WEST VIRGINIA
OFFICE OF
ENERGY

MEMORANDUM

To: President Mitch Carmichael, Chair
Speaker Roger Hanshaw, Chair
Joint Committee on Government and Finance

cc: Mike Hall, Chief of Staff
C. Edward Gaunch, Cabinet Secretary, West Virginia Department of Commerce
Wesley White, Deputy Secretary, West Virginia Department of Commerce
Michael Graney, Executive Director, West Virginia Development Office

From: West Virginia Office of Energy

Date: July 9, 2019

Re: Quarterly Report Ending June 30, 2019
Legal Challenges Potentially Impacting the Energy Industry

As mandated by West Virginia Code §5B-2F-2(s), the following information presents legal challenges with the potential to impact the state's energy industry. This submission was prepared by Amy Smith, Steptoe & Johnson PLLC. Reports are submitted on a quarterly basis.

1900 Kanawha Boulevard East, Building 3 Suite 200, Charleston, West Virginia 25305-0311
Toll Free: (800) 982-3386 (304) 558-2234 Fax: (304) 558-1455

SECOND QUARTER 2019
REPORT TO THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE
PURSUANT TO WEST VIRGINIA CODE § 5B-2F-2(q)

On April 22, 2019, the West Virginia Supreme Court of Appeals affirmed decisions of the Public Service Commission, which approved a contract rate whereby an electric utility would continue paying the operator of a small electricity-generating plant $34.25 per megawatt-hour for avoided capacity costs until 2035, and allowed the utility to continue passing the expense on to its customers, in *Sierra Club v. Public Service Commission of West Virginia*, 827 S.E.2d 224 (W. Va. 2019). The Court held as follows:

> Under West Virginia Code of State Rules § 150-3-12.6 (2018), also known as Rule 12.6 of the Public Service Commission's "Rules for the Government of Electric Utilities," before a traditional electric utility may pass on to its retail customers the rates it is paying to a qualifying facility because of an electric energy purchase agreement, the Commission may require the utility to show the rates are just and reasonable to the utility's customers, in the public interest, and do not exceed the utility's avoided costs. This is permitted regardless of whether the agreement with the qualifying facility was reached voluntarily or was compelled by the Commission.

Id. at Syl. Pt. 3.

On April 29, 2019, the West Virginia Supreme Court of Appeals affirmed the circuit court's order affirming the Board of Equalization and Review's determination that the petitioners' coal interests were properly valued and assessed in *Murray Energy Corporation v. Steager*, 827 S.E.2d 417 (W. Va. 2019). The Court held in Syllabus Point 7 that "[t]he methodology of calculating and use of the annual average Steam Coal Price Per Ton and coal seam thickness averages for *ad valorem* tax valuation purposes, as set forth in West Virginia Code of State Rules § 110-11-1 *et seq.* (2006), does not violate the requirement contained in West Virginia Code § 11-6K-1(a) (2010) that natural resources property be assessed based upon its 'true and actual value.'" The Court further held in Syllabus Point 10 that "[t]he valuation methodology contained in West Virginia Code of State Rules § 110-11-1 *et seq.* (2006) for the calculation and use of an average Steam Coal Price Per Ton and average coal seam thickness does not violate the equality provision of West Virginia Constitution Article X, Section 1 or the equal protection provisions of the West Virginia and United States Constitutions."

On June 5, 2019, the West Virginia Supreme Court of Appeals affirmed in part, reversed in part, and remanded the circuit court's orders reversing various Boards of Assessment Appeals and rejecting the West Virginia State Tax Department's valuation of the respondents' gas wells for *ad valorem* tax purposes in *Steager v. Consol Energy, Inc.*, No. 18-0121 (Lead Case), 2019 WL 2414962 (W. Va. June 5, 2019). The Court held in Syllabus Point 8 that "West Virginia Code of State Rules § 110-1J-4.3 (2005) does not permit the imposition of a 'not to exceed' limitation on the operating expense deduction authorized thereunder and use of such limitation along with a percentage deduction violates the 'equal and uniform' requirement of West Virginia Constitution Article X, Section 1, as well as the equal protection provisions of the West Virginia

and United States Constitutions." The Court further held in Syllabus Point 12 that "the provisions contained in West Virginia Code of State Rules §§ 110-1J-4.1 and 110-1J-4.3 (2005) for a deduction of the average annual industry operating expense requires the use of a singular monetary average deduction."

Also on June 5, 2019, the West Virginia Supreme Court of Appeals affirmed the circuit court's entry of final judgment for property owners on their trespass claims in *EQT Production Company v. Crowder*, No. 17-0968, 2019 WL 2414728 (W. Va. June 5, 2019). The Court held:

> A mineral owner or lessee has an implied right to use the surface of a tract in any way reasonable and necessary to the development of minerals underlying the tract. However, a mineral owner or lessee does not have the right to use the surface to benefit mining or drilling operations on other lands, in the absence of an express agreement with the surface owner permitting those operations.

Id. at Syl. Pt. 5.