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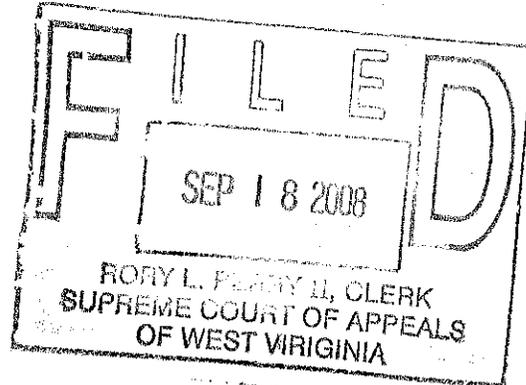
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
ON THE EMERGENCY PETITION FOR WRIT OF PROHIBITION
FROM AN ORDER OF THE CIRCUIT COURT OF BROOKE COUNTY,
CIVIL ACTION NO. 08-C-160**

**CENTRAL WEST VIRGINIA ENERGY
COMPANY**

**Petitioner and
Defendant below,**

v.

**THE HONORABLE RONALD E. WILSON,
JUDGE OF THE CIRCUIT COURT OF
BROOKE COUNTY, WEST VIRGINIA, and
MOUNTAIN STATE CARBON, LLC**



Respondents.

EMERGENCY PETITION FOR WRIT OF PROHIBITION

**James A. Walls (W. Va. State Bar No. 5175)
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No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

**CENTRAL WEST VIRGINIA ENERGY
COMPANY**

**Petitioner and
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v.

Civil Action No. 08-C-160

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Respondents.

EMERGENCY PETITION FOR WRIT OF PROHIBITION

Pursuant to West Virginia Code § 53-1-1 and Rule 14 of the West Virginia Rules of Appellate Procedure, Central West Virginia Energy Company ("Petitioner") hereby petitions for an emergency writ prohibiting the enforcement of numbered Paragraphs three through seven of an Order entered on September 17, 2008, in the underlying proceeding (the "September 17 Order"). The rulings reflected in Paragraphs three through seven of the September 17 Order improperly grant injunctive relief and adjudicate ultimate and dispositive issues in the underlying proceeding. The Circuit Court of Brooke County did not have jurisdiction to make the rulings reflected in Paragraphs three through seven of the September 17 Order, or exceeded its legitimate powers in making said rulings. The damage that will be caused by enforcement of

Paragraphs three through seven as to the Petitioner is immediate and not correctable on appeal, and Petitioner has no other adequate means to obtain the relief requested in this Petition.

In further support of its Petition, Petitioner hereby adopts and incorporates by reference its Memorandum in Support of Writ of Prohibition.

WHEREFORE, Petitioner Central West Virginia Energy Company prays that this Honorable Court:

1. Order Respondent Mountain State Carbon, LLC to show cause why the Writ should not be granted;
2. Issue a Writ of Prohibition enjoining the Circuit Court of Brooke County, West Virginia from enforcing Paragraphs three through seven of its September 17, 2008 Order;
3. Order the Circuit Court of Brooke County, West Virginia to vacate Paragraphs three through seven its September 17, 2008 Order; and
4. Grant such other and further relief as the Court deems appropriate under the circumstances.

CENTRAL WEST VIRGINIA ENERGY
COMPANY

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Respondents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petitioner Central West Virginia Energy Company's Emergency Petition for Writ of Prohibition was served upon the Respondents by United States mail, postage prepaid, this 18th day of September, 2008, as follows:

The Honorable Ronald E. Wilson
Judge, 1st Judicial Circuit
Brooke County Courthouse
632 Main Street
P.O. Box 474
Wellsburg, WV 26070

David B. Cross
727 Charles Street
Wellsburg, WV 26070
Brooke County
Prosecuting Attorney's Office
and
Counsel for Respondent,
Mountain State Carbon

and

David B. Fawcett
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Mountain State Carbon

