

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

HOPE GAS, INC.,

Petitioner,

v.

**Civil Action No. 24-P-71
(Judge John D. Beane)**

WEST VIRGINIA BOARD OF PUBLIC WORKS, and

**THE HONORABLE MATTHEW IRBY,
West Virginia State Tax Commissioner,**

Respondents.

TO: THE HONORABLE CHIEF JUSTICE

**HOPE GAS, INC.'S MOTION TO REFER
CASE TO THE BUSINESS COURT DIVISION**

Pursuant to West Virginia Code § 51-2-15 and Rule 29.06 of the West Virginia Trial Court Rules, the Petitioner Hope Gas, Inc. (“Hope Gas”), by counsel, John J. Meadows, Esq., Devon J. Stewart, Esq., William Ballard, Esq., and the law firm of Steptoe & Johnson PLLC, respectfully moves for the above-styled case to be referred to the Business Court Division for all further proceedings.

This is an appeal brought by Hope Gas pursuant to West Virginia Code § 11-6-12 to contest the West Virginia Board of Public Works’ (“BPW”) *ad valorem* tax assessment of Hope Gas’ public utility property for Tax Year 2024. The calculation of the tentative tax assessment (upon which the BPW’s final assessment was based) was prepared by the Honorable Matthew R. Irby, West Virginia State Tax Commissioner (“Tax Commissioner”), pursuant to West Virginia Code § 11-6-9(e). The BPW and the Tax Commissioner are referred to herein as the Respondents.

This case presents a complex tax appeal from a 19.20% increase in the Respondents’ assessed value of public utility property in Tax Year 2024, from \$187,658,100 for Tax Year 2023 to \$223,681,500 in Tax Year 2024, based on the mistaken inclusion of a *negative* operating expense line item for an overfunded ERISA-regulated pension fund, and misapplication of statutory and state-regulated accounting and appraisal rules.

Trial Court Rule 29.04 expressly provides that “complex tax appeals are eligible to be referred to the Business Court Division.” W. Va. Tr. Ct. R. 29.04. This matter constitutes a complex tax appeal, specifically concerning tax year 2024, and it involves issues for which specialized treatment will be helpful. For these reasons, the Court should grant Hope Gas’s Motion to Refer Case to the Business Court Division.

I. INTRODUCTION AND BACKGROUND

A. Hope Gas and the ERISA Pension Fund Owned by the Master Retirement Trust.

Hope Gas is a Local Distribution Company (“LDC”) providing gas service to approximately 125,000 residential, industrial, and commercial West Virginia customers, maintaining more than 6,900 miles of pipelines delivered to customers in thirty-five West Virginia counties. This case arises out of the *ad valorem* property tax assessment of Hope Gas’ public utility property in West Virginia for Tax Year 2024.

The assessment at issue incorporates in its appraised value—incorrectly, Hope Gas contends—a pension fund owned by a trust created under Illinois law and governed by ERISA. Hope Gas employs over 400 employees in West Virginia, and bargaining unit employees are members of the United Gas Workers Union Local 69, UWUA AFL-CIO. All union employees of Hope Gas are covered under qualified noncontributory defined benefit retirement plans maintained by the Hope Gas Pension Plan (“HGPP”). Benefits payable under the plans are based primarily

on each employee's years of service, age, and base compensation. Hope Gas's funding policy is to contribute annually the amount that is in accordance with the provision of the Employee Retirement Income Security Act of 1974 ("ERISA"). The pension program also provides payment of supplemental pension benefits to certain retirees depending on retirement dates.

The HGPP is owned by a legal trust entity called the Hope Gas, Inc. Master Retirement Trust (the "Master Retirement Trust") which has appointed the Northern Trust Corporation as trustee. The HGPP is administered by Tempo Holding Company LLC d/b/a Alight. Hope Gas is the "Plan Sponsor" within the meaning of ERISA, which means that it makes contributions to the HGPP, but it does not own the trust, is not the beneficiary of the trust, does not serve as trustee, and does not administer the trust. As Participants and Beneficiaries to the HGPP, retired and retiring Hope Gas employees and their beneficiaries have earned a well-funded pension providing sufficient assets to cover their Planned Benefit Obligations ("PBOs").

