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IN THE

Supreme Court of Appeals of West Virginia

NORTHSTAR ENERGY CORPORATION,

Petitioner (Defendant),

v.

RILEY NATURAL GAS COMPANY,

Respondent (Plaintiff).

ON APPEAL FROM THE
CIRCUIT COURT OF HARRISON COUNTY
BUSINESS COURT DIVISION

Civil Action No. 15-C-405-3
(Honorable Paul T. Farrell)

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

A. Factual background

1. Timeline of Parties' Dealings

Respondent, Riley Natural Gas Company ("RNG"), is engaged in the business of buying, selling, and marketing natural gas, including on behalf of natural gas producing companies like Petitioner, Northstar Energy Corporation ("Northstar").[1] Northstar represents that "it is no longer engaged in the business of natural gas production" but that it "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."[2] Despite this assertion in February 2017 and a claim then that "[t]he business doesn't have any revenue,"[3] public documents of which the Court may take judicial notice[4] confirm that Northstar remains engaged in the business of natural gas production. A search for the term "Northstar Energy Corporation" as "Operator Name" in the West Virginia Division of Environmental Protection's online Oil and Gas Well Search database[5] reveals that Northstar is the current operator for 130 wells, 103 of which are active wells. Of these 103 active wells, all list production during 2017 and 2018.[6] Similarly, a search for the same term in the West Virginia Secretary of State's Business Organization Search reveals that Northstar has been in business continually since 1995.[7]

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1 (Joint Appendix ("JA") 38 ¶ 6.)

2 (JA 241 at 25.)

3 (*Id.*)

4 (*See* W. VA. R. E. 201(c)(2) ("The court must take judicial notice if a party requests it and the court is supplied with the necessary information.") and (d) ("The court may take judicial notice at any stage of the proceeding.").)

5 (https://apps.dep.wv.gov/oog/wellsearch/wellsearch.cfm.)

6 (*Id.*)

7 (http://apps.sos.wv.gov/business/corporations/.)

RNG is not a producer of natural gas.[8] Northstar contracted with RNG to acquire firm pipeline transportation capacity on Dominion Transmission, Inc.'s ("DTI") Appalachia Gateway Pipeline Expansion Project ("DTI Gateway"), at a monthly cost and obligation, in order for Northstar's gas to be received and transported on DTI ("the Agreement").[9]

The primary purpose of the Agreement was to facilitate the purchase, sale, and marketing by RNG 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 3,500 dekatherms ("dth") per day for ten years.[10] The parties subsequently modified Northstar's commitment to include a firm transportation ("FT") rate of $0.495/dth; however, the firm transportation quantity remained at 3,500 dth/day.[11]

DTI Gateway was designed to help meet the demand for natural gas in the mid-Atlantic and northeastern United States by constructing additional firm pipeline transportation capacity on DTI Gateway to transport natural gas to homes, businesses, industries, and power plants throughout the region.[12]

Pipeline companies like DTI incur millions of dollars of construction costs building additional firm pipeline transportation capacity. So before constructing a pipeline or expanding an existing one, they rely for financial support on contracts (called precedent agreements) between the pipeline company and its shippers of natural gas—in this case, RNG on behalf of Northstar—that contain commitments from shippers to pay monthly charges, surcharges, deductions, and fees

[8] (JA 64 ¶ 8; JA 84 ¶ 5.)

[9] (JA 64–65 ¶ 10; JA 131–38.)

[10] (JA 66 ¶ 17; JA 136.) Dekatherm is a unit used to measure quantity of natural gas.

[11] (JA 140.)

[12] (JA 65 ¶ 11.)

to DTI ("DTI Gateway Charges"). In exchange, DTI commits to reserve firm capacity or space ("FT capacity") in the pipeline, ready at all times for the shipper to call on to use when needed, again, in this case for RNG's use on behalf of Northstar.[13]

Prior to Northstar entering into the Agreement with RNG, DTI conducted an "open season" that started on April 1, 2008 and ended on April 25, 2008 to seek commitments in the form of precedent agreements from shippers to reserve FT capacity on DTI Gateway, and to pay the DTI Gateway Charges over a fixed term of years for the reserved FT capacity to be constructed.[14] During this open season, RNG contacted Northstar and other producers on April 2, 2008 to assess interest in purchasing FT capacity on DTI Gateway.[15] Importantly, this open season request noted that the FT service Delivery Point was the Oakford Interconnection with Texas Eastern Transmission, LP, in Pennsylvania.[16]

On the same date, RNG also supplied to Northstar and other producers a Memorandum and Questions/Answers about the Gateway Project.[17] Significantly, this Memorandum provided that "[t]he 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."[18]

The Questions/Answers attached to the Memorandum reiterated:

(Q) What will be the primary delivery point for this project?