James A. Walls/by gph's

James A. Walls

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
ON THE EMERGENCY PETITION FOR WRIT OF PROHIBITION
FROM AN ORDER OF THE CIRCUIT COURT OF BROOKE COUNTY,
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**CENTRAL WEST VIRGINIA ENERGY
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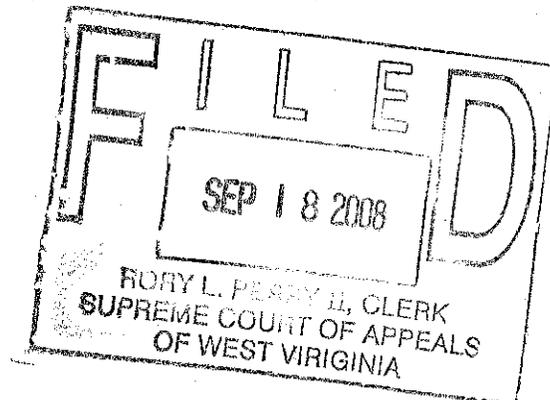
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**THE HONORABLE RONALD E. WILSON,
JUDGE OF THE CIRCUIT COURT OF
BROOKE COUNTY, WEST VIRGINIA, and
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Respondents.

**MEMORANDUM IN SUPPORT OF
EMERGENCY PETITION FOR WRIT OF PROHIBITION**

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**CENTRAL WEST VIRGINIA
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Civil Action No. 08-C-160

**THE HONORABLE RONALD E. WILSON,
JUDGE OF THE CIRCUIT COURT OF
BROOKE COUNTY, WEST VIRGINIA, and
MOUNTAIN STATE CARBON, LLC**

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF
EMERGENCY PETITION FOR WRIT OF PROHIBITION**

Preliminary Statement

Pursuant to West Virginia Code § 53-1-1 and Rule 14 of the West Virginia Rules of Appellate Procedure, Petitioner Central West Virginia Energy Company ("Petitioner") respectfully requests that this Honorable Court issue a rule to show cause in prohibition and grant a writ of prohibition against the Honorable Ronald E. Wilson, Judge of the Circuit Court of Brooke County, West Virginia, prohibiting enforcement of numbered Paragraphs three through seven of the Order on Plaintiff's Motion for Limited Expedited Discovery entered on September 17, 2008, in *Mountain State Carbon, LLC v. Central West Virginia Energy Company*, Civil Action No. 08-C-160. (A true and correct copy of the September 17, 2008 Order on Plaintiff's

Motion for Limited Expedited Discovery may be found at Exhibit 1 of Petitioner's Appendix of Exhibits.)

On September 2, 2008, six days after Respondent Mountain State's Verified Complaint was filed, Petitioner and Respondent Mountain State appeared before the Circuit Court, with no court reporter present, to address Respondent Mountain State's Motion for Expedited Discovery. No testimony was heard and no evidence was taken. On September 17, 2008, the Circuit Court entered an Order granting injunctive relief against the Petitioner. The September 17 Order grants relief which is largely dispositive of every material issue in the case and, in some circumstances, exceeds the relief requested by Respondent Mountain State.

In particular, the September 17 Order requires Petitioner to deliver between 112,500 and 136,000 tons of coal per month to Respondent Mountain State, even though Petitioner's delivery obligations were not at issue before the Circuit Court and Respondent Mountain State's Verified Complaint only seeks the delivery of 112,500 tons per month. In addition, the September 17 Order requires Petitioner to deliver such coal to Respondent Mountain State "until it meets its coal supply commitment," to make-up its "delivery shortfall," and "when available," issues which were not before the Circuit Court. This mandatory injunctive relief determines material, dispositive matters at issue in this case. The Circuit Court granted this relief less than three weeks after Respondent Mountain State filed its Verified Complaint, without noticing or holding a hearing for this relief, before Petitioner was permitted to respond to the Verified Complaint or other dispositive and injunctive issues, and without conducting a proper analysis or issuing a proper order under the statutes and rules. The only hearing conducted by the Circuit Court was on Respondent Mountain State's Motion for Expedited Discovery. Ironically, such motion was made to obtain expedited discovery to prepare for a hearing on these issues. Because the Circuit

Court exceeded its jurisdiction and clearly erred as a matter of law, this Court should grant a Writ of Prohibition.

