IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-ICA-84

ICA EFiled: May 13 2025
05:08PM EDT
Transaction ID 76266173

Haughtland Resources, LLC,

Interested Party Below, Petitioner,

v.

SWN Production Company, LLC,

Applicant Below, Respondent.

OPENING BRIEF OF PETITIONER HAUGHTLAND RESOURCES, LLC

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ASSIGNMENTS OF ERROR

1. The Oil and Gas Conservation Commission erred by failing to properly consider whether Respondent made good faith offers and negotiated in good faith with interest owners prior to filing its application for a unit order, as required by West Virginia Code § 22C-9-7a.

2. The Oil and Gas Conservation Commission erred by granting Respondent's application for a horizontal well unit order because Respondent did not establish that it met the requirements of West Virginia Code § 22C-9-7a.

3. The Oil and Gas Conservation Commission's Order is in error as it determined legal issues that the Commission repeatedly stated it could not and would not determine.

STATEMENT OF THE CASE

This appeal arises from an Application filed by Respondent SWN Production Company, LLC under West Virginia Code § 22C-9-7a (the "Act"), to form a horizontal well unit that includes oil and gas interests owned by Petitioner Haughtland Resources, LLC.

The West Virginia Oil and Gas Conservation Commission ("OGCC") entered an Order erroneously granting SWN's Application without properly considering whether SWN satisfied statutory prerequisites, much less requiring SWN to provide evidence demonstrating that it did so. Specifically, the Act requires applicants such as SWN to make offers and negotiate in good faith with nonconsenting mineral rights owners like Haughtland before filing an application. Under the Act, the OGCC may not grant a horizontal well unit order unless it finds that the applicant satisfied this good-faith requirement.

Unlike the agency process in other states with similar requirements — such as Texas, Oklahoma and Colorado — the OGCC in this State does not require the applicant to show that the alleged negotiations and offers were actually in good faith based on the terms of the offer, the prevailing market, or any other discernable standard. As to the application at issue in this appeal, SWN presented only cursory evidence that offers were made on certain dates, but provided no information whatsoever about the content of any offers or negotiations. SWN also provided no information regarding the market-basis for its alleged offers, and the OGCC made no inquiry. The only substantive evidence on the subject, introduced by Haughtland, revealed that SWN inexplicably made a low-ball offer to pay little more than *half* of the minimum amount that it knew Haughtland would be entitled to receive under the Act.

SWN evidently expected that the OGCC would do nothing to scrutinize its recitations of statutory compliance — even in the face of clear evidence that they were false. Unfortunately,

SWN was correct. Despite having no evidence from which it could possibly conclude that SWN made any good faith offers or negotiated in good faith, the OGCC somehow found that SWN met its burden. In-so doing, the OGCC abdicated its statutory duties and effectively read the good faith requirement out of the Act.

Additionally, the OGCC erred by including findings in its Order concerning the rights granted to the Lessee under Haughtland's lease, which is already a subject of dispute in pending litigation, despite the OGCC's statements that it lacked authority to make such a legal determination and refusal to entertain evidence on the matter.

I. SWN's Application to the OGCC

SWN initiated the matter below before the OGCC by filing its Application to establish a proposed drilling unit in Brooke County, West Virginia on December 17, 2024. (D.R.0143). The Application was filed pursuant to the Act and sought unitization of certain mineral interests to allow SWN to drill and operate a horizontal well to produce "oil, natural gas, and related liquids" in its proposed unit referred to as the "Gerald Gourley Southwest Unit." (D.R.0143-44).

The Act allows operators to apply to the OGCC for orders "unitizing" or "pooling" mineral interests to, effectively, compel owners like Haughtland who have not agreed or consented to the proposed use of their mineral resources. W.Va. Code §22C-9-7a (c)(1).[1] However, to obtain this remedy the applicant must first prove that it complied with a series of statutory requirements, including those set forth in subsection (c) of the statute. W.Va. Code § 22C-9-7a (c)(2). Most relevant here, an applicant must show that, before filing the application, it "[m]ade good-faith offers to participate or consent or agree to pool or unitize, and has negotiated in good faith with all

[1] "[T]he new law provides a mechanism for compulsory unitization of nonconsenting owners' mineral tracts, allowing an operator to apply to the Commission for an order allowing the development of an oil or gas reservoir with a horizontal well unit without the consent of all mineral owners. *See* W. Va. Code Ann. § 22C-9-7a(c)." *Sonda v. W. Va. Oil & Gas Conservation Comm'n*, 92 F.4th 213, 216 (4th Cir. 2024).

known and locatable royalty owners having executory interests in the oil and gas" to be included in the proposed unit. W. Va. Code ¶ 22C-9-7a (c)(2)(C)(i).

