "2017

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<sup>5</sup> Testimony during the October 2016 hearing focused on average expenses for all well types. Antero's per well cost for horizontal Marcellus wells in calendar year 2014 was \$1,061,000 per well. At the February 2017 hearing, it was noted that per well costs for horizontal Marcellus wells was \$817,000 for calendar year 2015, while the overall per well cost was \$544,000 per well. The overall well costs of \$648,000 per well in 2014 and \$544,000 per well in 2015 includes horizontal Marcellus wells, vertical Marcellus wells and conventional wells.

<sup>6</sup> The Harrison County Board of Assessment Appeals and Board of Equalization and Review are collectively referred to as the "Boards."

Hr'g Tr.'')). At both hearings, Antero presented clear and convincing evidence that the Tax Department failed to consider Antero's actual operating expenses in determining the valuation for the wells assessed for Harrison County. Antero presented a complete analysis of its actual operating expenses from the state and local tax firm Altus Group US, Inc. ("Altus"), supported by testimony from an Altus Director, Kirsten Evans, that correctly applies the approach to arrive at allowable operating expenses. (See 2016 Hr'g Tr., pp. 31-116; 2017 Hr'g Tr., pp. 17-76).

Antero also proved by clear and convincing evidence that the State erroneously calculated average operating expenses at the lesser of 20% of gross receipts or \$150,000 for tax year 2016 and 20% of gross receipts or \$175,000 for tax year 2017. Altus explained that by artificially capping operating expenses at \$150,000 or \$175,000, which is not permitted by the legislative rule, the State is grossly overvaluing the fair market value of Antero's wells. (2016 Hr'g Tr., at pp. 38:15-40:2; 2017 Hr'g Tr. at pp. 26:11-29:18). Additionally, the State does not take into account Antero's point-of-sale and the operating expenses incurred to get the gas downstream to market. (2016 Hr'g Tr. at pp. 32:18-34:3; 2017 Hr'g Tr. at pp. 32:21-39:3). Antero demonstrated that it is the largest producer in West Virginia, at 40% of market share, and that its actual operating expenses per Marcellus well were \$1,061,000 for 2014 and \$817,000 for 2015. (2016 Hr'g Tr. at pp. 72:12-73:20, 2016 Hr'g Exh. 16; 2017 Hr'g Tr. at pp. 52:18-53:12, 2017 Hr'g Exh. 11). Under these circumstances, it is not mathematically possible for the average operating expenses for Marcellus wells to be \$150,000 or \$175,000. *Id.*

At the 2016 hearing, James Harden, an expert appraiser from Hein & Associates, also testified. He explained that Antero hired Hein & Associates to appraise the fair market value of its wells in Harrison County. (2016 Hr'g Tr., at p. 118:17-118:22). Mr. Harden explained that the Tax Department's valuation did not properly account for the decline rate or actual operating

costs of the wells at issue, and that Hein & Associates used a different discount rate than the State. (2016 Hr'g Tr., at pp. 118:20-123:10). Hein & Associates appraised the fair market value of Antero's Harrison County wells at \$596.6 million for tax year 2016, while the state valued the wells at approximately \$692 million for tax year 2016. (2016 Hr'g Tr. at p. 123:23-123:24).

Hein & Associates did not testify at the 2017 hearing. However, Ms. Evans of Altus testified that Antero hired Hein & Associates to appraise its wells in Harrison County for the 2017 tax year. (See 2017 Hr'g Tr., at pp. 54:10-56:9; 2017 Hr'g Tr. Exh. 13). Hein & Associates appraised the fair market value of Antero's Harrison County wells at \$247.1 million, while the State valued them at \$343 million. (See 2017 Hr'g Tr. Exhs. 1, 13).

Finally, at both hearings, Altus testified that, while Hein & Associates' valuation is the fair market value of the wells, an alternative approach would be to calculate operating costs as 20% of gross production, without any cap. Altus stressed that this method would still overstate the fair market value of the wells, but that 20%, without a cap, is a reasonable resolution. (2016 Hr'g Tr., at pp. 133:18-134:20, 2016 Hr'g Tr. Exh. 15; 2017 Hr'g Tr., at pp. 56:10-57:6, 2017 Hr'g Tr. Exh. 12). This approach would value Antero's wells at approximately \$518 million for 2016 and \$299.6 million for 2017. (2016 Hr'g Tr. Exh. 15; 2017 Hr'g Tr. Exh. 12).