Statement of the Case

Petitioner and Respondent Mountain State are parties to a long-term Coal Supply Agreement under which Petitioner supplies Respondent Mountain State with its high volatile metallurgical coal requirements.¹ The Coal Supply Agreement contains a broad *force majeure* provision which excuses performance by the parties if events occur beyond their control, such as floods, fires, or railcar shortages, among others.

On August 27, 2008, Respondent filed a Verified Complaint against Petitioner, alleging that Petitioner breached the Coal Supply Agreement by failing to ship the required amount of high volatile metallurgical coal. (A true and correct copy of the Respondent's Verified Complaint is marked as Exhibit 2 in Petitioner's Appendix of Exhibits.) Respondent's Verified Complaint seeks, among other things, an order requiring Petitioner to specifically perform its obligations under the Coal Supply Agreement by delivering to Respondent Mountain State:

- (1) 112,500 tons of high volatile metallurgical coal, to be delivered immediately, in order to rebuild its inventory, and
- (2) 112,500 tons of high volatile metallurgical coal per month, in equal weekly installments, in accordance with the Coal Supply Agreement until the agreement expires in November 2010.

¹ Petitioner initially entered into the Coal Supply Agreement with non-party Wheeling Pittsburgh Steel Corporation ("Wheeling Pitt") in November 1993. In 2002, the parties extended the term of the Coal Supply Agreement to November, 2010. On September 29, 2005, Wheeling Pitt assigned its interest in the Coal Supply Agreement to Respondent Mountain State. The Coal Supply Agreement requires Respondent Mountain State to, among other things, provide notice annually and quarterly of its high volatile metallurgical coal requirements. (Cpl Ex. A. at p. 2.)

On Friday, August 29, 2008, Respondent Mountain State filed a Motion for Preliminary Injunction ("Injunction Motion") and supporting brief, a Motion for Limited Expedited Discovery ("Discovery Motion"), and a Motion for Order of Court Directing Preservation of Documents, Software and Things. (True and correct copies of the Respondent's Motion for Preliminary Injunction and Motion for Limited Expedited Discovery, without exhibits thereto, are marked as Exhibits 3 and 4 respectively in Petitioner's Appendix of Exhibits.) In the Injunction Motion, Respondent Mountain State seeks the following injunctive relief:

- (1) Requiring Petitioner to deliver 112,500 tons of high volatile metallurgical grade coal to Respondent Mountain State within 30 days;
- (2) Requiring Petitioner to deliver 112,500 tons of high volatile metallurgical grade coal to Respondent Mountain State in equal weekly installments;
- (3) Requiring Petitioner to deliver to the Court a list of contracts that it or its affiliates has which involve the sale of high volatile metallurgical coal;
- (4) Requiring Petitioner to seek leave of Court before it or its affiliates enter into contracts for the sale of high volatile metallurgical coal;
- (5) Requiring Petitioner to seek leave of Court before it or its affiliates extend any existing contracts for the sale of high volatile metallurgical coal; and
- (6) Requiring Petitioner to seek leave of Court before it or its affiliates enter into contracts for the sale of high volatile metallurgical coal which will be transported on a rail line used to transport coal to Respondent.

Petitioner has not filed a response to the Injunction Motion. No hearing has been scheduled on the Injunction Motion. In fact, Respondent Mountain State has not even requested a hearing on its Injunction Motion.

Late in the afternoon on Friday, August 29, 2008, the Circuit Court entered an Order scheduling a hearing on the Discovery Motion for Tuesday, September 2, 2008, at 1:00 p.m. (Monday, September 1, 2008, was Labor Day) (A true and correct copy of the Circuit Court's Order of August 29, 2008 is marked as Exhibit 5 in Petitioner's Appendix of Exhibits.) In its Discovery Motion, Respondent Mountain State sought an Order requiring Petitioner to respond to document requests and interrogatories and produce an individual for a deposition in an expedited manner (for example, Respondent Mountain State wanted to depose the Petitioner's Vice President on or before Friday, September 5, 2008, long before Petitioner was required to respond to the Verified Complaint). Respondent Mountain State asserted in its Discovery Motion that it needed the expedited discovery to adequately prepare for the injunction hearing. (Discovery Motion ¶ 3.)

