

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANTERO RESOURCES CORPORATION,

Petitioner,

vs.

Tyler County Circuit Court

Civil Action No. 16-AA-1

The Honorable Judge Cramer

**THE HONORABLE MARK MATKOVICH,
West Virginia State Tax Commissioner,**

**THE HONORABLE JACKSON L. HAYES,
Assessor of Tyler County, and**

**THE COUNTY COMMISSION OF TYLER COUNTY,
Sitting as the Board of Assessment Appeals,
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-C-98-2, Harrison County Circuit Court (Judge Bedell).
- *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 Dale Steager, et al.*, Civil Action Number 17-AA-1, Tyler County Circuit Court (Judge Cramer).¹
- *Antero Resources Corporation, v. The Honorable Mark Matkovich, 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.

¹ 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 several Marcellus wells located in Tyler 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 Harrison, 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 Rule that governs the valuation of producing natural gas wells.

For tax year 2016, the Tax Department calculates operating expenses at the lesser of 20% of gross receipts or \$150,000 for Marcellus wells (the “maximum amount” of \$150,000 of operating expenses per Marcellus well will be referred to as the “maximum amount” or “cap”). This cap unduly restricts 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.

In this matter, Antero evaluated its actual operating expenses for calendar year 2014,² 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 calendar year 2014, Antero’s average operating expense per well was 23% of gross receipts, 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. 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

² For property tax purposes, the operating expense data from calendar year 2014 is used to value the wells for tax year 2016.

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 25, 2016, Antero protested the Tax Department's valuation (as adopted by the Tyler County Assessor) to the Tyler County Commission sitting as the Tyler County Board of Assessment Appeals (the "Board"). (Certified Transcript of October 25, 2016 Hearing before the Tyler County Board of Assessment Appeals, See Exhibit A to Antero's Petition (hereinafter "Hr'g Tr.")). 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 Tyler County. Antero also 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 Senior Consultant, Elizabeth Burg, that correctly applies the approach to arrive at allowable operating expenses. (See Hr'g Tr., pp. 11-54).

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. Altus explained that by artificially capping operating expenses at \$150,000, which is not permitted by the legislative rule, the State is grossly overvaluing the fair market value of Antero's wells. (Hr'g Tr., at p. 27:17-27:24). The State also does not take into account Antero's point-of-sale, and the operating expenses incurred to get the gas downstream to market. (Hr'g Tr. at p. 29:7-29:19). Altus testified that Antero volumetrically represented 40% of horizontal production in West Virginia in 2014, and that its average operating expense was \$648,000 per well. (Hr'g Tr.,

pp. 34:5- 35:13). Under these circumstances, it is mathematically impossible for the average operating expenses for the industry to be \$150,000. (Hr'g Tr., pp. 34:5- 35:13).

An expert appraiser from Hein & Associates, Clarence Jim Harden, M.B.A., A.S.A., also testified at the hearing. He testified that he appraised Antero's wells in Tyler County. (*See* Hr'g Tr., 55:21-58:23). 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 used a different discount rate than his methodology. Mr. Harden valued Antero's Tyler County wells at just under \$23 million, while the State valued them at over \$58 million. (*Id.* at 58:12-58:23).

Finally, Altus testified that, while Hein & Associate's 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. (Hr'g Tr., pp. 66:13-67:15). This approach would value Antero's wells at approximately \$40.9 million. *Id.*

Despite the clear and convincing evidence produced by Antero, the Board made no adjustment to the Tax Department's valuation. (See Ex. B to Antero's Petition). Antero timely petitioned the Court for appeal of the Board's decision. 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, (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 an inaccurate “cap,” (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 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; that the State’s “cap” of \$150,000 in operating expenses be removed; and that the value of Antero’s Tyler County gas wells for the 2016 tax year be set at \$40,971,679, based on the compromise value calculated by applying the State’s 20% average annual industry operating expense percentage by 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 Tyler County. Before the Board, Antero submitted proof of its actual operating expenses, which it contends should be used in determining the value of its Marcellus wells. (*See* Hr’g Tr., pp.11-54; Hr’g Exhibits 4, 6, 8, 9, and 10). 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. (Hr’g Tr. at p. 29:7-29:19). 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 an inaccurate “cap” with respect to allowed operating expenses. Antero explained that by artificially capping operating expenses at \$150,000, which is not permitted by the legislative rule, the State is grossly overvaluing the fair market value of Antero’s wells. (Hr’g Tr., at p. 27:17-27:24). Antero explained that it volumetrically represented 40% of horizontal production in West Virginia from 2013 through 2015, and that its average operating expense was \$648,000 per well. (Hr’g Tr., pp. 34:5- 35:13). Under these circumstances, it would not be mathematically possible to get to an average of \$150,000 in operating expenses for the industry if Antero’s average operating expenses of \$648,000 per well is taken into consideration. (Hr’g Tr., pp. 34:5- 35:13).

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 is 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 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.

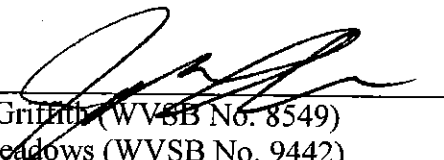
III. CONCLUSION

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 12 day of May, 2017.

ANTERO RESOURCES CORPORATION

By Counsel



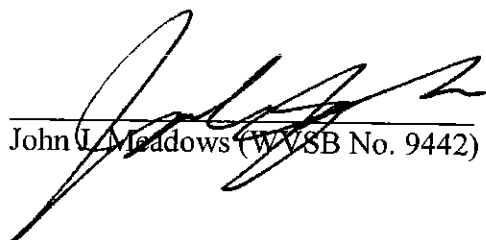
Craig A. Griffith (WVSB No. 8549)
John J. Meadows (WVSB No. 9442)
Steptoe & Johnson PLLC
Post Office Box 1588
Charleston, West Virginia 25326
Telephone (304) 353-8000
Facsimile (304) 353-8180

CERTIFICATE OF SERVICE

I, John Meadows, do hereby certify that on this 18th 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:

L. Wayne Williams, Esquire
Assistant Attorney General
1900 Kanawha Boulevard, East
Building 1, Room W-435
Charleston, WV 25305

D. Luke Furbee, Esquire
Prosecuting Attorney of Tyler County
P.O. Box 125
Middlebourne, WV 26149



John L. Meadows (WVSB No. 9442)