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13 (JA 65 ¶ 12.)

14 (JA 65 ¶ 13.)

15 (JA 142.)

16 (JA 143.)

17 (JA 145–48.)

18 (JA 145.)

> (A) The primary point of delivery will be DTI's interconnection with Texas Eastern at Oakford. By holding firm service rights, producers [like Northstar] or their marketers [like RNG] will be able to sell their gas at either Southpoint or Oakford on a primary basis and at all other points on DTI on a secondary basis.

(JA 146.)

As an integral part of the DTI open season process and as a prerequisite to RNG committing to purchase on Northstar's behalf FT capacity on DTI, Northstar agreed to reimburse RNG for the DTI Gateway Charges that RNG would pay to DTI for the DTI Gateway FT capacity for ten years; this was to facilitate RNG's ability to purchase, market, and sell Northstar's natural gas on a firm basis on the DTI Gateway facilities.[19] Northstar first demonstrated its agreement on April 24, 2008 when it submitted its Non-Binding Request Form in response to RNG's open season request.[20] Notably, the Form specified the Project's Point of Delivery as "Oakford Interconnection with Texas Eastern Transmission, LP." Northstar's President, James Abcouwer, completed the blank portions of this document, writing that the Receipt Point would be at "Chelyan, WV;" this is where Northstar's meter connects to Dominion's transmission line TL-263.

Following Northstar's non-binding expression of interest in having RNG purchase firm capacity on the DTI Gateway Project, in July 2008, RNG sent a letter to Northstar. The letter, which included Dominion's slides from a July 2, 2008 meeting about project updates, advised that RNG planned to forward a proposed contract for the purchase of firm capacity by RNG on Northstar's behalf.[21] Like the prior communications tendered to Northstar and other producers,

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19 (JA 131–38.)

20 (JA 150.)

21 (JA 152.)

these documents made clear that the Delivery Point for the DTI Gateway Project was DTI's interconnection with Texas Eastern at Oakford.[22]

Later in July 2008, RNG sent the promised contract proposal to Northstar and other producers.[23] The proposed contract incorporates an undated Term Sheet, which 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."[24] It also makes express reference to how to set the price for "any Delivery Point(s) into DTI's Appalachia Gateway Project facilities . . . ," by incorporating Exhibit B to the Agreement.[25]

Simultaneously, RNG supplied Dominion's slides from a July 22, 2008 meeting concerning the DTI Gateway Project.[26] The slides document that TL-263—the transmission line for Northstar's meter—is a Receipt Point in southern West Virginia for the DTI Gateway Project.[27] Again, the slides specify that the "Delivery Point" is "Oakford Interconnect."[28]

Next, 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, and requesting that the Agreement be returned by August 29, 2008.[29] On August 25, 2008, Mr. Abcouwer executed the Agreement and term sheet on Northstar's behalf.[30] The Agreement, like

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22 (JA 155 (map showing TL-263 terminating at this Delivery Point).)

23 (JA 172–80 (undated letter forwarding July 21, 2008 proposed contract).)

24 (JA 178.)

25 (JA 173 ¶ 2(b).)

26 (JA 182–204.)

27 (JA 186 and 187–88.)

28 (JA 198.)

29 (JA 206.)

30 (JA 135–36.)

the proposed version, incorporated an undated Term Sheet that 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."[31] The Term Sheet estimated that the Agreement's ten year Primary Term would not begin until November 2011, because the DTI Gateway construction was not yet complete.[32] It also made express reference to how to set the price for "any Delivery Point(s) into DTI's Appalachia Gateway Project facilities . . ." by incorporating an Exhibit B to the Agreement.[33]

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 FT service (the "in-service date" of the pipeline facilities) to begin on completion of the DTI Gateway facilities.[34] The Precedent Agreement defined 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 . . . ."[35] As it would pertain to Northstar, the Precedent Agreement defined the "Primary Point(s) of Receipt" as "an existing point of interconnect between Pipeline and Customer" at "TL-263."[36]

After entering into the Agreement on Northstar's behalf, Mr. Abcouwer acknowledged Northstar's "commit[ment] to firm transportation on the pipeline," when he wrote

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31 (JA 136.)

32 (*Id.*)

33 (JA 131 ¶ 2(b).)

34 (JA 65–66 ¶ 14; JA 208–23.)

35 (JA 213.)

36 (JA 213, 223.)

to RNG on December 8, 2011 on Northstar's behalf to request to discuss the contract's pricing mechanism.[37] RNG responded to Northstar's request for modification of the DTI Gateway Project pricing, by a December 21, 2011 letter from RNG's Regional VP of Natural Gas Marketing Tina R. Smith.[38] This letter reiterates the Agreement's Delivery Point:

> DTI's Gateway project will allow your gas to flow to the same delivery point the gas flowed to prior to Gateway, which is Dominion South Point....For additional fuel costs, approximately 2.85% , *the gas can be delivered to the Oakford Interconnect on Texas Eastern.*"

(*Id.* (italics in original).) The letter also states that "RNG producers [like Northstar] that committed to the Gateway firm are responsible for their applicable Gateway charges."[39] Northstar did not challenge this representation.

