IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-ICA-84

Haughtland Resources, LLC,

Interested Party Below, Petitioner,

v.

SWN Production Company, LLC,

Applicant Below, Respondent.

REPLY BRIEF OF PETITIONER HAUGHTLAND RESOURCES, LLC

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SUMMARY OF THE ARGUMENT

As SWN acknowledges, an applicant under the Forced Pooling Act "must present evidence that it made a good faith attempt to obtain a lease or consent to pool prior to submitting an application for a pooled unit."[1] That SWN failed to satisfy this requirement is belied by the meager evidence that it now relies upon in a bid to paper over the OGCC's erroneous finding of good faith.

The only evidence SWN presented at the hearing is the Affidavit and testimony of its Landman, Monty Mayfield, and the table appended to the Affidavit listing communications with owners.[2] As discussed in Haughtland's opening brief, this evidence boils down to a list of three (3) dates on which SWN communicated unspecified offers to Haughtland,[3] and conclusory assertions by Mr. Mayfield that SWN acted in good faith. This is also the only evidence that the OGCC cites in its Order as a basis for finding that SWN made "multiple good faith offers."[4]

Presumably recognizing that no serious argument can be made that this evidence establishes good faith, SWN's response brief emphasizes that the record also contains some further information about the offers. Specifically, SWN relies upon communications attached to the Objection submitted by Haughtland which disclose the amounts of two (2) offers, namely an email offering $500.00 per acre on February 15, 2024,[5] and a letter offering $545.31 per acre on October 2, 2024.[6]

However, it is undisputed that the OGCC did not consider this evidence and, in any event, knowing the amount of an offer, without some basis to determine that it is consistent with market

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[1] SWN Brief at 3.
[2] (D.R.0225-234).
[3] The communications listed by SWN consist of an email on February 15, 2024, letter on October 2, 2024, and email to Haughtland's attorney on December 5, 2024. (*See* D.R.0234).
[4] Order at ¶ 7 (D.R.0006).
[5] (D.R.0439).
[6] (D.R.0397).

value, is not enough to find good faith within the meaning of the Act under any standard. Further, the February 2024 offer relates to Haughtland's interest in another unit, which is the subject of pending litigation. Despite relying on this offer, during the OGCC hearing SWN objected that evidence relating to its conduct in that other unit and circumstances surrounding the offer is irrelevant, and the OGCC rejected Haughtland's efforts to introduce such evidence.

Throughout its response brief, SWN attempts to side-steps these issues by claiming that because there is *some* evidence of the offers it made to Haughtland, the OGCC's finding of good faith is adequately supported by the record and entitled to great deference. However, SWN makes no effort to explain how the evidence demonstrates that the offers were made in good faith, or by what standard. And that is the fundamental question in this appeal — the proper interpretation and standard for enforcing the good-faith requirements of the Act. SWN never addresses this issue or, therefore, Haughtland's first assignment of error.

The record makes clear that the standard applied by the OGCC and now implicitly advocated by SWN, if any, allows an applicant to establish good faith under the Act merely by presenting evidence of the fact that it made offers and reciting that they were in good faith. That is no standard at all. This Court should reverse the OGCC's Order, or remand with instructions for the OGCC to apply an appropriate standard to enforce the good-faith provisions of the Act.

ARGUMENT

I. The Good Faith Requirement of the Act Must be Given Meaning and the Appropriate Standard is a Question of Law for this Court.

SWN entirely focuses its arguments on the evidence to pretend that this appeal turns on evidentiary determinations by the OGCC that should be afforded deference. However, the real issue here does not involve a dispute about the evidence contained in the record or relied upon by

the OGCC. Rather, the central question is whether the OGCC applied an appropriate standard to evaluate the evidence and find that SWN made good faith offers within the meaning of the Act.