This and the other requirements of subsection (c) must be met *before* an operator may apply for unitization. "The commission *may not* issue a horizontal well unit order pursuant to this section unless it finds that the applicant has *before the filing of the application* met the requirements of subsection (c) of this section." W. Va. Code § 22C-9-7a (e)(2) (emphasis added). Thus, the OGCC lacks discretion to grant an application if any part of subsection (c) was not satisfied at the time of filing and must dismiss the application. *Id.*; W. Va. Code § 22C-9-7a (c)(4) ("If the applicant has not met all the provisions of this subsection, the application *shall be dismissed* without prejudice.") (emphasis added).

SWN's Application claims, as it must, that it "[m]ade good faith offers to lease, consent or agree to pool or unitize, and has negotiated in good faith" with all locatable royalty owners "who have not previously consented or agreed to the pooling or unitization. . . ." (D.R.0145). As ostensible support for that statement, SWN cites Exhibit 5 to its Application, which consists of an "Affidavit of Leasing and Modification Efforts" from SWN Landman Monty Mayfield and a table listing communications with various interest owners.

Mr. Mayfield's Affidavit merely recites that "SWN has made good faith offers and efforts" to obtain consent from owners of interests that are unleased or covered by leases that do not authorize pooling or unitization and "[t]hose efforts include making in-person visits, telephone calls and mail correspondence." (D.R.0224). The table accompanying the Affidavit purports to list such owners and provide cursory descriptions of the date and manner of communication by SWN to obtain their consent. (*See* D.R.0225-234). The table does not contain any detail regarding

the offers that SWN purportedly made to the owners listed on the table. The table does not set forth the terms of the lease, lease bonus, or royalty that SWN offered to any of the owners.

With respect to Haughtland, the table lists three communications, providing only dates and two-sentence descriptions of the communications. (D.R.0234). Neither document provides any details about the substance of SWN's purported communications with Haughtland, or any other owners for that matter, for the OGCC to evaluate whether they were, in fact, good-faith offers or negotiations as SWN claims.

II. Haughtland's Objections to the Application

Haughtland filed an Objection to the Application with the OGCC on January 26, 2025. (D.R.0244). Haughtland opposed the requested unit order based on deficiencies in the Application and SWN's failure to comply with the Act, including by failing to make offers or negotiate in good faith prior to filing its Application. Haughtland also objected because SWN incorrectly classified Haughtland as a non-consenting owner of a validly leased interest in the target Marcellus Shale formation, which Haughtland disputes (and is currently the subject of litigation in the United States District Court of Northern West Virginia[2] with respect to a different horizontal well unit). (*See* D.R.0246, 262-77).

The consequence of SWN's misclassification of Haughtland is that it would only be entitled to payment of the lesser amounts provided under the Act as "unitization consideration" for non-consenting owners of leased interests, as opposed to unleased interests. Specifically, the Act provides that "owners of leased tracts who have not consented to pooling or unitization" are entitled to unitization consideration equal to 25% of the weighted average bonus and 80% of the weighted average royalty percentage paid to owners of leased tracts in the unit and target

[2] *Haughtland Resources, LLC v. SWN Production Company, LLC et al.*, No. 5:24-CV-113 (N.D. W.Va.) (Bailey, J.).

formation. *See* W. Va. Code § 22C-9-7a (f)(6). In contrast, owners of unleased oil and gas interests may elect to receive unitization consideration equal to 100% of the weighted average bonus and the *highest* production royalty percentage paid under leases controlled by the applicant in the unit and target formation. *See* W. Va. Code § 22C-9-7a (f)(7)(B).

III. The OGCC Hearing

A hearing on SWN's Application was held before the OGCC on January 29, 2025, during which SWN failed to present any additional evidence or information concerning the content of any offers or negotiations with Haughtland, or any other nonconsenting mineral rights owner. The only evidence that SWN presented related to good faith was the following testimony of Mr. Mayfield on direct examination by SWN's counsel, referencing his Affidavit of Leasing and Modification Efforts:

> Q. Did you review and verify the accuracy of the resume of leasing efforts that was attached to the unit application?
>
> A. Yes.
>
> Q. And based on your experience as a landman, are you confident that SWN made good-faith efforts to obtain leases or the consent to unitization for every interest holder in the unit?
>
> A. Yes.

Transcript at 16:1-9 (D.R.0028).