To the contrary, Mr. Abcouwer sent an email to RNG in December 2011, again confirming his understanding that the Agreement relates to Northstar's placement of its gas into the DTI Gateway.[40] He asked, "Will you [please] tell me what Pod my Dominion Gateway FT is in and whether it is EB [electronic balancing] or non-EB."[41] Stephanie Channell of RNG responded on the same date, stating (in pertinent part): "Your FT for Gateway is not in a Pod. It is on Line TL-263 which is the line your meter 2155301 is located on."[42]

In June 2012, RNG offered Northstar the opportunity to modify its FT rate under the Agreement.[43] Mr. Abcouwer selected Northstar's modification option and returned an

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37 (JA 225.)

38 (JA 227.)

39 (*Id.*)

40 (JA 229.)

41 (*Id.*)

42 (*Id.*)

43 (JA 231.)

executed copy of the memorandum to RNG.[44] Consequently, the parties modified their Term Sheet to adjust the FT rate.[45]

On September 1, 2012, Abcouwer executed another document on Northstar's behalf, this time to release some of its DTI Gateway capacity.[46]

2. Breach

Pursuant to the Agreement, Northstar is responsible and liable to RNG for all charges of any kind, including transportation charges like the DTI Gateway Charges, upstream or downstream of Delivery Point(s) identified in the Agreement.[47] As a purchaser of DTI Gateway FT capacity on behalf of Northstar to facilitate the delivery of Northstar's gas into the DTI Gateway Delivery Point(s), RNG agreed to pay DTI Gateway Charges on behalf of Northstar.[48] Correspondingly, Northstar agreed to reimburse RNG for these DTI Gateway charges. Section 2 of the Agreement clearly sets forth this obligation:

> Seller [Northstar] shall be responsible and liable for all charges of any kind upstream of the Delivery Point(s) including without limitation any gathering and extraction charges or deductions for retainage, fuel or shrink. In addition, charges downstream of Delivery Point(s) shall be borne as follows:
>
> (a) for any Delivery Point(s) not into DTI's Appalachia Gateway Project facilities, [RNG] shall be responsible and liable for payment of all charges that are downstream of such Delivery Point(s); and
>
> (b) for any additional Delivery Point(s) into DTI's Appalachia Gateway Project facilities, the terms set forth on Exhibit B, "ADDITIONAL TERMS FOR ANY DELIVERY POINT(S)

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44 (*Id.*)

45 (JA 140.)

46 (JA 233.)

47 (JA 131 ¶ 2.)

48 (*Id.*)

> INTO DTI'S APPALACHIA GATEWAY PROJECT FACILITIES" shall also apply.

(*Id.*) Exhibit B, referenced in the above Section 2 of the Agreement, further states that Northstar shall pay and be liable to RNG for the DTI Gateway Charges listed in detail:

> (a) the cost and fees for all FT [firm transportation] reserved from DTI by [RNG] for [Northstar]'s Firm Quantity for the ten (10) year period; (b) all other charges or deductions of any kind whatsoever including without limitation commodity fees, retainage, fuel and shrink assessed by DTI; and (c) the Management Fee set forth in the Term Sheet that shall compensate [RNG] for its management of assets including without limitation the management of nominations and the meeting of DTI's credit requirements by [RNG.]

(JA 137 ¶ ii.)

Pursuant to its agreement with DTI, and given the nature of FT capacity on pipelines and the charges therefor, RNG is responsible and liable to DTI for the DTI Gateway Charges 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. As noted above, pursuant to 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.[49]

RNG has invoiced Northstar for DTI Gateway Charges incurred by RNG on behalf of Northstar.[50] Until it responded to the Complaint for breach of the Agreement, Northstar never alleged that the Delivery Point was other than into the DTI Gateway. In fact, when Abcouwer was asked "at what point before this litigation started that Northstar ever raised this issue and said, 'We're not in DTI. We're not putting our gas into DTI. We're not part of the Gateway'," he responded, "I don't know of any time."[51]

49 (JA 131 and 137.)

50 (JA 69 ¶ 30; JA 89 ¶ 25.)

51 (JA 240 at 20.)

Nor could Northstar legitimately have made such a claim. Abcouwer is a sophisticated businessman[52] who has "been in the [natural gas] business for 36 years."[53] He acknowledged having entered into a hundred contracts on Northstar's behalf in the prior fifteen years and "maybe 150" on behalf of other entities he owns.[54] Acting on Northstar's behalf, he entered into the contract for the purpose of delivering gas into the DTI Gateway:

> Q Are you claiming that when you executed this contract, you did not understand that you were entering into a contract for firm transportation on the DTI Gateway?
>
> A I understood that was the purpose of the contract, but I didn't realize that wasn't what was happening to my gas. I should have, but I didn't.

