IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
No. 21-1004

STATE OF WEST VIRGINIA EX REL. TH EXPLORATION II, LLC
and **TUG HILL OPERATING, LLC**

Petitioners,

v.

VENABLE ROYALTY, LTD.; V14, LP; VENRO, LTD.; V2, LP; and **THE HONORABLE JUDGE JEFFREY CRAMER,** Judge of the Circuit Court of Marshall County, West Virginia.

Respondents.

AMICUS CURIAE BRIEF ON BEHALF OF
WEST VIRGINIA ROYALTY OWNERS' ASSOCIATION, WEST VIRGINIA FARM BUREAU AND BOUNTY MINERALS LLC
(IN SUPPORT OF RESPONDENTS VENABLE ROYALTY, LTD., ET AL.)

To the Honorable, the Justices
Of the Supreme Court of Appeals of West Virginia:

I. Statement of Interest Regarding *Amici Curiae*

West Virginia Royalty Owners' Association ("WVROA"), is an association with 1,162 members that collectively own tens of thousands of acres in the State of West Virginia, interested in issues affecting the ownership of royalty interests in real property in West Virginia, including royalty interests in oil and gas estates. WVROA's mission is to inform West Virginia mineral owners about the state of the oil and gas industry, leasing, and their rights as real property owners, as well as promoting legislation that protects the rights of all property owners, whether fee, surface, or mineral owners and to ensure that oil and gas development in West Virginia is done responsibly and fairly.[1]

West Virginia Farm Bureau ("WVFB") represents over 22,721 members who are interested in issues affecting the ownership of mineral interests and real property in West Virginia, including the computation and payment of royalty interests in oil and gas estates. WVFB's mission is to provide leadership, education, information, training and economic services to members and county farm bureaus to enhance the quality of farming in West Virginia through the betterment of conditions of those engaged in agricultural pursuits, the improvement of the grade of their products, and development of a high degree of efficiency in their agricultural pursuits.

Bounty Minerals LLC ("Bounty") is a Texas limited liability company that holds mineral interests across West Virginia and is the lessor under hundreds of oil and gas leases that are potentially affected by these proceedings. Bounty is interested in issues affecting the ownership of mineral interests in West Virginia, including the proper computation and payment of oil and gas royalty interests. Bounty owns 26,637 net royalty acres in the West Virginia Counties of Brooke, Doddridge, Harrison, Marion, Marshall, Monongalia, Ohio, Ritchie, Tyler and Wetzel, and received more than $330,000.00 in royalties from its West Virginia properties in 2021.

Amici have interest in the issues before the Court in this matter. In particular, Amici are concerned with the preservation of the integrity of the so-called "landowners' royalty" from continued erosion via predatory accounting schemes such as that

---

[1] In accordance with *West Virginia Rule of Appellate Procedure 30(e)(5)*, no counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution specifically intended to fund the preparation or submission of the brief. No person other than the Amici, their members, or their counsel made such a monetary contribution. Pursuant to *Rule 30(a)*, all parties have consented to the filing of this brief.

advanced by the Petitioners in this case, and by which the natural gas producers seek to endlessly and unfairly saddle landowners with excessive post-production costs.

II. Relevant Facts and Procedural History.

Amici defer to and adopt the detailed "Factual Background" section contained in the Respondents' Response to Petition for Writ of Prohibition.

In summary, the Petitioner, a privately held exploration and production company based in Fort Worth, Texas, is seeking, via Writ of Prohibition, interlocutory review and reversal of various rulings contained in a November 10, 2021 Order entered by the Circuit Court of Marshall County, West Virginia, and granting the Summary Judgment Motion of Respondents and denying the Cross Motion for Summary Judgment of Petitioner, relating to the computation of royalty by Petitioner under fifteen oil and gas leases which were assigned to Petitioner as lessee and to which Respondents are lessors.