Later, on cross examination, Mr. Mayfield read the list of communications attached to his Affidavit, largely verbatim, to testify that SWN made three offers to amend Haughtland's lease to permit pooling prior to filing the Application. Transcript at 110:24-111:7, 112:19-113:6 (D.R.0122-125). However, Mr. Mayfield admitted that two of these communications involved property in other units and only one of the offers, communicated by letter dated October 2, 2024, specifically related to Haughtland's property within the subject Gerald Gourley Southwest Unit:

> Q. [B]efore applying for the application, you offered one time, specifically for the Gourley acreage?
>
> A. Specifically, but -- yes, specifically regarding the Gourley acreage we offered on the Cooper letter on 10/2/24.

Transcript at 114:6-11 (D.R.0126). Ultimately, SWN never provided, and the OGCC did not seek, any information about the terms or other details of those offers.

Notably, the only evidence in the record disclosing the substance of any offers or negotiations between the parties was provided by Haughtland. In SWN's letter dated October 2, 2024, which was attached to Haughtland's Objection filed with the OGCC, SWN offered to pay $545.31 per acre for Haughtland's consent to pool its interests in the Unit. (D.R.0397).

During the hearing, Haughtland attempted to present evidence and testimony concerning its objection to SWN's characterization of Haughtland's interest in the target Marcellus Shale formation in the unit as validly leased, rather than unleased. *See, e.g.*, Transcript at 91:13-96:21 (D.R.103-8). However, the OGCC refused to entertain such evidence and stated that it lacked authority to rule on the legal issue. *See, e.g.*, *id*. at 94:5-95:2 (D.R.0106-7). The OGCC also declined Haughtland's request to adjourn the hearing or dismiss SWN's Application pending determination of the issue in the pending litigation. *See id*. at 96:6-97-20, 100:15-23 (D.R.0108-9, 112).

IV. The OGCC's Final Unit Order

After abruptly adjourning the hearing and briefly deliberating, the OGCC voted to grant SWN's Application over Haughtland's objections. Transcript at 117:18–118:14 (D.R.0129-30). Following its decision, the OGCC asked SWN's counsel to prepare a draft order, which was never provided to Haughtland. *Id*. at 118:14-16 (D.R.0130). At the conclusion of the hearing, Haughtland made an oral motion to stay the order pending appeal, which the OGCC summarily denied. *Id*. at 118:19-21 (D.R.0130).

On February 13, 2025, the OGCC issued its final Order granting SWN's Application, which is presumably materially identical to the draft provided by SWN. The Order contains findings that are unsupported, and in fact contradicted, by the record evidence. Most relevant here, the Order includes a finding that "SWN made multiple good faith offers to Haughtland. . . ." Order, ¶ 7 (D.R.0006). The Order provides no explanation for this finding, beyond stating that it is based on Mr. Mayfield's Affidavit of Leasing and Modification Efforts and testimony at the hearing. *Id*.

The Order also states, without explanation, that Haughtland's interest in the proposed unit is subject to the lease that is currently the subject of pending litigation. *See* Order, ¶¶ 5-6 (D.R.0006). Therefore, according to the OGCC's Order, Haughtland is only entitled to the lesser amounts provided by the Act as unitization consideration for non-consenting owners of leased interests. The OGCC's Order calculated the unitization consideration payable to such owners based upon average bonus payment information set forth in an Economic Report introduced by SWN.[3] In contrast to SWN's offer to pay Haughtland $545.31 per acre, the OGCC found that non-consenting owners of leased interests are entitled to payment of $998.78 per acre under the formula prescribed by W. Va. Code § 22C-9-7a (f)(6). (D.R.0010).

This timely appeal from the OGCC's Order followed.

SUMMARY OF THE ARGUMENT

The OGCC's Order granting SWN's Application suffers from two fundamental errors.

First, SWN failed to demonstrate that it satisfied the requirement under the Act to make good faith offers and negotiate in good faith with Haughtland, or any other owners, prior to filing its Application. During the hearing before the OGCC, SWN's witness admitted that it made only one offer specific to Haughtland's property within the subject unit before filing the Application.

[3] *See* Transcript at 9:4-14, 27:19-28:4 (D.R.0021, 39-40); Economic Report (D.R.0240-43).

SWN never provided any evidence or information, and the OGCC never inquired, as to what the content of that offer, or any other offer, actually was. SWN also never provided any evidence or information and the OGCC never inquired about the market basis for its alleged negotiations and offers. Consequently, the OGCC lacked any information whatsoever to determine whether SWN made an offer or negotiated in good faith with any owners, and the only record evidence disclosing the terms of any relevant offer to Haughtland indicate a distinct lack of good faith. Yet, the OGCC's Order granted the Application based upon findings that SWN made multiple good faith offers and complied with the Act, which are unsupportable and clearly wrong on this record.