The Circuit Court convened at 1:00 p.m. on Tuesday, September 2, 2008, to take up the Discovery Motion only. No court reporter was present. Prior to the hearing, Petitioner served and filed its Opposition to the Discovery Motion, arguing that there were no grounds for expedited discovery and that the discovery sought was not relevant to the issues necessary to consider injunctive relief. The Circuit Court initially ordered the parties to meet and confer on Respondent's discovery, which was unsuccessful.

The Circuit Court subsequently heard argument on the Discovery Motion. Neither party presented witnesses or evidence. Neither party argued for or against injunctive relief. The Circuit Court did not inquire as to the likelihood of irreparable harm to Respondent Mountain State, the likelihood of Respondent Mountain State's success on the merits, the harm to Petitioner if injunctive relief were granted, or the public interest. The Circuit Court did not conduct a balance of the hardships analysis or inquire as to any other matters pertinent to

injunctive relief, such as the amount of a bond necessary to secure injunctive relief. The Circuit Court inquired as to the status of the business relationship between the parties and the plans for deliveries in the upcoming months. Respondent Mountain State informed the Circuit Court that the amount of coal it currently required was 112,500 tons per month. Petitioner informed the Circuit Court that it intended to ship 112,500 tons to Respondent Mountain State in September and October, subject to events beyond its control.

At the end of the hearing, the Circuit Court issued an Order from the bench requiring Petitioner to respond to Respondent Mountain State's document requests by September 22, 2008, and denying Respondent Mountain State's request for expedited interrogatories and a deposition. The Circuit Court directed Petitioner to draft the Order. The Circuit Court also directed Petitioner to include in the Order a provision requiring Petitioner to ship 112,500 tons of coal to Respondent Mountain State in September and October 2008, requiring Petitioner to contact the Circuit Court if railcar issues arise preventing the shipment of coal to Respondent Mountain State, and if such issues occur, requiring Petitioner to provide to the Circuit Court all documents evidencing steps taken by Petitioner to resolve the railcar issue.

On September 5, 2008, Petitioner submitted a draft Order to the Circuit Court, incorporating the matters directed by the Court to be included in the Order. On September 11, 2008, Respondent Mountain State submitted a letter to the Circuit Court objecting to the draft Order submitted by Petitioner and including a competing proposed Order. Respondent Mountain State's proposed order had, for the first time ever before the Circuit Court, a provision requiring Petitioner to ship 136,000 tons of coal per month in September and October. Neither the Verified Complaint nor Injunction Motion seeks the delivery of 136,000 tons per month.

On September 17, 2008, the Circuit Court entered its Order on Respondent's Motion for Limited Expedited Discovery ("the September 17 Order"). The September 17 Order accurately recites the fact that the Circuit Court held a hearing on Respondent's Motion for Limited Expedited Discovery. It also reflects that Respondent Mountain State's request for expedited document requests was granted, in part, but that the request for expedited interrogatories and deposition were denied. However, the September 17 Order goes on to make dispositive and material determinations and grant injunctive relief by ordering the following in numbered Paragraphs three through seven:

3. In order to ensure that [Respondent Mountain State] receives sufficient high volatile metallurgical coal to operate its coke plant in Follansbee, West Virginia, [Petitioner] will each and every month direct the shipment to [Respondent Mountain State] of at least 112,500 tons of high volatile metallurgical coal and will, when available, increase that delivery up to 136,000 tons of said coal each month until it meets its coal supply commitment to [Respondent Mountain State] as set forth in the parties' Coal Supply Agreement;
4. Defendant may not deliver high volatile metallurgical coal to any other party in any month in which it cannot fulfill its contractual obligation to [Respondent Mountain State] and until it has satisfied the "delivery shortfalls" that have occurred during its "Coal Supply Agreement" with [Respondent Mountain State];
5. If [Petitioner] alleges that its rail service provider cannot provide sufficient railcars to transport coal to [Respondent Mountain State], [Petitioner] shall instruct the rail service provider that it must prioritize deliveries to [Respondent Mountain State];
6. The Court is to receive copies of all correspondence between CSX Transportation and [Respondent Mountain State] that relate in any manner to rail car shortages and the delivery of coal to [Respondent Mountain State] from [Petitioner]; and

7. If Defendant Mountain State² knows, or should know by reasonable inquiry, of any railcar shortages caused because of increased transportation of coal from Massey Energy Company or any of its subsidiaries, it is ORDERED to immediately provide that information to Circuit Court.