Due to Hope Gas's contributions and success of the HGPP over the course of years, the HGPP is "overfunded" – which means that the deduced value of plan assets surpass the present value of its liabilities, including the PBOs to pensioners.

Although the HGPP is owned by the Master Retirement Trust—not Hope Gas—the Tax Commissioner contends that Hope Gas should pay *ad valorem* property taxes on the Master Retirement Trust's overfunded pension fund.

The crux of the dispute is that Hope Gas reports planned contribution expenses on its Annual Report forms to the BPW, pursuant to Generally Accepted Accounting Principles (GAAP) financial statements adopted by Hope Gas in its Statement of Financial Accounting Standards No. 87 in 1986. In the intervening years, however, the HGPP—and/or its predecessor plan(s)—became overfunded, resulting in a "negative" value for reporting as an operating expense of Hope Gas.

This “negative” expense value artificially lowers Hope Gas’s total operating expenses, resulting in an overstated net operating income calculation—from which an appraisal was calculated by the Tax Commissioner using the income method.

Hope Gas contends that, under federal law and the applicable plan documents, a *negative expense*, reported for accounting purposes, does not represent the true and actual value of net operating *income* to Hope Gas within the meaning of the applicable West Virginia statutes and regulations—and moreover flies in the face of the fundamental tenant of property tax law that taxpayers should be assessed only for property owned by the taxpayer. Here, by including the overfunded portion of the pension plan in calculating Hope Gas’s operating income, the Tax Commissioner is transparently taxing Hope Gas for assets that Hope Gas does not own.

B. Public Utility Property Tax Assessment Process.

Although county assessors generally assess values of property located in their respective counties, public utility properties are subject to *ad valorem* property tax assessment under a specialized regulatory process separate from standard property assessments by county assessors. *See* W. Va. Code 11-3-1(a) (“All property, **except public service businesses assessed pursuant to article six of this chapter**, shall be assessed annually as of July 1” (emphasis added)).

As a natural gas LDC, Hope Gas is a public service corporation, and its utility properties are, therefore, classified as public utility properties for purposes of *ad valorem* property taxation under W. Va. Code §§ 11-6-1, *et seq.* Public service corporations are required to file Annual Report with the BPW by May 1 for the year ending December 31 next preceding. W. Va. Code § 11-6-1. The Tax Commissioner arranges, collates, and tabulates such returns and all pertinent information and data, such further evidence or information as may be required, and all other pertinent evidence, information, and data upon suitable work sheets, and lay returns and work

sheets with recommendations to the BPW in the form of a tentative assessment by September 15. *Id.* § 11-6-9(e). The BPW then takes up the recommended tentative assessments for consideration as a final assessment during a regular meeting. *Id.* § 11-6-11.

Prior to the BPW's final assessment, Hope Gas presented the issues described, above, for consideration by the Tax Commissioner, but he failed to modify the tentative assessment to give full account for the understated operating expenses described above due to the erroneous inclusion of pension assets as a negative expense item. Hope Gas thus filed a timely appeal pursuant to West Virginia Code § 11-6-12 in the Circuit Court of Wood County, West Virginia,¹ asserting the following assignments of error:

- i. The BPW's final assessment erroneously incorporates the valuation of an overfunded pension that is not owned by Hope Gas.
- ii. The BPW's final assessment erroneously incorporates the valuation of an overfunded pension because plan earnings are not "operating earnings" in the rate making setting.
- iii. The BPW's final assessment violates regulatory requirements to consider prior returns in which the overfunded pension's value was adjusted or eliminated.
- iv. Taxing an overfunded pension governed by ERISA violates federal law.
- v. Taxing Hope Gas for the value of HGPP's overfunded pension violates the "equal and uniform" requirements the West Virginia Code and West Virginia Constitution by targeting Hope Gas for disparate tax treatment.

¹ The Circuit Court of Wood County, West Virginia has jurisdiction over this appeal pursuant to West Virginia Code § 11-6-12, being the circuit court in the county of the largest assessment of Hope Gas's property from the next preceding year, in Tax Year 2023.