Second, the OGCC erred by finding that Haughtland's interests in the target formation are subject to a valid lease, despite stating that it could not address such a legal issue and would not entertain evidence on the matter. In its Order, however, the OGCC accepted SWN's mischaracterization of Haughtland as the owner of a leased tract, entitling Haughtland to less unitization consideration under the Act.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Haughtland requests that this appeal be calendared for oral argument under R.A.P. 20. Although the underlying facts and circumstances are straightforward, this appeal involves significant questions of law that have not previously been decided and affect the interests of oil and gas owners and as operators throughout West Virginia.

ARGUMENT

I. Standard of Review

It is well-settled in West Virginia that:

> Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they

> claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.

Ringel-Williams v. State Consol. Pub. Ret. Bd., 2015 W.V. Cir. LEXIS 88, *8-9 (citing *McDaniel v. WV Division of Labor*, Syllabus Point 4, 214 W.Va. 719, 591 S.E.2d 277 (2003)). An administrative agency "can exert only such powers as those granted by the legislature and if it exceeds its statutory power its actions may be nullified by a court." *Id*. (citing *State Human Rights Comm'n v. Pauley*, 158 W. Va. 495, 212 S.E.2d 77 (1975)).

Review of the OGCC's Order on appeal is governed by W. Va. Code § 29A-5-4. *See* W. Va. Code § 22C-9-11(a). This Court "shall reverse, vacate, or modify the order or decision of the [OGCC] if the substantial rights of the petitioner . . . have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

W. Va. Code § 29A-5-4(g). Findings of fact by the OGCC are afforded deference unless they are clearly wrong or arbitrary. *See id*.; *Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 115, 705 S.E.2d 806, 812 (2010). Questions of law are reviewed de novo. *Cabot*, 227 W. Va. at 115-16, 705 S.E.2d at 812-13 ("[I]ssues pertaining to the construction and application of statutory law to the facts before us also are afforded a plenary review.").

II. The OGCC Erred in Granting the Application Without Considering Whether SWN Negotiated in Good Faith with Interest Owners Prior to Filing the Application or Requiring SWN to Demonstrate that it Made Good Faith Offers

It is important to recognize that, contrary to what the apparent attitude of SWN and the OGCC in the proceedings below would suggest, SWN is not presumptively entitled to the relief made available under the Act, which was enacted in 2022 as an exception to long-standing common law. West Virginia common law has long provided that all owners of mineral rights must give consent to an exploitation of those rights. *Law v. Heck Oil Co.*, 106 W.Va. 296, 297 (1928). The relief available to operators under the Act is, therefore, in derogation of the common law and should be subject to strict interpretation and "interpreted in the manner that makes the least rather than the most change in the common law." *Phillips v. Larry's Drive-In Pharm., Inc.*, 220 W.Va. 484 (2007). In other words, to receive statutory relief in derogation of the common law, parties seeking that relief must strictly comply with the requirements of the statute. SWN manifestly failed to do so here and the OGCC erred in granting its Application.

As noted above, the OGCC has no discretion to grant applications "unless it finds that the applicant has before the filing of the application met the requirements of subsection (c)," including that the applicant made good faith offers and negotiated in good faith. *See* W. Va. Code § 22C-9-7a (e)(2). In making these determinations, the OGCC may not serve as a mere "rubber stamp" of approval. Rather, the OGCC is tasked with conducting "an objective search for the applicable facts and the correct principles of law" and must only render its decision "[u]pon consideration of the evidence." W. Va. Code R. § 39-2-2 (2.2), (2.5).

Accordingly, the OGCC was not at liberty to simply accept SWN's self-serving recitations of good faith, and was obligated to scrutinize the record to determine whether the evidence

establishes sufficient facts to make a reasoned finding of good faith. The record evidence before the OGCC cannot support such a finding and, if anything, compels the contrary conclusion.

A. The OGCC's Finding of Good Faith is Arbitrary and Without any Support in the Record

In its Order, the OGCC made the following finding:

> Based on the Affidavit of Leasing and Modification Efforts included in SWN's Application and the direct testimony of Mr. Mayfield, as confirmed through the cross-examination by Mr. Corwin of Haughtland, SWN made multiple good faith offers to Haughtland to obtain its consent to the unitization and pooling of the subject land for the target formation or to obtain a modification of the Haughtland Lease allowing the same.