In its Motion for Summary Judgment, Petitioner had argued that two upstream meters referred to as "Corley" and "Burch Ridge," which lie between the wellheads and downstream processing plants are the "points of sale" and are a "market," because they had been designated as such in a sales contract entered into by Petitioner and a third-party gas purchaser. Since the gas arrives at Corley and Burch Ridge in raw form, this would seemingly allow Petitioners to deduct all costs associated with the processing of the raw gas into natural gas liquids and salable residue gas from the computation of royalty due the lessors. The Court rejected this argument and instead adopted the argument advanced by Respondents in their Motion.

After finding that the phrase "market value at the well" as used in the royalty provision was ambiguous as to the method by which deductions from royalty are to be computed, the Circuit Court's Order found that the Corley and Burch Ridge meters were not "points of sale" within the meaning of the West Virginia Supreme Court of Appeals' holdings in *Wellman v. Energy Resources, Inc.*, 210 W.Va. 200, 557 S.E.2d 254 (2001), *Tawney v. Columbia Natural Resources, L.L.C., 219 W.Va. 266, 633 S.E.2d 22 (2006),* and most recently *SWN Production Company, LLC, v. Kellam,* 21-0729 (W.Va. Jun 14, 2022) ("*Tawney, et al.*"), because West Virginia's implied marketing covenant, which underpins the reasoning of *Tawney, et al.,* requires that the gas be in "marketable form" at the "point of sale." The Court found that when it arrives at Corley and Burch Ridge, the gas is unprocessed, contains contaminants, and entrained liquids, and lacks commonly accepted commercial uses. In short, the gas is not yet a marketable product, like residue gas and natural gas liquids ("NGLs").[2]

The Circuit Court also found that the Corley and Burch Ridge meters were not markets under *Tawney, et al.* because they are "merely pipeline transfer points" on a closed proprietary gathering system, which is owned by Williams Ohio Valley Midstream LLC, and "multiple active sellers and buyers of gas do not conduct sales at these meters." Instead, the Order held that royalties must be calculated based on index prices, for processed gas, at the interstate pipeline (the "TETCO Market") and for processed NGLs at the processing plant-tailgate where the liquids emerge as a separate product. The Order explains that no true "'point of sale' exists upstream of these foregoing "markets" which would allow Petitioners to compute royalties on lower upstream prices" in conformance with *Tawney, et al.* and the implied covenant to

[2] APP0001, p. 5

market.[3] The Order clarifies that a "market" is a place where multiple active sellers and buyers exchange title to gas and gas products that are in a "marketable condition."[4] Unlike Corley and Burch Ridge, at the TETCO Market and plant-tailgate many sellers and buyers regularly exchange title to residue gas and liquids and thereby create competitive and market-sensitive prices.[5]

The Circuit Court held that

> ...only after processing and further transportation does the gas become residue gas with a known price at the TETCO market or liquids with a known price at plant tailgate markets."[6]

Amici urge the Court to uphold the Circuit Court's rulings which *Tawney, et al.* and uphold the integrity of the lessor's royalty.

III. Argument

A. West Virginia's Long Recognized Implied Covenant to Market Protects the Integrity of the "Lessor's Royalty" From Erosion Through Excessive and Unfair Deduction for Post Production Costs by the Lessee.

West Virginia law has long recognized an implied covenant to market, which underpins the default rule that producers bear all costs associated with production, processing and placing the gas into a "marketable form" and transporting it to market, often referred to as the "Marketable Product Rule." Under longstanding West Virginia law, the implied covenant to market places the exclusive burden of bearing the costs of extraction, production and placing the product in a marketable form upon the lessee. *See Tawney, et al., supra.*

---

[3] APP0001, pp. 5-6.
[4] APP0001, p. 23.
[5] APP0001, p. 24.
[6] APP0001, p. 36.

Oil and gas lessees paying their lessors an undiluted royalty from the proceeds received from the sale of the oil and gas produced is an age-old industry practice in West Virginia. In discussing the evolution of gas-royalty clauses and the "long-established" expectation of lessors in this State, the West Virginia Supreme Court of Appeals has explained:

> From the very beginning of the oil and gas industry it has been the practice to compensate the landowner by selling the oil by running it to a common carrier and paying him [the landowner] [a portion] of the sale price received. This practice has, in recent years, been extended to the situations where gas is found....the [portion] received is commonly referred to as the **landowner's royalty**.