Because the issues in this matter are complex and require specialized knowledge regarding taxation of public utilities under West Virginia law, ERISA and pension plan law, Illinois trust law and GAAP standards, specialized treatment will improve the expectation of a fair and reasonable resolution of this matter. Accordingly, Hope Gas 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.” W. Va. 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. Tr. 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 they are the type of issues that should be referred to the Business Court Division. *See* W. Va. Tr. 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* W. Va. Tr. Ct. R. 29.04(a)(1)-(2).

Here, Hope Gas is challenging the Tax Commissioner’s valuation of public utility property. Hope Gas submitted evidence showing the existence of a separate legal trust entity owning the pension asset at issue and cited the applicable statutes and regulations to show that the inclusion of assets owned by another legal entity was not proper.

The resolution of this case will require analyses of property ownership, interest characterization, GAAP Statement of Financial Accounting Standards, regulatory definitions of public utility property at W. Va. Code St. R. § 110-1M-2 and the “income” appraisal approach at *id.* § 110-1M-4, ERISA preemption, and the “equal and uniform” requirements the West Virginia Code and West Virginia Constitution.

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* W. Va. Tr. Ct. R. 29.04(a)(2). 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 Tax Division’s role and relationship with the BPW to assess public utility properties (including the methodology

set forth in § 110-1M-4), as well as familiarity with allowable operating expenses and calculation of net operating income. Hope Gas asserts that specialized knowledge on the above-mentioned issues would improve the likelihood that the submitted evidence is fairly considered, and that a reasonable resolution of this controversy will result.

This Court has referred multiple *ad valorem* property tax assessment appeals to the Business Court by assignment to The Honorable Judge Christopher Wilkes:

1. *Antero Resources Corporation v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 16-AA-1, Tyler County Circuit Court.
2. *Antero Resources Corporation v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 17-AA-1, Doddridge County Circuit Court.
3. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 17-AA-3, Doddridge County Circuit Court.
4. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 17-C-98-2, Harrison County Circuit Court.
5. *Antero Resources Corporation v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 17-AA-1, Ritchie County Circuit Court.
6. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 17-AA-2, Ritchie County Circuit Court.
7. *Antero Resources Corporation v. The Honorable Mark Matkovitch, et al.*, Civil Action Number 17-AA-1, Tyler County Circuit Court.
8. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 18-AA-1, Doddridge County Circuit Court.
9. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 18-P-235-3, Harrison County Circuit Court.
10. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 18-AA-1, Ritchie County Circuit Court.
11. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 18-AA-1, Tyler County Circuit Court.
12. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 19-AA-1, Doddridge County Circuit Court.

13. *Antero Resources Corporation v. The Honorable Dale Steager, et al.*, Civil Action Number 20-P-83-2, Harrison County Circuit Court.
14. *Antero Resources Corporation v. The Honorable Matthew Irby, et al.*, Civil Action Number 21-P-15, Ritchie County Circuit Court.
15. *Antero Resources Corporation v. The Honorable Matthew Irby, et al.*, Civil Action Number 21-P-31, Doddridge County Circuit Court.
16. *Antero Resources Corporation v. The Honorable Matthew R. Irby, et al.*, Civil Action Number 22-AA-1, Tyler County Circuit Court.
17. *Antero Resources Corporation v. The Honorable Matthew R. Irby, et al.*, Civil Action Number 22-P-85, Harrison County Circuit Court.

This Court's precedents thus compel referring this case to the Business Court Division. *See, e.g., Lee Trace LLC v. Berkeley Cnty. Council as Bd. of Review & 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); *Univ. Healthcare Found., Inc. v. Larry A. Hess, et al.*, Case No. 16-AA-3, Berkeley County Circuit Court, Business Court Division (contending that 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 West Virginia Trial Court Rule 29.

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.

For all 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 petition, answer, and docket sheet. *See* Exhibit A.

IV. CONCLUSION

WHEREFORE, Hope Gas, Inc. hereby moves, pursuant to West Virginia Trial Court Rule 29, that the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted, this 24th day of May 2024.

PETITIONER HOPE GAS, INC.
By counsel,

/s/ Devon J. Stewart

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CERTIFICATE OF SERVICE

I, Devon J. Stewart, do hereby certify that on this 24th day of May 2024, I served the foregoing ***“Hope Gase Inc.’s Motion to Refer Case to Business Court Division”*** upon counsel of record, as noted below, by filing with the West Virginia E-Filing System:

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