The September 17 Order determines the following dispositive and material issues in the case:

Requiring Petitioner to Deliver Specific Amounts of Coal. Respondent Mountain State's Verified Complaint and Injunction Motion seek to compel Petitioner to deliver 112,500 tons of coal per month. Petitioner alleges that it is not required to deliver 112,500 tons per month. The Circuit Court took no evidence and heard no testimony concerning the amount of coal Petitioner is required to deliver under the Coal Supply Agreement, yet the September 17 Order requires Petitioner to deliver between 112,500 and 136,000 tons per month.

Requiring Petitioner to Make Monthly Deliveries. Respondent Mountain State alleges that the Coal Supply Agreement requires quarterly deliveries; Petitioner alleges that the course of performance between the parties requires monthly deliveries. The Circuit Court took no evidence and heard no testimony concerning the parties' course of performance or the frequency of deliveries Petitioner is required to make under the Coal Supply Agreement, yet the September 17 Order requires Petitioner to make monthly deliveries.

Requiring Petitioner to Deliver Excess Coal. Respondent Mountain State alleges that the *force majeure* events suffered by Petitioner do not excuse Petitioner's performance. Petitioner alleges that, as a basic matter of contract law, *force majeure* excuses the so called "shortfalls" in deliveries. The Circuit Court took no evidence and heard no testimony concerning the *force majeure* events prohibiting deliveries, yet the September 17 Order requires Petitioner to deliver coal "until it meets its coal supply commitment," to make-up its "delivery shortfall," and "when

² The September 17 Order specifically states "Defendant Mountain State." Defendant is Petitioner, Central West Virginia Energy Company. Mountain State Carbon, LLC is the plaintiff.

available.” These are material and dispositive issues that go to the foundation of the dispute between the parties.

This Court should grant a Writ of Prohibition because the Circuit Court exceeded its legitimate powers in resolving dispositive issues of material fact and law and granting injunctive relief without noticing or holding a hearing on these issues, because Petitioner was not permitted to respond to these issues, and because the Circuit Court did not conduct a proper analysis or issue a proper order on these issues.

Reasons for Issuing the Writ

A writ of prohibition lies as a matter of right whenever an inferior court (a) does not have jurisdiction or (b) it exceeds its legitimate powers when it does have jurisdiction. W. Va. Code § 53-1-1. Where a petition contends that the lower court exceeded its legitimate powers, this Court will examine the following five factors to determine whether to issue a writ:

- (i) Whether the petitioner has no other adequate means, such as a direct appeal, to obtain the desired relief;
- (ii) Whether the petitioner will be damaged or prejudiced in a way that is not correctable by appeal;
- (iii) Whether the lower court’s order is clearly erroneous as a matter of law;
- (iv) Whether the lower court’s order is an often repeated error or manifests persistent disregard for either procedural or substantive law; and
- (v) Whether the lower court’s order raises new and important problems or issues of law of first impression.

Syl. pt. 4, State ex rel. Hoover v. Burger, 199 W.Va. 12, 483 S.E.2d 12 (1996). These factors are general guidelines that serve as a useful starting point for determining whether a writ of

prohibition should issue. The third factor, the existence of clear error as a matter of law, should be given substantial weight, and all five factors need not be satisfied. Id.; Syl. pt 2, State ex rel. State Road Commission v Taylor, 151 W.Va. 535, 153 S.E.2d 531 (1967)(“Although a court has jurisdiction of the subject matter in controversy and of the parties, if it clearly appears that in the conduct of the case it has exceeded its legitimate powers with respect to some pertinent question a writ of prohibition will lie to prevent such abuse of power.”)