(JA 240 at 20–21.)

Incredibly, Northstar (via Abcouwer) asserts that RNG engaged in "bait-and-switch tactics" and misrepresentation:

> [W]hen you indicate certain things for months in advance of the actual contract happening and the actual service happening, and then the service is actually something else, but you charge as if it were what you were promising in the past, that's commonly referred to as bait-and-switch tactics.

(JA 276 at 164.) When pressed to explain further, Abcouwer testified that:

> [RNG] didn't offer me firm transportation on the Gateway. [RNG] may or may not have taken its own firm transportation on the Gateway. What they were asking me to do was pay for it, and they got me to do that by misrepresenting what the delivery point was going to be.

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52 When asked about his educational background, Mr. Abcouwer initially responded, "I went to school." (JA 277 at 168.) Upon further questioning, he admitted that he obtained an undergraduate degree from West Point in 1975, and a master's degree from Harvard University in 1982. (*Id.*)

53 (JA 241 at 22.)

54 (JA 277 at 169.)

(*Id.*) The record contains no evidence to support these bald assertions. Rather, the Term Sheets executed by Abcouwer on Northstar's behalf beginning in August 2008 specifically reference the in-service date for the DTI Gateway, as well as the quantity "For any Delivery Point(s) into DTI's Appalachia Gateway Project Facilities..." (*see, e,g.*, JA 136 and JA 140.) These Term Sheets also specify: "The conditions of this Term Sheet are binding unless disputed within (3) business days." (*Id.*) Northstar did not challenge these binding conditions.

Simply put, Northstar wrongfully refused to reimburse RNG for DTI Gateway Charges incurred by RNG on behalf of Northstar as required by the Agreement. Instead, Northstar's Answer included a counterclaim, alleging that it is not liable for DTI Gateway Charges because the Delivery Point allegedly was at its meter at Chelyan.[55] Northstar seeks early termination of the ten year Agreement, which expires in September 2022, and claims that it is entitled to reimbursement of the DTI Gateway Charges that it previously paid, as well as to damages related to RNG's marketing of its gas.[56]

Northstar's wrongful refusal to reimburse RNG for DTI Gateway Charges incurred by RNG on behalf of Northstar constitutes a breach of the Agreement, which provides:

> 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.

(JA 137 ¶ iii; *see also* JA 131 ¶ 2 and 136.) RNG has incurred substantial expenses resulting from Northstar's failure to comply with the Agreement. (JA 463–65.)

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55 (JA 83–99.)

56 (*Id.*)

B. Procedural history

For the purposes of the instant petition, RNG accepts Northstar's recitation of the procedural history of this case.

II. SUMMARY OF THE ARGUMENT

Despite Northstar's assignment of five points of error and lengthy petition, this case involves one simple issue: Does a written contract mean what it says, which meaning is also what the parties involved accepted it meant for a decade, or can it instead mean what one party—who, after ten years of peaceful performance now wants out of the contract because of what it says was a souring of market conditions—disingenuously says it supposedly means?

The Circuit Court was correct to hold that the answer is the former. First, the parties' Agreement involving transportation of natural gas is clear and unambiguous, so the law clearly requires that it means what it says. Specifically, the Circuit Court was correct in finding that the meaning of "Delivery Point" is set out unambiguously in the agreement, and that the contract is not terminable by Northstar like Northstar says it is. Second, even if the Agreement were found ambiguous on the salient issues, the sole evidence easily demonstrates that the Agreement means what the parties' decade-long course of performance confirms it means.

Northstar's positions find no basis in the law. The real explanation for Northstar's new-found change of heart about what its promises supposedly mean—incredibly based in part on arguing that it did not understand those promises and only bothered to read them after its position soured due to changing market forces—can instead be found in simple regret.

III. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case because the facts and legal arguments are adequately presented in the briefs and record and oral argument would not significantly aid the decisional process. W. VA. R. APP. P. 18(a)(4).

If the Court determines that oral argument is necessary, argument under W. VA. R. APP. P. 19 is appropriate because the appeal involves assignments of error in the application of settled law, and the appeal is appropriate for disposition by memorandum decision under W. VA. R. APP. P. 21.

IV. ARGUMENT

A. The governing standard on appeal.

"A circuit court's entry of summary judgment is reviewed *de novo*."[57] "In considering the propriety of summary judgment in this case, we apply the same standard that is applied at the circuit court level . . . ."[58]

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."[59] This Court's decisions interpreting and applying Rule 56 "demonstrate both the importance of its role in our litigation system and the parties' respective burdens regarding the same."[60]

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57 Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

58 *Watson v. Inco Alloys Int'l, Inc.*, 209 W. Va. 234, 238, 545 S.E.2d 294, 298 (2001).