Wellman, supra, 557 S.E.2d at 263-64 (2001) (*citing* Robert Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* § 104 (1951)) (emphasis added).

The well-established principle is that the landowners' royalty is passive in nature and not subject to the costs of production. Instead, producers pay their lessors a royalty out of the proceeds received from sale of the gas, with the producer retaining the balance in view of its assumption of all costs as attendant business risk relating to the drilling of the well and subsequent production therefrom. *See Donley, supra* at §104. This Court has long held that charging a royalty owner with the costs of transporting and treating the gas produced from her property impermissibly places the landowner/lessor in the position of business partner with the lessee. In *Davis v. Hardman*, 148 W.Va. 82, 133 S.E.2d 77 (1963), the Court stated:

> The distinguishing characteristics of a [landowners] non-participating royalty interest are: (1) Such share of production is not chargeable with any of the costs of discovery and production; (2) the owner has no right to do any act or thing to discover and produce the oil and gas; (3) the owner has no right to grant leases; (4) the owner has no right to receive bonuses or delay rentals.

Id., 133 S.E.2d at 82.

After all, if the lessors' royalty is improperly diluted by excessive production costs, which she had no role in negotiating or approving, an untenable situation results. The same reasoning applies to the lessee's deduction of post-production costs necessary to place the gas produced into marketable form, such that it can be sold to the profit/benefit of both lessor and lessee. *See* Donley, supra at §104. ("In the absence of an express covenant to market either oil or gas, the court implies one in order to effectuate the basic purpose of the lease, which, after all, is to enable the lessor to convert his minerals into cash").

In 2001, the *Wellman* Court confirmed the importance of protecting the integrity of the lessor's property, via the implied covenant to market, from post-production expenses, holding that since the lessee has a duty to market the oil and gas produced, and to pay the costs associated therewith, it also has the duty to bear the costs of preparing the oil and gas for market and to pay the cost of transporting them to market.

> West Virginia holds that a lessee impliedly covenants that he will market oil or gas produced. "Like the courts of Colorado, Kansas, and Oklahoma, the Court also believes that historically the lessee has had to bear the cost of complying with his covenants under the lease. It, therefore, reasonably should follow that the lessee should bear the costs associated with marketing products produced under a lease. Such a conclusion is also consistent with the long-established expectation of lessors in this State, that they would receive one-eighth of the sale price received by the lessor. **In view of all this, this Court concludes that if an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale."**

Wellman, 210 W.Va. at 210-11, at 264-65 (internal citations omitted) (quoting *Garman v. Conoco, Inc.*, 886 P.2d. 652, 658 (Colo. 1994)) (Emphasis added).

Again, the *Wellman* Court's reasoning recognized that since gas is generally not sold "at the wellhead," but instead at a remote "point of sale", **and usually after the**

lessee adds value to it by preparing it for market, processing it, and transporting it to the point of sale, the implied covenant to market dictates that the lessee must bear all costs of marketing and transporting the gas to that point of sale. *Wellman, supra,* 210 W.Va. at 270. (emphasis added).

Five years later, *Tawney* held that the standard "at the well" language found in many leases was ambiguous and not sufficient to allow the lessee to deduct post-production expenses from the calculation of royalty. Tawney, supra, 633 S.E.2d at 30. In tandem, *Wellman and Tawney* represented the Court's full-throated adoption of Marketable Product Rule, mandating that the lessee bear all costs incurred in obtaining a marketable product and disallowing the deduction of post-production costs incurred prior to the point at which a marketable product is obtained.[7] In each case, the major principle undergirding the Court's decision was the application of the implied duty to market.