That is a legal question involving statutory interpretation and application of the law to the evidence, which is reviewed *de novo*. *E.g.*, *Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 115-16, 705 S.E.2d 806, 812-13 (2010) ("[I]ssues pertaining to the construction and application of statutory law to the facts before us also are afforded a plenary review."); *Stemple v. W. Virginia Consol. Pub. Ret. Bd.*, 251 W. Va. 121, 909 S.E.2d 634, 637 (Ct. App. 2024). Therefore, regardless of whether this Court ultimately agrees that the OGCC erred in finding that SWN made good faith offers, the OGCC's interpretation and application of the good faith requirements of the Act to make that finding is not entitled to any deference.

Although SWN ignores the issue, it is fundamental that the explicit good-faith requirement enacted by the legislature must be given meaning, and implemented through some meaningful standard or criteria to determine whether the applicant has met its burden. *See Duff v. Kanawha Cnty. Comm'n*, 250 W. Va. 510, 516, 19, 905 S.E.2d 528, 534, 37 (2024). Currently, the standard applied by the OGCC, if any, is untenable and neuters the statutory requirements to the point that applicants like SWN expect a rubber stamp upon making mere recitations of good faith.

As detailed in Haughtland's opening brief, for the good-faith provisions of the Act to have real meaning and serve the purpose evidently intended by the legislature of promoting voluntary agreements and protecting owners, the OGCC's determinations must at least be based upon sufficient evidence to compare the terms of the offers made, against the prevailing market terms for similar interests. *See* Opening Brief at 15-20. SWN implicitly concedes that this is an

appropriate standard for the OGCC to apply in evaluating whether applicants made offers and negotiated in good faith, and does not contest the proposition or suggest any other standard.[7]

II. The Limited Evidence of Offers made by SWN is Insufficient to Support the OGCC's Finding of Good Faith Under any Standard.

Although SWN never addresses the standard for establishing good faith under the Act, it touts the email and letter attached to Haughtland's Objection disclosing the amounts offered as evidence providing the OGCC with "specific details of two of the three offers" sufficient to find good faith. SWN's reliance on this evidence is unavailing.

First and foremost, the OGCC did *not* consider the email or letter reflecting those offers. To the contrary, the OGCC's Order states only that its finding that "SWN made multiple good faith offers to Haughtland" was "[b]ased on the Affidavit of Leasing and Modification Efforts included in SWN's Application" and testimony of Mr. Mayfield. Order at ¶ 7 (D.R.0006). Thus, there is no basis for SWN's suggestion that the OGCC considered any evidence of the offers beyond that specifically cited in its Order — Mr. Mayfield's affidavit and testimony. The OGCC of course cannot rationally find an offer to be made in good faith without considering what was actually offered, which, according to its own Order, the OGCC did not do here.

Even if it could somehow be assumed that the OGCC did rely upon the amounts offered to Haughtland, that still does not establish a basis for finding good faith because there is no evidence of fair market value or from which the OGCC could otherwise have evaluated the offers. If anything, evidence of the offers serves only to demonstrate SWN's lack of good faith.

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[7] Though the statutes admittedly are not entirely similar, this standard for determining good faith under the Act is analogous to the duties imposed on insurers by West Virginia's Unfair Trade Practices Act. Thereunder, bad-faith claims may be brought against insurers who fail to "attempt[] in good faith to effectuate prompt, *fair and equitable* settlements of claims" or "provide a reasonable explanation" for a claim denial or settlement offer with a basis "*in relation to the facts* or applicable law." W.Va. Code § 33–11–4(9) (f), (n) (emphasis added). Similarly, the OGCC should not find that an applicant satisfied the good-faith requirements of the Act without evidence that the offers it made were fair and equitable in relation to the facts, most importantly that the offers approximate market value in a voluntary transaction.

SWN's offers of $500.00 and $545.31 per acre are barely half of the $998.78 SWN knew or should have known Haughtland would be entitled to under the Act for unitization consideration if force pooled. Making an offer for a deal at 50% of the amount that the other party will receive if the deal falls through is surely not evidence of good faith. SWN attempts to deflect this problem with an ill-conceived argument that the statutory formula for unitization compensation is "arbitrary" and not an appropriate measure of whether SWN's offers were in good faith. *See* SWN Brief at 13-14.