Despite the clear and convincing evidence produced by Antero, the Board made no adjustment to the Tax Department's valuations. (See Ex. C and D to Antero's Petition). Antero timely petitioned the Court for appeal of the Boards' decisions. In its petition, Antero alleges that the Tax Department abused its discretion by failing to consider Antero's actual and allowable operating expenses in a manner contrary to the statutes, regulations and official releases from the Tax Department governing valuation of personal property, and that the Tax Department has failed to support its valuation with substantial evidence.

In its Complaint, Antero alleges that (1) the Tax Department failed to properly calculate the fair market value of its Marcellus wells for tax years 2016 and 2017, (2) the Tax Department improperly placed a “cap” on operating expenses, resulting in an inflated value of Antero’s wells, (3) the Tax Department calculated inaccurate “caps,” (4) the Tax Department treats similarly situated tax payers differently in violation of United States Constitution and the West Virginia Constitution, as the “cap” of \$150,000 or \$175,000 only adversely affects tax payers that have wells with gross receipts over a certain threshold; and (5) the Tax Department’s valuation of Antero’s wells did not properly account for the decline rate or discount rate.

Antero asks the Court to find that the Board incorrectly made no changes to the Tax Department’s valuation for the 2016 and 2017 tax years; that the State’s “cap” in operating expenses be removed; that the value of Antero’s Harrison County gas wells for the 2016 tax year be fixed at \$518.9 million, based on the compromise value calculated by applying the State’s 20% average annual industry operating expense percentage for Marcellus wells to Antero’s gross receipts; and that the value of Antero’s Harrison County gas wells for the 2017 tax year be fixed at \$299.6 million, based on the compromise value calculated by applying the State’s 20% average annual industry operating expense percentage for Marcellus wells to Antero’s gross receipts.

Because the issues in this matter are complex and require specialized knowledge regarding taxation of oil and gas wells, specialized treatment will improve the expectation of a fair and reasonable resolution of this matter. Accordingly, Antero requests that this matter be transferred to the Business Court Division.

## **II. APPLICABLE LEGAL STANDARD**

West Virginia Trial Court Rule 29.06 provides that “[a]ny party . . . may seek a referral of Business Litigation to the [Business Court] Division by filing a Motion to Refer to the

Business Court Division with the Clerk of the Supreme Court of Appeals of West Virginia.” Tr. Ct. R. 29.06(a). “Business Litigation” is defined as follows:

(a) “Business Litigation”-- one or more pending actions in circuit court in which:

(1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and

(2) the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and

(3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that ***complex tax appeals are eligible to be referred to the Business Court Division.***

W. Va. Trial Ct. R., 29.04 (emphasis added).

### III. ANALYSIS

This is a complex tax appeal that should be referred to the Business Court Division. The tax assessment issues in this case are technical, and are precisely the type of issues that should be referred to the Business Court Division. *See* Trial Ct. R., 29.04(a)(3) (providing that “complex tax appeals are eligible to be referred to the Business Court Division.”). Further, this case “involve[s] matters of significance to the transactions, operations, or governance between business entities,” and “presents commercial and/or technology issues in which specialized

treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy.” *See* Trial Ct. R., 29.04(a)(1)-(2).

Here, Antero is challenging the Tax Department’s valuation of its Marcellus wells in Harrison County. Before the Boards, Antero submitted proof of its actual operating expenses, which it contends should be used in determining the value of its Marcellus wells. (*See* 2016 Hr’g Exhibits 2, 3, 5, 6, 7, 8, 9, 10, 11, 16; 2017 Hr’g Exhibits 2, 3, 4, 5, 7, 11, 12, 13, 14, 15). Antero also demonstrated that the State does not take into account Antero’s point-of-sale for the gas, or the operating expenses incurred to get the gas downstream to market. (2016 Hr’g Tr. at pp. 32:18-34:3; 2017 Hr’g Tr. at pp. 32:21-39:3). Analysis of these issues requires an understanding of Antero’s business model, particularly with regard to the point-of-sale, and an understanding of allowed operating expenses under Section 3.16 of Series 1J, Title 110 State Tax Department Legislative Rule for Valuation of Producing and Reserve Oil & Natural Gas for Ad Valorem Property Tax Purposes.