59 W. VA. R. CIV. P. 56(c) (emphasis added).

60 *Reed v. Orme*, 221 W. Va. 337, 655 S.E.2d 83, 87 (2007); *see also Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329, 335 (1995) (noting that Rule 56 "plays an important role in litigation in this State" and "is designed to effect a prompt disposition of controversies on

"Summary 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."[61] "Genuineness and materiality are not infinitely elastic euphemisms that may be stretched to fit whatever preferrations catch a litigant's fancy."[62] "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."[63] Material facts are only those that might affect the outcome of the action under governing law.[64]

"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) . . . ."[65]

Applying the above standard, the Circuit Court correctly held that RNG is entitled to summary judgment in its favor as a matter of law. There exist no genuine issues of material fact regarding Northstar's breach of its payment obligations under the parties' contract or the failure of its purported justifications for such breach, and resulting damages to RNG.

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their merits without resort to a lengthy trial, if there essentially is no real dispute as to salient facts or if it only involves a question of law").

61 *Poweridge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 474 S.E.2d 872, 878 (1996).

62 *Id.*

63 *Reed*, 655 S.E.2d at 87.

64 *Poweridge*, 474 S.E.2d at 878 n.11 (citing *Williams*, 459 S.E.2d at 337 n.13).

65 Syl. pt. 3, *Williams*.

B. There is no genuine issue of material fact regarding Northstar's breach of its contract with RNG.

"In a breach of contract action, the plaintiff must make out a complete contract and allege a breach of that contract."[66] Breach of contract consists of active or passive failure to observe a contractual obligation.[67] RNG satisfied these legal requirements. It is undisputed that RNG has a complete contract with Northstar.[68] Northstar breached that Agreement by failing to pay the DTI Gateway Charges it owed to RNG.

1. The express terms of the Agreement establish that the Delivery Point is into DTI's Appalachia Gateway Facilities.

"Where the terms of a contract are clear and unambiguous, they must be applied and not construed."[69] "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."[70] In this case, the Agreement's terms are clear, and Northstar's breach of those terms is equally clear. It is

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[66] *McDaniel v. Travelers Prop. 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)).

[67] *Holland v. Client Bros. Min. Co.*, 877 F. Supp. 308, 316 (S.D. W. Va. 1995); *see also Thomas v. Bd. of Educ. of McDowell County*, 181 W. Va. 514, 383 S.E.2d 318, 322 (1989) ("When a promisor has undertaken to do a particular act and fails to do what he is contractually bound to do, a breach occurs.") (citing *Jefferson Cooperage Co. v. Getzendanner*, 116 W. Va. 489, 182 S.E. 90 (1935)); *Prudential Sec. Inc. v. Haugland*, 973 S.W.2d 394, 397 (Tex. App. 1998) (the elements of a breach of contract claim are the existence of a valid contract, performance or tendered performance by the plaintiff, breach by the defendant and damages to the plaintiff resulting from that breach).

[68] (*See* JA 131–38 and 140.)

[69] Syl. pt. 2, *Orteza v. Monongalia County Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984) (citation omitted).

[70] Syl. pt. 4, *Capitol Chrysler-Plymouth, Inc. v. Megginson*, 207 W. Va. 325, 532 S.E.2d 43 (2000) (citation omitted).

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.[71] It is undisputed that the Delivery Point for purposes of the Agreement is "into DTI's Appalachia Gateway Facilities."[72]

2. Even if the Agreement were to be considered ambiguous—which it should not be—the parties' course of performance confirms the same Delivery Point into DTI's Appalachia Gateway Facilities.

When language in a contract is unclear, it is ambiguous.[73] "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."[74] "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.[75]

The relevant documents are unambiguous. Nevertheless, even assuming that the Agreement was ambiguous, the Parties' course of performance resolves any alleged ambiguity and demonstrates that the Delivery Point is, and always has been, into DTI's Appalachia Gateway Facilities at Dominion Transmission, Inc.'s Oakford Interconnection with Texas Eastern Transmission, LP. It is undisputed that the purpose of the Parties' Agreement was for RNG to assure FT capacity for Northstar's gas into DTI Gateway.[76] It is undisputed that, in conformance

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71 (*See* JA 131–38 and 140.)

72 (JA 131 ¶¶ 1–2; JA 136–38 and 140.)

73 *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W. Va. 252, 267, 162 S.E.2d 189, 200 (1968).