Point I
The Circuit Court Lacked Jurisdiction to Issue Injunctive Relief

This Court has previously held that a party seeking relief must follow the procedural requirements proscribed before a circuit court’s jurisdiction to entertain a request for such relief will be triggered. In the absence of such compliance, relief should not be granted by the circuit court, and any orders improvidently issued by the circuit court are void and subject to a writ of prohibition to block enforcement. See State ex rel. TermNet Merchant Services, Inc. v. Jordan, 217 W.Va. 696, 619 S.E.2d 209 (2005) (court lacked jurisdiction to compel discovery and to impose sanctions when statutory procedures overlooked); State ex rel. Smith v. Thornsbury, 214 W.Va. 228, 588 S.E.2d 217 (2003) (circuit court lacked jurisdiction to issue temporary restraining order based on employer’s failure to exhaust administrative remedies); and Mangus v. McCarty, 188 W.Va. 563, 425 S.E.2d 239 (1992) (failure of probation officers to follow procedures notifying defendant of probation violations resulted in court lacking jurisdiction to revoke probation). Thus, in order for the Circuit Court to assume jurisdiction regarding the injunctive relief sought by Respondent Mountain State, Respondent Mountain State must prove compliance with the proper procedures for requesting such relief, which it cannot do.

Rule 65 of the West Virginia Rules of Civil Procedure sets forth the procedures for seeking injunctive relief that must be followed in order to trigger a court's jurisdiction to entertain the same. Specifically, the Rule dictates that "(n)o preliminary injunction shall be issued without notice to the adverse party." W.Va.R.Civ.P. 65(a)(1). In syllabus point 3 of State ex rel. E.I. Dupont De Nemours and Co.v. Hill, 214 W.Va. 760, 591 S.E.2d 318 (2003), this Court clarified this notice requirement.

Pursuant to West Virginia Rule of Civil Procedure 65(a)(1), no preliminary injunction shall issue without notice to the adverse party. A preliminary injunction which is ordered without notice to the adverse party is void. Notice necessarily implies that the opposing party be provided a fair opportunity to oppose the application and to prepare for such opposition.

Id. In the Dupont case, notice was given to the parties that two motions would be addressed at a hearing before the circuit court, specifically a motion for partial summary judgment and a motion for sanctions. Id. at 321, 763. Despite that fact, the circuit court in Dupont granted the plaintiffs injunctive relief upon an oral motion for the same. On appeal, this Court found that the defendants had not been afforded sufficient opportunity to prepare an opposition to the preliminary injunction, and thus the circuit court's actions in granting injunctive relief were erroneous. The facts of the case at bar are strikingly similar to those in Dupont, and thus warrant this Court's intervention to prevent enforcement of the September 17 Order.

On August 27, 2008, Respondent Mountain State filed its Verified Complaint in which it asserted claims against the Petitioner for breach of contract and breach of implied duty of good faith and fair dealing. On August 29, 2008, Respondent Mountain State filed its Discovery Motion, its Injunction Motion, and a Motion for Order of Court Directing Preservation of Documents, Software and Things. In Paragraph 3 of its Discovery Motion, Respondent

Mountain State specifically stated that the purpose of the motion was to allow the parties to engage in discovery "(i)n order to fully and adequately prepare for the preliminary injunction hearing . . . before the date of such hearing." (emphasis added) (Exh. 4, ¶3). To that end, the hearing on September 2, 2008 was noticed by the Circuit Court as addressing only the Discovery Motion. Relying upon the clear language in Respondent Mountain State's Discovery Motion indicating that the preliminary injunction would be addressed on a future date and the Order of the Circuit Court limiting the issue to be addressed at the September 2, 2008 hearing to the Discovery Motion, the Petitioner prepared a response only to the Discovery Motion. As the procedural prerequisites for notice prior to the issuance of a preliminary injunction were clearly not met in this case, and no efforts were made by Respondent Mountain State of the Circuit Court to treat the issue as a request for a temporary restraining order³, the Circuit Court had no jurisdiction to grant the relief set forth in Paragraphs three through seven of the September 17 Order.