Order, ¶ 7 (D.R.0006). This finding is entirely unfounded. There is nothing in Mr. Mayfield's Affidavit or oral testimony, nor anywhere else in the record, that could conceivably allow the OGCC to determine that SWN made *any* "good faith offers to Haughtland." Although Mr. Mayfield testified to multiple communications in which offers were made, he admitted that SWN only made one offer specifically related to Haughtland's interest within the subject Unit prior to filing the Application. Transcript at 114:6-11 (D.R.0126). Further, the OGCC did not make any finding that SWN *negotiated* in good faith, as required by the Act.

More importantly, however, SWN failed to present *any* evidence to the OGCC regarding the substance of any alleged offers. Near the conclusion of the hearing and after SWN's questioning of Mr. Mayfield, OGCC Chairman Albert acknowledged that the OGCC had "heard no testimony whatsoever about good faith or lack of good faith." Transcript, 104:15-16 (D.R.0116).

Ultimately, SWN's effort to adduce evidence in support of its self-proclaimed good faith is entirely confined to the following cursory list of three communications with Haughtland set forth

in Exhibit 5 to its Application, and Mr. Mayfield's hearing testimony recapitulating the same information:

> 12/05/2024 - (CF) - The applicant's legal counsel emailed Anthony Edmond, attorney representing Haughtland Resources LLC, and made an offer to amend the pooling language of the existing oil and gas lease encumbering this parcel. The offer was rejected.
>
> 10/02/2024 - (CF) - The applicant emailed Brian Corwin, Member of Haughtland Resources LLC, an offer letter detailing an offer to amend the pooling language of the existing oil and gas lease encumbering this parcel. The offer was rejected.
>
> 02/15/2024 - (PB) - The applicant emailed Brian Corwin, Member of Haughtland Resources LLC, and made an offer to amend the pooling language of the existing oil and gas lease encumbering this parcel. The offer was rejected.

(D.R.0234). At best, this list evidences only that there were communications between SWN and Haughtland concerning amendment of Haughtland's lease to permit pooling and unitization of the target Marcellus Shale formation. It provides no details or information about any offers made or the nature of negotiations, and does nothing to demonstrate that SWN ever made a good faith offer or negotiated in good faith prior to filing the Application. At no time during the hearing did SWN provide the OGCC with the contents or details of its purported offers.

As such, there is simply no basis upon which the OGCC could find that SWN satisfied the statutory requirement of good faith in subsection (c). This alone is dispositive and dictates that the OGCC had no choice but to dismiss the Application and erred in refusing to do so. *See* W. Va. Code § 22C-9-7a (c)(4) ("If the applicant has not met all the provisions of this subsection, the application *shall be dismissed* without prejudice.") (emphasis added).

B. The only Evidence Concerning the Terms Offered by SWN Demonstrate a Lack of Good Faith

In addition to the foregoing, what little evidence was before the OGCC concerning the parties' communications shows a distinct lack of good faith by SWN. As discussed above, the only record evidence reflecting the substance of any relevant offer is SWN's letter dated October

2, 2024, included only in Haughtland's Objection to the Application. (D.R.0397). For a pooling amendment to the subject lease, SWN offered $545.31 per net acre of Haughtland's land that was intended to be included in the Unit. *Id.* Yet, as set forth in the Order, the Act's computation of what an owner with a valid lease — as SWN and the OGCC characterized Haughtland — is entitled to be paid yields a price of $998.78 per net acre. In other words, SWN offered little more than half of what it knew Haughtland would receive if an agreement could not be reached and the Application was granted.

There is no indication that the OGCC ever considered the letter, but it would be impossible to conclude that it evidences a good faith offer. On the contrary, the only conclusion that can be drawn from the October 2, 2024 letter is that SWN made a low-ball, bad faith offer. Thus, it is unsurprising that SWN elected not to present any evidence disclosing the terms of its supposed "good faith" offer before the OGCC.[4]

Regardless of whether this Court agrees that the evidence affirmatively demonstrates bad faith, there is no evidence that could rationally support the OGCC's finding that SWN made multiple, or any, good faith offers before filing the Application, as required by the Act. Accordingly, the OGCC lacked discretion in this matter and had no choice but to dismiss SWN's Application under the plain text of the Act.

[4] The two other offers referenced in Mr. Mayfield's Affidavit, listed as having been communicated on February 15 and December 5, 2024, include other acreage outside the proposed unit and cannot support a finding of good faith even if they were relevant for purposes of the Application. For one, those offers were made in response to concerns Haughtland raised about SWN's failure to make *any* offers before drilling an earlier well – the Ballato 10H well – which produces from Haughtland's property subject to the same lease at issue here. Moreover, the only record evidence concerning the substance of either offer was again attached to Haughtland's Objection, namely email correspondence showing that SWN made an even lower offer of just $500 per acre on February 15, 2024. (D.R.0439).