74 Syl. pt. 6, *State v. Janicki*, 188 W. Va. 100, 422 S.E.2d 822 (1992).

75 Syl. pt. 1, *id.*

76 (JA 240 at 20–21 ("I understood that was the purpose of the contract. . . ."); JA 131–38.)

with this purpose, 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, LP."[77]

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 it was prior to Northstar contracting for FT on the Gateway Facilities.[78] It is undisputed that Northstar released some of its DTI Gateway capacity in September 2012.[79] In addition to acknowledging this Delivery Point via its course of performance with RNG, Northstar also specified that its Receipt Point is its meter at Chelyan, West Virginia.[80]

It is undisputed that Northstar asked RNG in December 2011 for confirmation of whether its "Dominion Gateway FT" was in a pod or on transmission line TL-263.[81] It is also undisputed that Northstar agreed to modify its FT rate in June 2012 by executing a "DTI Appalachian Gateway Project Proposal Clarified"[82] as well as a modified Term Sheet specifically referencing "Delivery Point(s) into DTI's Appalachia Gateway Project Facilities…."[83] Finally, it is undisputed that, prior to responding to RNG's Complaint, Northstar never suggested to RNG that it believed the Delivery Point under the Agreement was other than into the DTI Gateway.[84]

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77 (JA 131 ¶ 2(b); JA 136–38; JA 140; JA 143; JA 145–46; JA 150; JA 155; JA 172–180; JA 185, 188–89, and 198.)

78 (JA 225 and 227.)

79 (JA 233.)

80 (JA 150.)

81 (JA 229.)

82 (JA 231.)

83 (JA 140.)

84 (JA 240 at 20–21.)

3. Northstar's argument that the Agreement was a sale agreement and not a marketing agreement lacks merit.

Focusing on only part of the Agreement, Northstar argues that the Circuit Court erred in finding that the Agreement was a marketing, rather than a sale, agreement. This argument lacks merit.

First, the Circuit Court's reference to the Agreement encompassing "purchase, sale and marketing" is accurate and not erroneous. While Northstar claims that there is no mention of "marketing" in the Agreement, the Term Sheets, incorporated as Exhibit A of the Agreement, specifically provided for Petitioner to pay a monthly "Management Fee."[85] Moreover, Exhibit B of the Agreement references Northstar's obligations to pay "(a) the costs and fees for all FT reserved from DTI by [RNG] for [Northstar's] Firm Quantity for the ten (10) year period; (b) all other charges or deductions of any kind whatsoever...; and (c) the Management Fee set forth in the Term Sheet...."[86] These include marketing fees.

Second, Northstar has admitted that RNG represented to it "that without the DTI Gateway facilities RNG would be unable to market and sell the gas produced by Northstar and Northstar depended upon RNG and its role as the transportation expert in entering into the Agreement with RNG and the representations to Northstar by representatives of RNG . . . ."[87]

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85 (JA 78.)

86 (JA 79.)

87 (*Compare* JA 66 ¶ 16 (Am. Verified Compl.) *and* JA 86 ¶ 13 (Answer to Am. Compl. and Countercl.) (emphasis added).)

Third, when answering ¶ 17 of the Amended Complaint,[88] rather than explicitly deny that the Agreement's primary purpose included facilitating the marketing of its gas, Northstar challenged the Agreement's "delivery point."[89]

Fourth, Northstar's claims that the Agreement does not relate to the marketing of its gas are directly contradicted by its counterclaim, which alleges that RNG failed to adequately market that gas.[90]

Simply put, Northstar's argument that the Agreement does not concern marketing is predicated on its incorrect assertion (*see supra*) that the "delivery point" is at its meter and therefore that such fees are not its responsibility. However, because the Agreement sets forth that the "delivery point" is "into DTI's Appalachia Gateway Project facilities . . . ,"[91] the management fee and related costs and fees for all FT reserved from DTI by Northstar—including marketing fees—remain Northstar's obligation.[92]

4. Whether the Agreement is unambiguous or contains an ambiguous term, Northstar breached the Agreement, thereby damaging RNG.

Regardless of whether the Court interprets the contract as unambiguous or ambiguous, the Circuit Court was correct to hold that as a matter of law, the Agreement obligated Northstar to pay RNG but that RNG failed and refused to do so,[93] and that, by virtue of Northstar's breach, it is in default of the Agreement.[94] As a matter of the parties' express contractual

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88 (JA 66.)

89 (JA 86 ¶ 14.)

90 (JA 92–98.)

91 (*See* JA 73 ¶ 2(b); JA 78.)

92 (*See* JA 78–79.)

93 (JA 131–33 ¶¶ 2, 6, and 11; JA 136; JA 137.)

94 (JA 134 ¶ 14.) *See, e.g.*, *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

agreement, RNG is entitled to liquidation and to recover from Northstar the amounts still owed under the contract.[95]

C. There is no genuine issue of material fact regarding the failure of Northstar's defenses for its breach of the contract.