Despite this clearly defined limitation on the subject matter before the Circuit Court on September 2, 2008,⁴ Paragraphs three through seven of the September 17 Order not only award injunctive relief, but adjudicate several of the ultimate issues in the case by interpreting and adding terms to the contract at issue. As this Court has previously established, "(i)t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties

³ Rule 65 (b) provides the procedure for seeking a temporary restraining order, which may be granted without written or oral notice to the adverse party or that party's attorney only if "(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required." W.V.R.C.P. 65(b). None of these requirements were met by Respondent Mountain State. Moreover, the September 17 Order contains none of the required findings, including why such measures are necessary and what irreparable harm would result in the absence of such measures, and why the Circuit Court felt that no notice to the Petitioner was necessary under the circumstances. *Id.*

⁴ The apparent intention of the Circuit Court to limit the issues that should have been addressed to those involving early discovery is underscored by the fact that the court did not even have a court reporter present at the September 2, 2008.

as expressed in unambiguous language in their written contract or to make a new or different contract for them.” Syl. pt. 2, Bennett v. Dove, 166 W.Va. 772, 277 S.E.2d 617 (1981), citing Cotiga Development Co. v. United Fuel Gas Co., 147 W.Va. 484, 128 S.E.2d 626 (1962). The provisions in the September 17, 2008 Order requiring the Petitioner to ship specific quantities and qualities of coal to Respondent Mountain State, in restraining the Petitioner’s right to contract with non-parties to this suit, and in dictating the manner in which Petitioner shall conduct its business with non-parties such as rail service providers are clearly erroneous as a matter of law.

The Petitioner was afforded no notice of a hearing on Respondent Mountain State’s Injunction Motion, and had no meaningful opportunity to prepare to defend against the Motion. As was the case in Dupont, the Circuit Court lacked jurisdiction to take up the issue of a preliminary injunction, and thus Paragraphs three through seven of the September 17 Order cannot stand. Likewise, Paragraphs three through seven of the September 17 Order exceed the Circuit Court’s legitimate authority and constitute a clear error of law in *sua sponte* providing both extraordinary relief to Respondent Mountain State and adjudicating ultimate issues in this case, thus entitling Petitioner to a writ of prohibition as requested herein.

Point II

The September 17 Order Erroneously Grants Injunctive Relief

The September 17 Order is clearly erroneous as a matter of law. Rule 52 of the West Virginia Rules of Civil Procedure requires that in granting injunctive relief, a court must issue findings of fact and conclusions of law which constitute the grounds for its action. W.Va.R.Civ.P. 52(a). Furthermore, an order granting injunctive relief must (1) set forth the reasons for its issuance, (2) be specific in terms, and (3) describe in reasonable detail, and not by

reference to the complaint or other document, the acts or acts sought to be restrained. W.Va.R.Civ.P. 65(d).

The West Virginia Code also provides that an order of injunction is of no legal effect under unless the court requires a bond, or recites in the order that no bond is required for good cause. W. Va. Code § 53-5-9; Kessel v. Leavitt, 204 W.Va. 95, 160, 511 S.E.2d 720, 785 (1998) (quoting Syl. Pt. 4, Meyers v. Washington Heights Land Co., 107 W.Va. 632[, 149 S.E. 819 (1929)].” Syl. pt. 7, Hall v. McLuckey, 134 W.Va. 595, 60 S.E.2d 280 (1950)).

Finally, this Court has held that a lower court is required to utilize the “balance of hardship” test to determine whether to grant injunctive relief. Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass’n, 183 W.Va 15, 29-31, 393 S.E.2d 653, 662 (1990). Under the “balance of hardship” test, a court must consider the likelihood of irreparable harm to the plaintiff without the injunction; the likelihood of harm to the defendant with an injunction; the plaintiff’s likelihood of success on the merits; and the public interest. Id. (quoting Merrill Lynch, Pierce, Fenner & Smith v. Bradley, 756 F.2d 1048, 1054 (4th Cir. 1985)). The purpose of an injunction is to preserve the “status quo” of the parties pending final outcome, not to render final relief. Kessel v. Leavitt, 204 W.Va. 95, 151, 511 S.E.2d 720, 776 (1998). Injunctive relief is a harsh remedial process, used only in cases of great necessity and not looked upon with favor by the courts. Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass’n, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990). Furthermore, injunctive relief, like other equitable or extraordinary relief, is inappropriate when there is an adequate remedy at law. Hechler v. Casey, 175 W.Va. 434, 440, 333 S.E.2d 799, 805 (1985).