Earlier this year SWN *Production Company, LLC, v. Kellam,* 21-0729 (W.Va. Jun 14, 2022), this Court roundly reaffirmed *Wellman* and *Tawney,* and the centrality of the implied covenant to market in protecting the integrity of the landowners' royalty. Indeed,

---

7 A majority of states who have analyzed the issue currently favor the Marketable Product Rule, and when analyzed on the basis of acreage, the Marketable Product Rule applies to a significantly greater volume of gas producing property than the so-called "Property" or "Net Back" rules which allow the lessee to deduct all costs from royalty past the wellhead irrespective of whether or not the gas is sold or placed in marketable form at the wellhead. At least six major producing states and two lesser ones follow in one way or another, the Marketable Product Rule. These are Arkansas, Colorado, Kansas, Oklahoma, and West Virginia by case law. *See Hanna Oil & Gas Co. v. Taylor*, 759 S.W.2d 563, 564-565 (Ark. 1988); *Garman v. Conoco*, 886 P.2d 652 (Colo. 1994); *Tawney v. Columbia Nat. Res., L.L.C., 219 W. Va. 266, 633 S.E.2d 22 (2006)*; *Gilmore v. Superior Oil Co.*, 388 P.2d 602 (Kan. 1964); and Wyoming, Michigan, and Nevada by statute *Wyo. Stat. § 30-5-304(a)(i)* (1999); *Mich. Comp. Laws Ann. § 03(b)(1)* (1999). Moreover, a Federal Magistrate in Virginia has ruled Virginia would follow it as well. *See Leggett v. EQT Prod. Company*, 2011 WL 86598 at 9-13 (Jan. 11, 2011), *denying motion to certify question to Virginia Supreme Court*, 2011 WL1087160 (W.D. Va. Mar. 24, 2011).

It should also be noted that the Federal Government, the largest landowner in the country, follows a version of the Marketable Product Rule as well, pursuant to the Mineral Leasing Act, which requires payment under most Federal Leases to be based upon "the amount or value" of production and allows the Secretary of the Interior to determine said value on not less than "the gross proceeds received for said gas." *See* 30 C.F.R. § 1205.152(h)-(i) (2010).

Kellam definitively rejected producers' decades long effort to overturn *Wellman* and *Tawney*, stating:

> [*Wellman* and *Tawney*] firmly cemented West Virginia as a "marketable product rule" state, meaning that the lessee bears all post-production costs incurred until the product is first rendered marketable, unless otherwise indicated in the subject lease.

SWN Prod. Co., v. Kellam, 21-0729 (W. Va. Jun 14, 2022). Thus, for nearly a quarter century, this Court has recognized the application of the implied covenant to market in oil and gas leases to shield the lessor's royalty from erosion by lessees through deductions of post-production costs.

B. When the Lessee Seeks to Avoid Its Obligations By Arbitrarily Setting the "Point of Sale" at an Upstream Point From the Wellhead, the Implied Covenant to Market Dictates that the Lessor's Royalty Nonetheless be Computed at the Geographic Point Where the Gas Becomes "Marketable."

"Point of sale" and "point of marketability" are not synonymous terms. "Point of Sale" is a geographical point which might easily be set (arbitrarily) by the sales contract between the buyer and seller, and in which the lessor has no input. On the other hand, the point where raw gas becomes "marketable" is more objectively determined by taking into account both the fixed geographic location and the marketable quality of the gas.

In *W.W. McDonald v. EQT Production Co.,* 983 F.Supp. 2d 790 (S.D. W.Va. 2013), U.S. District Judge Goodwin held that after *Tawney*, it was unclear whether lessees are required to bear post-production costs until the "point of sale," wherever that may be, or until the market, reasoning:

> This is an important distinction. The market, as the parties stipulated at oral argument, is the first place downstream of the well where the gas can be sold to any willing buyer and title passed to that buyer market value is

> computed by ascertaining the price that a willing buyer would pay a willing seller in a free market....But a point of sale may be at the wellhead (upstream from the market) or at a burner tip (downstream from the market). Therefore, determining the point until which lessees must bear post-production costs is crucial.... When *Tawney* and *Wellman* are read in their entirety, it becomes clear that lessees **must bear the costs of bringing gas to the market, not to a point of sale**. At the TCO line, gas is commoditized and bought and sold by third parties. The TCO line is therefore a market. Thus, *Tawney's* holdings are related to the duty to get the gas to market, not to a point of sale.... The only way to reconcile *Tawney's* facts – only the costs of bringing the gas to market were at issue – with the "point of sale" language in *Tawney's* syllabus points is to assume that *Tawney* applies to the costs incurred in bringing the gas to market, not to a point of sale.