However, unitization compensation is directly tied to market conditions, namely 25% of bonuses paid in the exact same market (i.e., the unit that is subject to the application). In contrast, there is no evidence that SWN's offers were at all consistent with the market, and it does not even claim so. Further, if SWN believes that the market-based statutory formula is arbitrary, then what does that make its own offers? Thus, even accepting the faulty premise of SWN's argument that the statutory formula is not indicative of market value, the fact remains that there is no evidence to support a non-arbitrary finding that SWN's offers were made in good faith.

Additionally, SWN's February 15, 2024 offer of $500 per acre included Haughtland's interest in another unit — the Ballato 10H — which was and is the subject of pending litigation. Again, the OGCC did not consider the substance of this offer and had no basis to conclude that an offer of $500 per acre was a good faith offer.

Further, according to the positions previously taken by SWN and the OGCC, the OGCC could not have considered this offer because it included acreage in the Ballato Unit. *See* Opening Brief at 14, n. 4. When Haughtland sought to illicit testimony and present evidence about circumstances concerning the other unit covered by this offer, SWN objected that "it's not relevant

to what's before us." Transcript at 88:4-5; *see also id*. at 94:3-4 (D.R.0100, 106). The OGCC sided with SWN and refused to hear such evidence because it involved another unit.

For example, the OGCC's counsel and Chairman cut off Haughtland's questioning of Mr. Mayfield regarding SWN's failure to seek Haughtland's permission for its property to be included in the Ballato unit or apply for a pooling order before drilling, which is highly relevant to SWN's good faith or lack thereof:

> MR. JOHN GRAY: I've asked you to stick to the questions with regard to good faith with regard to this particular unit, not this —. And this is the same tract of ground, sir. This is literally like this well —. The other one that you keep wanting to harp on and to keep asking questions to, and to keep referring to is a voluntary unit that is not before this Commission, cannot be before this Commission, and for which this Commission has no authorization over.
>
> I've asked you to limit your questions to good faith with respect to the efforts on this unit and solely this unit. Unless somebody in the Commission disagrees.
>
> . . . .
>
> CHAIRMAN ALBERT: We're not going to litigate your Ballato case with SWN before this Commission. I've made that abundantly clear. Counsel's made that abundantly clear. So you can either move to ask him questions about good-faith negotiations simply on this unit before the Commission

Transcript, 109:12-23, 110:13-22 (D.R.0121-22). *See also* Transcript at 91:13-96:21, 106-110 (D.R.0103-8, 118-122).

Having refused to hear testimony about the circumstances that lead to this offer, there is no basis to conclude — as SWN now claims — that the OGCC considered the February 2024 offer at all, let alone that it reached a conclusion that this offer had a good faith basis. Furthermore, SWN's attempt to now rely on this offer in its response brief contradicts its previous position that evidence related to matters outside the Gourley Unit is irrelevant. And, even if the OGCC had considered this offer, it could not possibly make a reasoned finding of good faith without also considering context, including what the offer encompassed, why it was made, and whether it presented reasonable value under the circumstances.

Remarkably, SWN simultaneously acknowledges the various evidentiary deficiencies and attempts to dismiss them by arguing that the OGCC's finding should be afforded deference despite the absence of evidence. Specifically, SWN claims that because the OGCC's members have experience in the oil and gas industry, they could find good faith based solely on the amounts offered, *without considering any evidence* to assess the reasonableness of those sums against market value or any other metric. *See* SWN Brief at 14.

This line of argument is particularly disingenuous since, according to its own Order, the OGCC did not rely upon evidence reflecting the amounts offered by SWN. Moreover, there is no indication that any of the OGCC members possess expertise to know the relevant market value. Thus, there is no basis for SWN's suggestion that the OGCC considered the amounts of the offers at all, much less applied expertise to make a reasoned finding that they were made in good faith. To put it plainly, SWN is asking this Court to summarily affirm based on speculation that the OGCC *might* have applied some hypothetical expertise to evaluate evidence that it did not rely upon or even mention. That nonsensical contention should be rejected out of hand.