Northstar attempts to excuse its breach of the contract by belatedly suggesting that the Delivery Point is at its meter at Chelyan, and by alleging that RNG therefore breached the Agreement by accepting Northstar's payment of Gateway Charges. Northstar also contends that it is entitled to damages because RNG allegedly failed to market adequately Northstar's gas.[96] Northstar has raised no genuine dispute on either ground, and these attempted justifications for its breach are without merit.

First, as set forth in § IV.B. herein,[97] under the terms of the Agreement, because the Delivery Point is into DTI's Appalachia Gateway Facilities, Northstar is obligated to pay its full contractually-agreed Gateway Charges. Moreover, due to its breach of the Agreement Northstar, and not RNG, owes damages.

Otherwise, Northstar has presented no evidence to demonstrate the Agreement allows it to challenge marketing fees or to pursue early termination as it erroneously attempted. To the contrary, the Management Fee is fixed by the Agreement, and Northstar agreed to pay it.[98] Moreover, Northstar is not entitled to seek termination of the Agreement until expiration of the Primary Term in September 2022.[99] Paragraph 3 provides that the "Primary Term of this

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material breach); *Chittim v. Tex. Pac. Coal & Oil Co.*, 317 F.2d 81, 85 (10th Cir. 1963) (failure to pay drilling costs constitutes a breach of contract).

[95] (JA 134 ¶ 14.)

[96] (JA 92–98.)

[97] (*Supra* at 16.)

[98] (JA 136; JA 140.)

[99] (*See* JA 131 ¶ 1; JA 132 ¶ 3.)

Agreement shall be as set forth in the Term Sheet . . . ."[100] The Term Sheet establishes the Primary Term as 10 years.[101] Although the Primary Term initially was expected to begin in November 2011,[102] it did not commence until September 2012, thus making the Primary Term through September 2022.[103]

Paragraph 3 further provides that the Agreement "continues in effect from month to month unless terminated by either party by written notice to the other party at least thirty (30) calendar days prior to the expiration of the Primary Term or any extension thereof or as otherwise set forth in this Agreement."[104] The Agreement's express language does not contemplate termination before the end of the Primary Term. Accordingly, it precludes Northstar's December 7, 2015 attempt to terminate, as well as its attempt to do so via the Counterclaim.

Northstar has, without legal basis for doing so, withheld payment of the full amount it owes under the Agreement. Its argument that it does not owe the Gateway Charges, and that it is entitled to reimbursement of those charges and to early termination of the contract, is supported by no material fact. Nor is such stance viable under applicable law. Accordingly, RNG is entitled to summary judgment.

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100 (*Id.*)

101 (JA 136.)

102 (*Id.*)

103 (JA 140.)

104 (JA 131 ¶ 3 (emphasis added).)

D. The Circuit Court was right to find that Northstar's decade-long delay in pressing what it says were its rights establishes as a matter of law that Northstar simply wants out of an agreement that it no longer sees as a good deal.

The parties entered into the Agreement in 2008. Northstar does not contest the fact that it happily performed that Agreement for about a decade without ever challenging the meaning of Delivery Point.[105] Then, in 2017, Northstar alleged for the first time that market conditions changed and that the company thus had second thoughts about the wisdom of the deal that it had made, so it needed a story to defend walking away from its earlier promises.

Northstar says it "had no reason or cause to contest the Delivery Point" until market conditions changed.[106] As demonstrated below, that is neither true nor relevant. From the outset, the Agreement referenced the "Delivery Points) into DTI's Appalachia Gateway Project Facilites…."[107] The Term Sheets incorporated into the Agreement in September 2012 changed the Agreement's Primary Term to coincide with the in-service date of the Gateway.[108] Northstar never disputed these provisions of the Term Sheets within (3) business days, as the Agreement expressly required.[109]

Northstar asserts that "the Circuit Court did not specify the legal theory upon which it relied" to look at the fact that Northstar waited until after it got sued before coming up with what it supposedly thinks Delivery Point means. That, too, is false. The Circuit Court could not have

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[105] (*See, e.g.*, JA 6 (Order) ¶ 32 ("At no time prior to being sued in this matter did Northstar assert that the Delivery Point was other than at Oakford, Pennsylvania.") and ¶ 38 ("Northstar never alleged the Delivery Point was anywhere other than the DTI Gateway until it responded to the Complaint alleging breach of the Agreement.").)

[106] (Petitioner's Br. at 21.)

[107] (JA 131 ¶ 2; JA 136–137.)

[108] (JA 140.)