Paragraphs three through seven of the September 17 Order clearly provide for mandatory injunctive relief against Petitioner. The September 17 Order requires Petitioner to deliver

112,500 tons, and “when available,” 136,000 tons to Respondent Mountain State, to deliver “its coal supply commitment,” to satisfy its “delivery shortfalls,” and prohibits Petitioner from delivering coal to other parties (Exh. 1 ¶¶ 3 and 4); requires Petitioner to deliver to the Circuit Court information about transportation shortages and coal deliveries by non-parties (Exh. 1 ¶¶ 6 and 7); and requires Petitioner to direct the conduct of a non-party (Exh. 1 ¶ 5).

On its face, the September 17 Order summarily fails to satisfy the procedural and statutory requirements for issuing injunctive relief. It contains no findings of fact or conclusions of law supporting the relief provided as required by Rule 52 of the West Virginia Rules of Civil Procedure. It also fails to discuss whether a bond is necessary as required by the West Virginia Code.

Moreover, the September 17 Order fails the mandates of Rule 65(d). The Order does not contain reasons for its issuance and it is not specific. For example, it requires Petitioner to increase its deliveries up to 136,000 tons “when available.” Whether coal is available is a significant and material issue in dispute in the action. Petitioner alleges that a failure to receive sufficient railcars from a third party to ship its coal excuses its performance to the extent such railcars were unavailable. Respondent Mountain State alleges that the lack of rail service does not excuse performance. Whether coal is “available” is not adequate language for an injunction order.

Similarly, the September 17 Order requires Petitioner to deliver coal “until it meets its coal supply commitment” in the Coal Supply Agreement and to satisfy its “delivery shortfall.” Once again, the central issue in dispute in the underlying action is the amount of the coal supply commitment and whether there is a delivery shortfall or an excused performance. The September 17 Order fails the Rule 65 precision requirements for issuing injunctive relief.

In addition to the reasons mentioned above, the September 17 Order is erroneous as a matter of law because the Circuit Court failed to conduct a balance of the hardships in granting the relief. Petitioner was not permitted to respond to the Verified Complaint, file a motion opposing the Injunction Motion, obtain or submit evidence as to the issues relevant to granting injunctive relief, or present to the Circuit Court the likelihood of harm imposed upon it as a result of the injunctive relief granted. In fact, the Circuit Court did not even discuss or consider the issues necessary to conduct the proper analysis in issuing injunctive relief.

Conclusion

The Circuit Court exceeded its authority by granting injunctive relief adjudicating ultimate issues in the case. Petitioner will suffer irreparable harm and damage unless the Circuit Court is enjoined from enforcing numbered Paragraphs three through seven of its September 17 Order; the damage that will be caused to Petitioner is not correctable on appeal; and Petitioner has no other adequate means to obtain the relief requested.

Prayer for Relief

WHEREFORE, Petitioner Central West Virginia Energy Company prays that this Honorable Court:

1. Order the Respondent Mountain State Carbon, LLC to show cause why the Writ should not be granted;
2. Issue a Writ of Prohibition enjoining the Circuit Court of Brooke County, West Virginia, from enforcing Paragraphs three through seven of its September 17, 2008 Order;

3. Order the Circuit Court of Brooke County, West Virginia to vacate Paragraphs three through seven of its September 17, 2008 Order; and

4. Grant such other and further relief as the Court deems appropriate under the circumstances.

Respectfully submitted this 18th day of September, 2008.

CENTRAL WEST VIRGINIA ENERGY COMPANY

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No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

**CENTRAL WEST VIRGINIA ENERGY
COMPANY**

**Petitioner and
Defendant below,**

v.

Civil Action No. 08-C-160

**THE HONORABLE RONALD E. WILSON,
JUDGE OF THE CIRCUIT COURT OF
BROOKE COUNTY, WEST VIRGINIA, and
MOUNTAIN STATE CARBON, LLC**

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petitioner Central West Virginia Energy Company's Memorandum in Support of Emergency Petition for Writ of Prohibition was served upon the Respondents by United States mail, postage prepaid, this 18th day of September, 2008, as follows:

The Honorable Ronald E. Wilson
Judge, 1st Judicial Circuit
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Wellsburg, WV 26070

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