Even if this Court could properly join SWN in such speculation, the OGCC's Order still should not be affirmed because it does not reference any evidence providing details of the offers, much less explain how they provided a basis for finding good faith. The OGCC must support its decisions with adequate findings of fact and conclusions of law in accordance with the State Administrative Procedures Act. *See* W.Va. Code § 22C-9-10; § 29A-5-3. This requires "fully articulated bases for agency determinations, particularly where economic or scientific matters are at issue:"

> 'the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex, scientific, statistical, or economic evidence was evaluated.'

Modi v. W. Virginia Bd. of Med., 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995) (quoting Syl. Pt. 2, *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions*, 160 W.Va. 220, 233 S.E.2d 719 (1977)).

Further contrary to SWN's contention that this Court must defer to the OGCC's findings, a deferential standard of review applies only insofar as "'the decision is supported by substantial evidence or by a rational basis.'" *YMCA of Parkersburg v. W. Virginia Dep't of Health & Hum. Res.*, No. 22-ICA-54, 2023 WL 4838229, at *5 (W. Va. Ct. App. July 28, 2023) (quoting Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). This Court is "not required to 'rubber stamp' agency determinations'" and "must determine not just whether the decision is supported by 'substantial evidence,' but 'whether its findings and conclusions were adequately explained.'" *Id*. (quoting *Queen*, 196 W.Va. at 446-47).

The finding of good faith in the OGCC's Order fails to satisfy these standards in any respect, most especially if — as SWN speculates — it relied on the amounts offered to conduct some type of unstated and unexplained economic analysis.

At bottom, the record plainly reflects that the OGCC found good faith based only on the mere fact that three offers were made, and conclusory testimony from SWN's representative that they were made in good faith. That is not sufficient to satisfy the requirements of the Act under any conceivable standard. Nor can SWN back-fill the OGCC's unsupported finding with speculation that it relied upon evidence or hypothetical expertise that is nowhere mentioned in the Order.

III. It is the Province of this Court to Interpret and Clarify the Requirements of the Act for Good-Faith Offers and Negotiations.

SWN next attempts to forestall scrutiny by urging that the Court should simply decline to consider whether the OGCC's finding is consistent with the Act because a decision establishing any standard for satisfying the good-faith requirement would improperly "re-write" the statute and usurp the legislature. *See* SWN Brief at 15-17. This flies in the face of the Court's well-established authority to interpret statutes.

There is no question that the Act requires an applicant to present evidence that it negotiated and made offers in good faith, and the OGCC must dismiss the application unless it finds that the applicant satisfied this requirement. *See* W. Va. Code § 22C-9-7a (c)(4), § 22C-9-7a (e)(2). The OGCC has rule making authority and could adopt an appropriate standard for making that determination at any time, just as its counterparts in states with similar statutes have done. *See* Opening Brief at 19. Unfortunately, as this case demonstrates, the OGCC has neglected to do so.

Therefore, Haughtland asks this Court to clarify what the good-faith provisions of the Act mean, and the corresponding standard for applicants to demonstrate compliance. Contrary to SWN's dramatic claims, that does not involve any improper "re-writing" of the Act, adding words "that the legislature chose to omit," or promulgating rules on behalf of the OGCC. It is a routine matter of statutory interpretation to give meaning and effect to the express language of the Act, which is squarely within the purview of the Court. *E.g.*, *W. Virginia Hum. Rts. Comm'n v. Garretson*, 196 W. Va. 118, 125, 468 S.E.2d 733, 740 (1996) ("[I]t is the function of the courts finally and authoritatively to interpret what the law says.).

Courts across the country routinely determine the meaning of statutory provisions and fill gaps by adopting interpretive rules and analytical frameworks. As a particularly apt example, the Texas forced pooling statute does not define "fair and reasonable offer"; therefore, the Texas

Supreme Court supplied a definition to fill that statutory gap. *See* Opening Brief at 19 (citing *Carson v. R.R. Com. of Tex.*, 669 S.W.2d 315, 318 (Tex. 1984)). *See also Shepherdstown Volunteer Fire Dep't v. State ex rel. State of W. Virginia Hum. Rts. Comm'n*, 172 W. Va. 627, 637, 309 S.E.2d 342, 352 (1983) (adopting evidentiary standards applicable to discrimination actions under West Virginia Human Rights Act).

