

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
Longview Power, LLC, <i>et al.</i> ,)	Case No. 13-12211 (BLS)
)	(Jointly Administered)
Debtors.)	
)	<u>Related D.I.: 689</u>

**RESPONSE OF ALLEGHENY ENERGY SUPPLY COMPANY, LLC TO DEBTORS’
MOTION FOR ENTRY OF AN ORDER AUTHORIZING (A) THE REJECTION OF A
CERTAIN ASH DISPOSAL CONTRACT EFFECTIVE *NUNC PRO TUNC* TO THE
DATE THEREOF AND (B) GRANTING RELATED RELIEF**

Allegheny Energy Supply Company, LLC (“Allegheny”) responds as follows to the motion (the “Motion”) of the above-captioned debtors and debtors-in-possession (each a “Debtor,” and collectively, the “Debtors”) to authorize the rejection of the Material Handling Agreement (the “Ash Disposal Contract”), dated as of April 30, 2009 between Allegheny and Debtor Coresco, LLC. Allegheny does not dispute the Debtors’ ability to reject the Material Handling Agreement (referred to as the “Ash Disposal Contract” by the Debtors) pursuant to 11 U.S.C. § 365 and the business judgment rule as set forth in paragraphs 9-10 of their Motion. However, the Debtors’ motion is silent as to the fate of that certain Amended and Restated Coal Sales Agreement between Debtor MEPCO, LLC and Allegheny dated April 30, 2009 (the “Coal Supply Contract”) that is inextricably linked to the Ash Disposal Contract. The two agreements were executed simultaneously and as part of the same bargain, i.e., for both the purchase of usable coal and the disposal of spent coal, they each contain a cross-default provision referencing the other, and Debtor MEPCO, LLC is also the guarantor of the obligations of Debtor Coresco under the Ash Disposal Contract. The Debtors’ silence on the Coal Supply Contract in the Motion, combined with the fact that the Debtors’ proposed plan of reorganization (the “Plan,”

Doc. 671) will by default assume all contracts not rejected (*See* Plan section V.A), suggests that the Debtors may intend to attempt to assume the Coal Supply Contract after rejecting the Ash Disposal Contract, effectively jettisoning half of the bargain between the Debtors and Allegheny and retaining the other. Allegheny therefore files this response to reserve its rights to argue at a later time, if necessary, that the cross-default clauses between the Ash Disposal Contract and the Coal Supply Contract make the latter either incapable of assumption, or place it immediately in default upon such assumption.

While cross-default provisions in executory contracts and unexpired leases are not always enforceable in bankruptcy, they are denied enforcement only “where the non-debtor party would have been willing, absent the existence of the cross-defaulted agreement, to enter into a contract the debtor wishes to assume.” *Kopel v. Campanile (In re Kopel)*, 232 B.R. 57, 66 (Bankr. E.D.N.Y. 1999). By contrast, “enforcement of a cross-default provision should not be refused where to do so would thwart the non-debtor party’s bargain.” *Id.* Likewise, the Fifth Circuit in *Lifemark Hospitals, Inc. v. Liljeberg Enters. (In re Liljeberg Enters.)*, 304 F.3d 410 (5th Cir. 2002) reversed a lower court decision denying enforcement to a cross-default clause when the executory contract the debtor sought to assume (an agreement to operate a hospital pharmacy) would not have existed but for the lease agreement for the hospital building that the debtor sought to reject. *See id.* at 445.

Similar circumstances prevail here. But for the Ash Disposal Contract, Allegheny would not have entered into the Coal Supply Contract. Allegheny reserves the right to argue later that this therefore leads to the same outcome in *Kopel* and *Liljeberg* if the Debtors attempt to assume the Coal Supply Contract after rejecting the Ash Disposal Contract. Given the current state of the docket, this issue is probably unripe for a final judicial determination, as the Debtors have not

{BAY:02427773v1}

yet made clear on the record whether they do in fact intend to assume the Coal Supply Contract. Therefore, Allegheny seeks only to avoid waiving or being estopped from asserting this argument, and therefore asks that this Court's order granting the instant Motion reflect Allegheny's reservation of rights.

WHEREFORE, Allegheny asks that any order granting the Debtors' Motion be expressly without prejudice to Allegheny's right to later argue that the Coal Supply Agreement cannot be assumed.

DATED: January 6, 2014
Wilmington, DE

BAYARD, P.A.

/s/ Evan T. Miller
Ashley B. Stitzer (No. 3891)
Evan T. Miller (No. 5364)
222 Delaware Avenue, Suite 900
Wilmington, Delaware 19801
Tel: (302) 655-5000
Fax: (302) 658-6395
E-mail: astitzer@bayardlaw.com
emiller@bayardlaw.com

and

Marc B. Merklin, Esq.
John P. Hickey, Esq.
BROUSE MCDOWELL, LPA
388 S. Main Street, Suite 500
Akron, Ohio 44311
Tel: (330) 535-5711
Fax: (330) 253-8601
E-mail: mmerklin@brouse.com
jhickey@brouse.com

Counsel for Allegheny Energy Supply Co.

CERTIFICATE OF SERVICE

I, Evan T. Miller, hereby certify that on the 6th day of January, 2014, I caused a true and correct copy of the **Response of Allegheny Energy Supply Company, LLC to Debtors' Motion for Entry of an Order Authorizing (A) the Rejection of a Certain Ash Disposal Contract Effective *Nunc Pro Tunc* to the Date Thereof and (B) Granting Related Relief**, to be served upon the parties listed below via United States First Class Mail:

Daniel J. Defranceschi
Paul N. Heath
Zachary I. Shapiro
Marisa A. Terranova
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801

Richard M. Cieri
Paul M. Basta
Ray C. Schrock
KIRKLAND & ELLIS LLP
601 Lexington Ave.
New York, NY 10022-4611

Ryan Preston Dahl
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654

/s/ Evan T. Miller
Evan T. Miller (No. 5364)