W.W. McDonald, supra, 983 F. Supp. 2d at 790, 800 (emphasis added).

Indeed, leaning on the analysis of the Colorado Supreme Court in *Garman v. Conoco,* 886 P.2d 652 (Colo. 1994), *Tawney* explained that under the implied covenant to market, the lessee "had a duty to market oil and gas produced, and since under the law it was required to pay the costs to carry out its covenants, it had the duty to bear the costs of preparing the oil and gas for market and to pay the cost of transporting them to market." 210 W.Va. at 210, 557 S.E.2d at 264.

In *Rogers v. Westerman Farm Co.,* 29 P.3d 887 (Colo. 2001), the Supreme Court of Colorado built on its holding in *Garman,* addressing the definition of "marketability" and the point at which raw gas becomes marketable.

> We believe that the more accurate definition of marketability includes both a reference to the physical condition of the gas, as well as the ability for the gas to be sold in a commercial marketplace.... In defining whether gas is marketable, there are two factors to consider, condition and location. First, we must look to whether the gas is in a marketable condition, that is, in the physical condition where it is acceptable to be bought and sold in a commercial marketplace. Second, we must look to location, that is, the commercial marketplace, to determine whether the gas is commercially saleable in the oil and gas marketplace.... A market is a "[p]lace of commercial activity in which goods, commodities, securities, services, etc., are bought and sold." [Citation omitted] ... It is also defined as "[t]he region in which any commodity or product can be sold; the geographical or economic extent of commercial demand." Id. Thus, the determination of

> when gas is first-marketable is driven in part by the commercial realities of the marketplace.

Rogers, supra, 29 P.3d at 887.

Other courts, legislative bodies, and commentators have engaged in a similar analysis. See, e.g., *TCO Prod. Corp. v. State ex rel. Commissioners of Land Offices,* 903 P.2d 259, 262-63 (1994) (implying that the standard for determining when gas is marketable is when it is fit to enter the pipeline, because costs of dehydration and gathering, which are required in order for the gas to enter the pipeline, are expenses borne by the lessee as part of the duty to market gas, and are not deductible expenses from royalty payments); *R.E. Yarbrough & Co.,* 122 IBLA 217, 223 (1992) (gas not in marketable condition until prepared for delivery into pipeline); Wyo. Stat. § 30-5-304 (2000) (lessee pays all non-deductible costs of production including costs of gathering, compressing, dehydrating, and transporting the gas into the market pipeline); Jay G. Martin, *Summary of Significant Gas Market and Transportation Changes Affecting Producers in the 1990's*, 37 Rocky Mtn. Min. L. Inst. § 16.01 (1991)(production function of gas industry includes producer being responsible for "putting the gas into a marketable state by removing its impurities and gathering the gas from the various points of production (wellhead), and delivering it via gathering lines to a common point for delivery into the large diameter transmission lines").

This same conclusion was reached with respect to regulations promulgated under the Federal Mineral Leasing Act by Chief Justice John G. Roberts (then a member of the U.S. Court of Appeals for the District of Columbia Circuit) in *Amoco Prod. Co. v. Watson:*

> Under the 1988 regulations, lease products are considered in marketable condition if they "are sufficiently free from impurities and otherwise in a condition that they will be accepted by a purchaser under a sales contract

> typical for the field or area." If a lessee sells "unmarketable" gas at a lower cost, the gross proceeds for purposes of royalty calculation must be "increased to the extent that gross proceeds have been reduced because the purchaser, or any other person, is providing certain services" to place the gas in marketable condition.