Antero also demonstrated to the Board that the Tax Department calculated inaccurate “caps” with respect to allowed operating expenses. Antero explained that by artificially capping operating expenses at \$150,000 for tax year 2016 and \$175,000 for tax year 2017, which is not permitted by the legislative rule, the State is grossly overvaluing the fair market value of Antero’s wells. (2016 Hr’g Tr., at pp. 38:15-40:2; 2017 Hr’g Tr. at pp. 26:11-29:18). Antero explained that it volumetrically represents 40% of horizontal Marcellus production in West Virginia, and demonstrated that it would be mathematically impossible to get a weighted average of \$150,000 for tax year 2016, or \$175,000 for tax year 2017, in operating expenses for Marcellus wells if Antero’s average operating expense per well are taken into consideration. (2016 Hr’g Tr. at pp. 72:12-73:20; 2017 Hr’g Tr. at pp. 52:18-53:12).

Thus, this tax appeal presents “issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy.” *See* Trial Ct. R., 29.04(a)(2). In order to fairly and reasonably resolve these issues, the decision-maker should have familiarity with the tax code, the mechanisms used to value taxable property, the mass appraisal system used to assess oil and gas wells (including the methodology set forth in § 110-1J-4.1 as reflected in Tax Department’s 2017 Administrative Notice), as well as familiarity with allowable operating expenses under Section 3.16 of Series 1J, Title 110. As demonstrated in the hearing transcript and exhibits (attached to Antero’s complaint), Antero has placed clear and convincing evidence on the record as to why its Marcellus wells have been overvalued. Antero asserts that specialized knowledge on the above-mentioned issues would improve the likelihood that the submitted documentation and testimony is fairly considered, and that a reasonable resolution of this controversy will result.

Furthermore, several tax matters have been referred to the Business Court Division. *See e.g., Lee Trace LLC v. Berkeley County Council as Board of Review and Equalization, et al.*, Case Nos. 11-AA-2 and 14-AA-1, 2015 WL 7628718 (W. Va. Nov. 20, 2015) (deciding Lee Trace LLC’s appeal of the Business Court Division’s decision related to its challenge of its property tax assessments, including that it did not receive proper notice of its right to appeal its assessment, that the assessor did not consider the requisite depreciation factors, and that the assessor failed to consider income information); *Matkovich v. University Healthcare Foundation, Inc.*, 238 W.Va. 345, 795 S.E.2d 67 (2016) (deciding whether a parcel of real property is exempt from *ad valorem* property tax); *John Skidmore Trucking, Inc. v. Mark W. Matkovich*, Case No. 14-C-27, Braxton County Circuit Court, Business Court Division (involving an assessment for

sales and use tax related to services provided by an Enrolled Agent). The issues presented in this case similarly qualify for transfer under W.Va. Trial Court Rule 29.06.

Finally, because this case is in the early stages of litigation, referral to the Business Court Division would not prejudice the Respondents or waste judicial resources. Instead, it is in the interest of the parties and judicial economy for the above-referenced related cases to be consolidated and referred to the Business Court Division. Absent transfer and consolidation, four different circuit courts and three different judges will have to hear and decide the same issue, possibly reaching inconsistent results. Thus, not only is this case exactly the type that should be referred to the Business Court Division, but consolidation in the Business Court Division will also promote judicial economy and consistency. For all of these reasons, this case should be referred to the Business Court Division.

In further support of this Motion, please find attached hereto an accurate copy of the operative complaints, answers, and docket sheet.

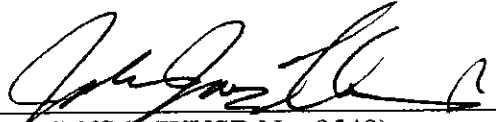
#### **IV. CONCLUSION**

WHEREFORE, the undersigned hereby moves, pursuant to W.Va. Trial Court Rule 29.06, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted, this ~~6<sup>th</sup>~~ day of May, 2017.

**ANTERO RESOURCES CORPORATION**

**By Counsel**

A handwritten signature in black ink, appearing to read "John J. Meadows", is written over a horizontal line.

Craig A. Griffith (WVSB No. 8549)

John J. Meadows (WVSB No. 9442)

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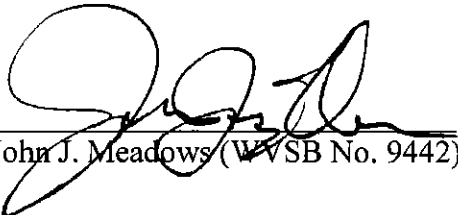
Facsimile (304) 353-8180

**CERTIFICATE OF SERVICE**

I, John Meadows, do hereby certify that on this 16<sup>th</sup> day of May, 2017, I have served the foregoing *"Motion to Refer Case to Business Court Division,"* with attachments by first class mail to all counsel of record at the addresses provided below:

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John J. Meadows (WV SB No. 9442)