C. The OGCC did not Apply an Appropriate Standard to Determine Whether SWN made Good Faith Offers

For all the OGCC knew based on SWN's proffered evidence and the findings in its Order — which makes no mention of SWN's low-ball offer of $545.31 per acre — SWN offered to pay Haughtland one stick of bubble gum per acre. Yet, the OGCC was somehow satisfied and found that SWN made good faith offers and met other requirements of the Act which include negotiating in good faith, solely on the basis that offers were made, regardless of the content of any such offers or negotiations. The only apparent explanation for the OGCC's disregard of the evidence, and lack thereof, is a troubling one: the OGCC must have accepted the mere fact that SWN made *any* offer as sufficient to also establish that a *good faith* offer was made.

Although the question of what is required to demonstrate good faith under the Act has not been decided, requiring applicants to show only that an offer was made cannot meet even the lowest conceivable threshold and would read the requirement for good faith out of the Act. Such a low standard would be contrary to the statutory text and legislative intent behind the Act, which quite evidently seeks to promote voluntary agreements and, failing that, approximate the results of an arm's length transaction in which owners receive fair market value for their interests being taken or impaired by the OGCC. These purposes are readily apparent from the very provisions of the Act at play here.

For example, the requirement that the OGCC dismiss forced pooling applications unless operators like SWN made good faith offers and negotiated in good faith *before* filing their applications encourages negotiation of voluntary resolutions. Similarly, the Act reflects the legislature's intention to ensure that negotiations and any consideration ordered by the OGCC are keyed to the fair market value of the interest at issue by (1) requiring applicants to submit economic reports summarizing bonus and royalty terms of leases in the same unit, and (2) providing formulas

for calculating unitization consideration based on those terms prevailing in the market. *See* W. Va. Code § 22C-9-7a (f)(6) & (7), § 22C-9-7a (g)(4)(C).

These and other provisions of the Act serve to disincentivize operators from making low-ball offers and rushing to file forced pooling applications without first negotiating in good faith — or at least they would if operators thought the OGCC would actually require evidence of good faith and enforce the Act by dismissing their applications. Conversely, the Act deters owners from making inflated demands or rejecting fair-market offers, since the owner will end up receiving unitization compensation in line with the terms of his neighbors' leases if the operator is forced to obtain a unit order from the OGCC.

With the foregoing in mind, it becomes clear that to properly effect the terms and intent of the Act, the OGCC must require applicants to show — not just claim — that they made offers and negotiated in good faith by presenting evidence sufficient for the OGCC to examine the terms and find that what the applicant offered was consistent with fair market value as indicated by comparable arms'-length leases. Otherwise, the OGCC has no evidence or metric by which to distinguish between good faith offers and any other offers, as the Act necessarily requires.

By way of illustration, imagine someone approaches with an offer to purchase your Mercedes for $54,531, despite knowing that many examples of the same model in similar condition have recently sold in the community for an average of $99,878. Of course, you would not accept that offer, and no one would consider it a serious offer made in good faith. Yet, that is fundamentally what happened in this case, where at best the record evidence only shows that SWN offered $545.31 per acre, while Haughtland is entitled to payment of at least $998.78 under the Act.

Texas, Oklahoma and Colorado have forced pooling statutes which are similar to the Act, in that they also require applicants to seek voluntary agreement on market-based terms. Though the statutory language is not identical, the guidance in these states is instructive as to the type of evidence that the OGCC must consider to properly enforce the Act.

For instance, Texas similarly requires that applicants must make a "fair and reasonable offer to pool voluntarily" or the application will be dismissed:

> The commission *shall dismiss* the application if it finds that a fair and reasonable offer to pool voluntarily has not been made by the applicant.

Tex. Nat. Res. Code § 102.013(b) (emphasis added). Also mirroring the market-based focus of the provisions of the Act discussed above, the same section of the Texas statute states that

> An offer by an owner of a royalty or any other interest in oil or gas within an existing proration unit to share on the same yardstick basis as the other owners within the existing proration unit are then sharing shall be considered a fair and reasonable offer.

Id. at § 102.013(c). Although the Texas statute does not further define a "fair and reasonable offer," the Texas Supreme Court has held that "the offer must be one which takes into consideration those relevant facts, existing at the time of the offer, which would be considered important by a reasonable person in entering into a voluntary agreement concerning oil and gas properties." *Carson v. R.R. Com. of Tex.*, 669 S.W.2d 315, 318 (Tex. 1984). Thus, evidence concerning the offer and circumstances that would be important in a voluntary transaction — i.e., an arm's length deal for fair market value — must be considered.