410 F.3d 722, 725 (D.C. Cir. 2005) (internal citations omitted).

Adoption of the analysis set forth in *Westerman and Amoco* is wholly consistent with *Tawney et al.* and protects West Virginia lessors from lessees' predatory accounting practices, which diminish and ultimately negate their royalty. A recent article (Adam H. Wilson, *Without a Leggett to Stand On: Arguing for Retroactive Application of West Virginia's Amended Flat-Rate Well Statute*, 124, W. Va. L.R. 259 (2021)), provides an apt description of the various strategies which the gas producers and, in particular, the large national producers (who implement tactics that may be aptly described as "vertical integration"), use against their lessors in an unrelenting effort to completely consume the entire landowner's royalty through a "death by a thousand cuts" strategy.

> Gas companies claim the net-back method is a fair way of allocating to mineral owners their *pro rata* share of expenses, but this pays mere lip service to the idea of equity. Instead, lessees carefully structure their businesses--by forming alter egos--in order to maximize the amount of deductions that can be taken, thereby diluting the mineral owner's royalty payment. Such a scheme enables the lessee to dictate how much the lessor's royalty will be, to the point he receives wholly inadequate compensation for his valuable minerals.
>
> Proponents of the net-back method argue that mineral owners should not fret about gas companies inflating costs because the latter is responsible for the remaining seven-eighths. This position is incorrect because it fundamentally misunderstands how the net-back method works in practice. While the total costs are in fact a zero-sum game, which costs are deductible remains in flux. Each subsidiary, Production, Energy, and Gathering, are best thought of as departments, amongst which EQT's total costs must be distributed. Because Production's costs are not deductible, EQT has no incentive to allocate expenses to Production. On the other hand, every expense Gathering accounts for can be charged to the mineral owner as a post-production expense, thereby incentivizing EQT to assign Gathering as many expenses as possible. Unsurprisingly, EQT does exactly that. The rate that Gathering charges includes not only the

costs of gathering and transporting the gas but also meals and entertainment, uniforms, meter operations and repair, personal property taxes, salaries, retirement, medical insurance, and office supplies.

Wilson, supra, 124 W. Va. L.R. at 284-85 (citations omitted).

Similarly, the Petitioners' actions of fixing the "point of sale" at some arbitrary point upstream of processing the final products actually sold via sales contracts, in which the lessor has no involvement or say, are a continuation of such predatory schemes.

In the end, because they have relied entirely upon Petitioners to market their gas, Respondents have no control over either the "point of sale" component or the "market" component in the foregoing analysis. They are beholden to Petitioners to market oil and gas from their leases and to define a "point of sale" in that marketing effort. However, the application of implied marketing covenant, as in the Circuit Court's Order, ensures that Petitioners are computing royalty on the sale of marketable gas products, and not just any sort of raw, unprocessed product. Moreover, it also ensures that Petitioners are selling into an actual market—one with active sellers and buyers and responsive prices--and not merely a closed or limited selling location, before computing the lessor's royalty.[8]

---

[8] Nor is it unprecedented, as suggested by Petitioners, for a producer to pay royalty to its lessee on a price which exceeds the proceeds it received in a sale. In *Imperial Colliery Co. v. OXY USA Inc.,* 912 F.2d 696, 699 (4th Cir.1990), the United States Court of Appeals for the Fourth Circuit held a lessee must pay royalties based on the market price of the gas it produced, even though it actually received a lower, fixed contract price for the gas. By the terms of the 1944 Lease, Oxy was required to pay its lessor one-eighth (1/8) of the current wholesale market value at the well for all gas produced ... which was defined to mean "the prevailing purchase price currently paid at the well by purchasers of gas at wholesale in the field in which the well is located." *Id.* 912 F. 2d at 699. Oxy contended that even if the terms of the lease required it to pay royalties on market value rather than proceeds received, the proceeds represented the federally mandated maximum price Oxy could receive for the gas and therefore constituted "market value" as a matter of law. The Fourth Circuit rejected this argument, stating:

> Some have held that the federally regulated maximum for gas of similar legal characteristics forms the basis for determining market value of gas sold in interstate commerce. *See, e.g., Bowers v. Phillips Petroleum Co.,* 692 F.2d 1015, 1021 (5th Cir.1982) (applying Texas law: market value for royalty purposes cannot exceed the maximum ceiling price imposed on the gas

IV. Prayer for Relief

For all these reasons *Amici* WVROA, WVFB, and Bounty respectfully request the Court protect the integrity of the Lessor's Royalty and reaffirm *Tawney, et al.* by denying the Writ of Prohibition sought by Petitioners.

---

within that particular federally regulated category). Others have held that federally regulated prices are irrelevant to the issue of determining market value under the lessor-lessee contract. See, e.g., *Matzen v. Cities Service Oil Co.,* 233 Kan. 846, 667 P.2d 337, 344 (1983) (rejecting *Bowers*). These latter courts have looked, as did the district court here, to the price that a willing buyer would pay a willing seller in a free market without reference to federal price maxima. The primary difference between the approach taken by *Matzen* and that taken by Bowers is that *Matzen* considers only the physical characteristics of the gas for the purpose of computing market value. See *Matzen*, 667 P.2d at 345 ("quality, as that term is used in defining comparable sales, does not include the 'legal characteristics' of the gas"). Conversely, Bowers looks to the legal characteristics of the gas in computing its market value. Oxy does not dispute that Consolidated gas, the price of which the district court used in computing market value, had the same physical characteristics as gas produced on Imperial's land. The argument is that under the Bowers approach gas produced on the two different properties had different legal characteristics, were subject to different federally regulated maximum prices, and therefore constituted an improper cost comparison. We reject Oxy's argument. The Natural Gas Policy Act classifies natural gas by reference to several categories. Imperial's gas was classified as both Sec. 104 and Sec. 108 gas. Section 104 gas is gas that had been committed to interstate commerce on November 8, 1978, and "for which a just and reasonable rate under the Natural Gas Act was in effect on such date." Thus, market value is to be determined "using only comparables with the same 'legal characteristics' of the natural gas in question, such as sales 'in one particular category of a regulated market ... with marketing outlets similar to the gas in question.'" Oxy argues that, because its gas had been classified under Sec. 104, Oxy was charging the FERC maximum and therefore Imperial gas' market value equaled the price filed with FERC--the price under the Equitable contract. We cannot agree. At any time relevant to this controversy, Oxy could have sought a rate increase for Imperial's gas under 15 U.S.C. Sec. 717c, or an abandonment of the Equitable contract under 15 U.S.C. 717f, in which case Oxy could obtain another buyer subject to the rates established for Sec. 108 gas. 1 Oxy never made such an effort. Moreover, *Bowers* simply does not support Oxy's position. Implicit in *Bowers* was that the gas could not legally be classified under any category other than Sec. 104. Thus, the *Bowers* plaintiffs had no other category into which their gas might be classified and there was no discussion concerning whether abandonment was desired or available. In the instant case, Imperial's gas was classified under Sec. 108 as well as Sec. 104. Had Oxy abandoned the Equitable contract, Oxy might very well have been able to negotiate to sell Imperial's gas under the FERC Sec. 108 price. The *Bowers* court was careful to note that its ruling did not mean in every case that market value and the contract price (which in Bowers equaled the regulated ceiling) were the same.

Thus, *Oxy's* holding further supports the notion that "point of sale" and "point of marketability" be distinct concepts.

Respectfully Submitted,

West Virginia Royalty Owners Association, West Virginia Farm Bureau, and Bounty Minerals LLC, by Counsel

HOWARD M. PERSINGER, III
WV Bar ID 6943
Persinger & Persinger, L.C.
237 Capitol Street
Charleston, WV 25301
304-346-9333 Phone
304-346-9337 Fax
hmp3@persingerlaw.com

Dated: September 7, 2022