Here too, it is entirely proper for this Court to interpret the Act to determine what good faith offers and negotiations mean, and the appropriate standard for enforcing those requirements, as set forth above.

IV. The OGCC's Findings Regarding Haughtland's Lease Improperly Encompass Legal Issues that it Disclaimed Authority to Decide and Refused to Consider Evidence on.

Lastly, SWN presents a cursory argument that Haughtland's third assignment of error is without merit because the OGCC's Order does not contain conclusions of law concerning Haughtland's lease. SWN Brief at 18. However, SWN even acknowledges that the OGCC's Order does include several findings concerning the status of the lease, what interests it covers, and the rights granted under the lease. *See id*. at 17-18. Specifically, the OGCC's Order includes the following findings:

> 5. Haughtland is a successor lessor under an Oil and Gas Lease dated September 20, 2001 covering Tax Map/Parcel No. 04-CC23-0078-0000, a portion of which is included in the Unit and identified therein as Tract 75 (the "Haughtland Lease").
>
> 6. The Haughtland Lease does not grant the lessee thereunder rights to pool and unitize the target formation of the Unit.
>
> 9. The Gerald Gourley Southwest Unit includes only a portion of the tract of land that is owned by Haughtland and leased by SWN.
>
> 10. Haughtland and SWN are currently engaged in pending litigation concerning the Nick Ballato BRK 10H well that passes through a portion of the leasehold acreage that is located outside of the Gerald Gourley Southwest Unit. The Commission finds that the pending litigation between Haughtland and SWN does not prevent the Commission from entering a unitization order approving the Gerald Gourley Southwest Unit.

Order at ¶¶ 5, 6, 9, 10 (D.R.0006-7).

Yet, when Haughtland attempted to elicit testimony on this issue, the OGCC refused to hear the testimony, repeatedly shut down Haughtland's questioning of SWN's witnesses, and abruptly adjourned the hearing before Haughtland could present its case:

> 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). *See also id*. at 88:11-96:5, 104:8-105:15, 107:5-110:22, 115:21-118:14 (D.R.0100-108, 116-7, 119-22, 127-30).

SWN apparently seeks to minimize these defects by stating that "Haughtland was afforded the opportunity to question all of SWN's witnesses and to present evidence on its own behalf for the Commission to consider" SWN Brief at 7. That is simply untrue.

In addition to the OGCC's refusal to entertain evidence relating to the circumstances surrounding the Ballato unit that was the subject of SWN's February 2024 offer, Haughtland was not afforded the opportunity to fully cross-examine Mr. Mayfield, or to examine SWN's other witnesses at all, despite agreement at the beginning of the hearing that Haughtland would be permitted to do so. Transcript, 11:17-12:9 (D.R.0023-24). Instead, the OGCC abruptly adjourned the hearing after hurrying Haughtland's examination of Mr. Mayfield and indicating that it did not want to hear from Mr. Corwin. *See, e.g.*, Transcript, 105:9-19, 115:3-116:4 (D.R.0117, 127-28).

This highlights not only the impropriety of the OGCC's findings concerning Haughtland's lease, but also any reliance on the February offer by SWN or, ostensibly, the OGCC. The circumstances evidencing of SWN's lack of good faith in dealing with Haughtland with respect the portion of the same parcel in the Ballato Unit are highly relevant, and the OGCC's refusal to take evidence on SWN's actions outside the unit prejudices Haughtland. SWN cannot have it both ways by first objecting to Haughtland's introduction of evidence concerning the circumstances of February offer as irrelevant, while now touting the same offer as evidence of good faith.

CONCLUSION

SWN's response brief entirely fails to counter, or even substantively address, the arguments and evidence demonstrating the errors committed by the OGCC. Most fundamentally, SWN makes no effort to explain how the evidence supports the OGCC's finding of good faith under any standard. It does not and cannot.

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 under an appropriate standard as set forth above.

Respectfully submitted,

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Dated: June 27, 2025

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing REPLY 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 27th day of June 2025, as follows:

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