In Oklahoma, applicants for forced pooling orders must show that "the applicant exercised due diligence to locate each respondent and that a bona fide effort was made to reach an agreement" with interest owners in the proposed unit. Okla. Admin. Code § 165:5-7-7(a). The applicant must detail such efforts in its application and present supporting evidence at a hearing on the application.

Id. The benchmark for determining appropriate compensation for force-pooled interest owners is "fair market value — the level at which this interest can be sold, on open-market negotiations, by an owner willing, but not obliged, to sell to a buyer willing, but not obliged, to buy." *Miller v. Corp. Comm'n of Okla.*, Okl., 635 P.2d 1006, 1008 (1981) (internal quotations omitted). This requires applicants to submit evidence of other lease terms, as "[t]he value to be arrived at is that paid for comparable leases in the unit [and] best extracted from transactions under usual and ordinary circumstances which occurred in a free and open market." *Id*.

Colorado's forced pooling statute contains a similar requirement that a nonconsenting mineral owner must receive a "reasonable offer, made in good faith" before being force pooled. Colo. Rev. Stat. § 34-60-116(7)(d)(I). The statute further provides that the offer shall be on "terms no less favorable than those currently prevailing in the area at the time application for the order is made." *Id*. The Colorado Oil and Gas Conservation Commission subsequently promulgated its Rule 506 codifying the method of making this determination, which instructs that the commission must "*receive evidence* that Owners were tendered a good faith, reasonable offer…" 2 Colo. Code Regs. 404-1, Rule 506(b) (emphasis added). The rule clarifies that "good faith means a state of mind consisting of observance of reasonable commercial standards of fair dealing in oil and gas operations, and absence of intent to defraud or seek unconscionable advantage." *Id*. at Rule 506(b)(1).

The rule further requires the commission to consider the offered lease terms in comparison with other leases offered in the spacing unit and adjacent units as necessary to "obtain a representative sample of the lease market[.]" *Id*. at Rule 506(c)(3). For an offer to be "considered reasonable and have been made in good faith," it must be "written in clear and neutral language

and include information on which the offered price can be determined to be fair." *Id*. at Rule 506(c)(4).

Although the OGCC in this State is authorized to and could promulgate standards codifying its method for determining good faith (as the Colorado OGCC did), it has not done so to date. *See* W. Va. Code § 22C-9-4(f)(2) (authorizing the OGCC to "[m]ake and enforce reasonable rules"); § 22C-9-5(a) ("The commission may propose rules . . . to implement and make effective the provisions of this article and the powers and authority conferred and the duties imposed upon the commission[.]"). Because the OGCC has no reasoned standard for making a good faith determination, this Court should instruct the OGCC, similar to the guidance provided by the Texas and Oklahoma courts, that the OGCC's determination must be based *at least* on evidence of the actual offer made and the prevailing market. This is particularly important because the current lack of oversight by the OGCC inevitably decreases the compensation paid to both consenting and nonconsenting mineral owners by incentivizing operators such as SWN to make below-market offers. Those below-market offers are not only made to mineral owners under the imminent threat of forced pooling, but also without providing any information regarding the relevant market.

Such below-market offers will oftentimes be accepted by owners who are unfamiliar with forced pooling and who lack any information to evaluate the offer, or the knowledge and resources necessary to protect their interests. A summary of the terms of these below-market leases and amendments (as well as any other leases and amendments within the preceding 24 months) are confidentially provided by the operator to a third-party accountant, per the Act. *See* W.Va. Code § 22C-9-7a (g)(4)(A)&(B). The third-party accountant then prepares an economic report which the OGCC uses to impose royalty and bonus terms on the remaining non-consenting mineral owners in the proposed unit. *Id.* at (C). Thus, the operator's below-market offers lead to below-

market leases and below-market orders by the OGCC. The good faith standard of the Act stands as the only safeguard disincentivizing abuse of the Act by operators, but it must be enforced.

Because the OGCC was not presented with and did not require any evidence of good faith, it had no way of knowing what offers were actually made to Haughtland or any other owners, or at most knew only that SWN had offered Haughtland just $545.31 per acre. Thus, the OGCC had no basis to find that SWN made any much less "multiple good faith offers" as stated in its Order. Even if SWN's low-ball $545.31 offer to Haughtland could somehow be considered a good faith offer, the OGCC still should have dismissed the Application because there is no evidence whatsoever of any offers made by SWN to other owners. Furthermore, the OGCC made no finding, and had no evidence from which it could find, that SWN engaged in good faith negotiations with Haughtland or any owners as required by the Act.