[109] (JA 136 and 140.)

been clearer: In § C of its order, it held that the Agreement unambiguously defined the term,[110] and in § D, it held that even if the Agreement were ambiguous, Northstar's decade-long course of performance was insurmountable evidence that its eleventh-hour attempt to redefine the term in a way that contradicted its own conduct lacked merit as a matter of law.[111]

But even assuming counterfactually that Northstar were correct and the Circuit Court had relied on waiver or laches, as Northstar argues, it would have been perfectly correct in doing so. As for waiver, Northstar argues that waiver is inapplicable because waiver requires, *inter alia*, the relinquishment of a known right, whereas Northstar, it says, did not know that RNG was using Delivery Point to mean a location other than what Northstar supposedly thought it meant. Northstar is wrong.

Northstar does not deny that for years, it had everything before it necessary to "learn" how RNG was using Delivery Point. Northstar argues only that it lacked the *motivation to bother doing so*.[112] Neither a mere change of heart nor supposedly coming to ones senses can serve to undo (or prevent) a waiver. The undeniable evidence is that Northstar was *not* subjectively "unaware of the specifics of those contracts," nor was Northstar's supposed failure to read what it had signed objectively reasonable, even assuming that it is credible.[113]

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110 (JA 10–12 ¶¶ 57–63.)

111 (JA 12–14 ¶¶ 64–75.)

112 (*See, e.g.*, Petitioner's Br. at 23 (saying that it only bothered to look at what it had known all along because "the changing economic conditions . . . caused it to look carefully at the terms of the contracts under which it operated").)

113 *See, e.g.*, *IKON Office Sols., Inc. v. Am. Office Prod., Inc.*, 178 F. Supp. 2d 1154, 1165 (D. Or. 2001) ("Ikon argues that it did not intend to waive its rights, but what matters is the *objective* manifestations evidenced by Ikon's words and deeds, not some hidden subjective reservations or intent.") (emphasis added), *aff'd*, 61 F. App'x 378 (9th Cir. 2003); *Dunkin' Donuts Inc. v. Panagakos*, 5 F. Supp. 2d 57, 60 (D. Mass. 1998) ("Whether or not a waiver has been effected is determined by an *objective* assessment of the conduct of the party asserted to have surrendered its contractual rights.") (emphasis added).

Northstar's laches argument fails no better. Laches requires, Northstar says, "such neglect as leads to a presumption that the party has abandoned his claim and declines to assert his right."[114] That perfectly describes even Northstar's own (incredible) theory of how it supposedly came to be ignorant of the terms of a millions-of-dollar complex commercial transaction. Northstar argues that "delay alone will not ordinarily constitute laches."[115] But delay alone was not what was present here. Here, there was Northstar's ten-year delay. Plus, there was Northstar's executing a professionally negotiated, unambiguous commercial Agreement. Plus, from 2008 through 2017, there was Northstar's possession of everything that it needed to "learn" what it claims not to have bothered wanting to learn until 2017—*i.e.*, the "change in circumstances," when Northstar's position became, it says, too lean for its comfort.

Contrary to Northstar's argument, there was *not* any relevant "newly discovered information," and so it was *not* "reasonable for the Petitioner to not assert its claims."[116] There was only, it says, Northstar's thinking that the deal that it had made and performed for a decade might now not be so good, and so it simply wanted out. Again, that is *exactly* what laches covers: a negligent failure to press what one (supposedly) thinks a contract means for so long as to lead the other party to believe that one does not dispute what the contract means.

The Circuit Court was perfectly correct in rejecting Northstar's eleventh-hour effort both to contradict the plain meaning of the Agreement and, even if the Agreement's meaning were less than plain, to unsettle the parties' lengthy and peaceful course of dealing. And that is all the

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114 (Petitioner's Br. at 23 (indentation and citation omitted).)

115 (*Id.*)

116 (Petitioner's Br. at 24.)

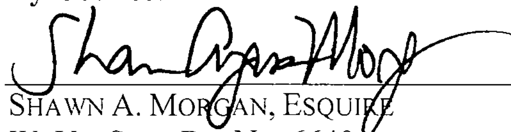
Circuit Court held. So although Northstar's waiver and laches arguments are irrelevant, they are also wrong.[117]

V. CONCLUSION

Under the clear and unambiguous language of the contract, Northstar is liable to reimburse RNG for all costs, charges, surcharges, deductions, and fees for firm transportation capacity on the DTI Gateway incurred by RNG on behalf of Northstar, irrespective of whether RNG, on behalf of Northstar, uses DTI Gateway capacity because of Northstar's failure to tender its gas to RNG. Because there exists no genuine factual dispute that Northstar breached the contract, RNG remains entitled to judgment as a matter of law. Accordingly, RNG respectfully requests that the Court DENY Petitioner's petition.

RESPONDENT,

By Counsel



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[117] Northstar also engaged in an extended discussion of the statute of limitations for a claim for breach of contract. Like its arguments on waiver and laches, however, the Circuit Court never ruled that the statute of limitations bars Northstar's claim.