In short, the OGCC disregarded its obligation under the Act to ensure that SWN made good faith offers and negotiated in good faith with Haughtland and all other owners prior to filing of the Application, and its finding that SWN satisfied its statutory obligations is wholly unsupported by the record evidence and clearly wrong. This Court should reverse and vacate the OGCC's unit Order. Alternatively, this Court should remand this matter back to the OGCC with instructions to apply a lawful standard for good faith negotiations and good faith offers in order to determine whether there is sufficient evidence to show that, prior to the date that it filed its application, SWN satisfied the good faith standard of the Act.

III. The OGCC's Order is in error as it determined legal issues that the OGCC repeatedly stated it could not and would not determine

As noted above, Haughtland and SWN are parties to pending litigation in the Northern District of West Virginia involving the same oil and gas lease that was identified by SWN in its application as covering Haughtland's interest in the proposed well/unit. In that litigation, which

Haughtland commenced prior to SWN's instant Application, Haughtland challenges SWN's claimed right to produce and develop the Marcellus Shale formation targeted by SWN's Application.

If the District Court agrees with Haughtland and finds that the lease does not grant SWN the right to develop the target Marcellus Shale formation, then Haughtland's interest in that formation should be considered an interest "as to which there is no lease in existence" within the meaning of W. Va. Code § 22C-9-7a (f)(7). In that case, Haughtland would be entitled to the options afforded unleased executive interest owners under that section, including to elect to receive the greater measure of unitization consideration set forth in § 22C-9-7a (f)(7)(B).

At the January 29, 2025 Hearing, the OGCC stated multiple times that it lacked the power to rule on legal issues, including the validity or applicability of the lease and that such a ruling would have to come from a court. *See, e.g.*, Transcript, 94:5-10 (D.R.0106). Indeed, the OGCC refused to hear testimony on this issue on the grounds that that it could not make any "legal conclusions":

> CHAIRMAN ALBERT: Yeah. Let me just state--. I mean, I think kind of where we're at, we, as a Commission, can opine on whether good faith occurred in negotiations or not. We can't opine on the validity of the lease. That is a matter for—for Circuit Court to determine.
>
> MR. CORWIN: Well, and that is the crux of one of the issues here is they claim that I'm leased unmodified. My contention is that while there is a lease in place, it does not allow the production right of the Marcellus. And so, therefore, essentially I am unleased and should be viewed as such from the Commission.
>
> CHAIRMAN ALBERT: That's a matter--. Mr. Corwin, I understand what you're saying. I will tell you categorically, I disagree with you, for what that's worth. But that's not a matter that this Commission can decide, whether—whether I agree or disagree or Bob or--- or Eddie or Marty or anybody. We can't decide a legal issue.

Transcript, 94:5-10 (D.R.0106).

Yet, the OGCC's order specifically makes findings that Haughtland is leased and that the lease is only deficient in that it lacks pooling authority with respect to the Marcellus Shale formation. *See* Order ¶¶ 5-6 (D.R.0006). Thus, as a result of adopting the proposed Order provided by SWN, the OGCC made a legal conclusion that it apparently did not intend to make, without any basis in the record and despite claiming that it lacked the authority to do so.

CONCLUSION

The Act in many ways upends the long-settled law of West Virginia, allowing a private actor to use a legal process to seize private property in order to sell it for profit. Any such law must be carefully construed, strictly applied, and considered minutely by the OGCC and reviewing courts to determine that it is administered fairly, equitably, and in conformity with the law.

It is essential — both to protect the rights of royalty owners and because it is mandated by statute — that the OGCC seriously evaluate forced pooling applications and the record evidence, or lack thereof, to determine whether the applicant has satisfied all statutory requirements for the relief it seeks. This is especially critical with respect to the requirement for good faith offers and negotiations, which should approximate market values, as those are the primary mechanisms the Act provides to protect the rights of Haughtland and numerous other interest owners throughout West Virginia. None of that occurred in this case, and there is nothing in the record from which the OGCC could have concluded otherwise.

The OGCC erred in failing to perform its statutory duties and enforce the Act and, as a result, granting SWN's Application. Haughtland asks that this Honorable Court right that wrong by reversing and vacating the OGCC's unit Order, or alternatively remanding with instructions requiring the OGCC to proceed in accordance with the letter and purpose of the Act by taking evidence and enacting rules necessary to properly implement the statute.

Respectfully submitted,

BERNSTEIN-BURKLEY, P.C.

Dated: May 13, 2025

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing BRIEF OF PETITIONER, HAUGHTLAND RESOURCES, LLC has been served on counsel of record via the Court's Electronic Filing System and via electronic mail this 13th day of May 2025, as follows:

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