

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

_____)
In re:) **Chapter 11**
)
Alpha Natural Resources, Inc., et al.) **Case No. 15-33896 (KRH)**
)
) **(Jointly Administered)**
Debtors.)
)
_____)

**OBJECTION OF VIRGINIA ELECTRIC AND POWER COMPANY
DBA DOMINION VIRGINIA POWER TO THE DEBTORS' PROPOSED
PIECEMEAL ASSUMPTION, ASSIGNMENT AND
REJECTION OF EXECUTORY CONTRACT [DOCKET NO. 2886]**

Virginia Electric and Power Company dba Dominion Virginia Power (“DVP”) by and through its undersigned counsel, for its Objection (the “Objection”) to the Debtors’ proposed piecemeal assumption, assignment and rejection of executory contract, respectfully represents as follows:

FACTS

Procedural Facts

1. On August 3, 2015 (the “Petition Date”), the Debtors commenced their cases under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) that are now

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pending in the United States Bankruptcy Court for the Eastern District of Virginia (the “Court”). The Debtors’ cases are being administered jointly pursuant to Fed. R. Bankr. P. 1015(b).

2. The Debtors continue in possession of their property and continue to operate and manage their businesses as Debtors-in-Possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.

3. On June 2, 2016, the Debtors filed solicitation versions of their *Second Amended Joint Plan of Reorganization* (the “Proposed Plan”) and related *Second Amended Disclosure Statement* [Docket No. 2594].

4. Pursuant to the Proposed Plan, on June 22, 2016, the Debtors filed a *Notice of Filing of Certain Exhibits to Second Amended Joint Plan of Reorganization* [Docket No. 2757], which included Exhibit II.G.1.a. – Executory Contracts and Unexpired Leases to Be Assumed (the “Assumption Schedule”), Exhibit II.G.4. – Previously Assumed Executory Contracts and Unexpired Leases to Be Assigned (the “Previously Assumed/Assignment Schedule”), and Exhibit II.G.5. – Executory Contracts and Leases to Be Rejected (the “Rejection Schedule”).

Then, on June 30, 2016, the Debtors filed a *Notice of Filing Certain Amended Exhibits to Second Amended Joint Plan of Reorganization* [Docket No. 2886], which included amended versions of the Assumption/Assignment Schedule, the Previously Assumed/Assignment Schedule and the Rejection Schedule (collectively, the “Amended Schedules”).

5. Also pursuant to the Proposed Plan, on June 29, 2016, the Bankruptcy Court entered an *Order, Pursuant to Sections 105, 365 and 1123 of The Bankruptcy Code, (I) Establishing Procedures with Respect to the Proposed Assumption, Assumption and Assignment, and Rejection of Executory Contracts and Unexpired Leases and the Treatment of Other Agreements Pursuant to the Debtors’ Second Amended Joint Plan of Reorganization and*

Applicable Law and (II) Approving the Form and Manner of Notice Thereof (the “Contract Procedures Order”). Pursuant to the Contract Procedures Order, within two business days after entry of the Contract Procedures Order, the Debtors were to serve counterparties to all executory contracts with individualized Assumption, Assignment-Only, Customer Assumption and/or Rejection notices, as applicable (collectively, the “Contract Notices”), and the applicable counterparties are to file all objections to assumption and/or assignment of a contract within 10 days of service of the applicable Contract Notice and objections to rejection of a contract within 20 days of service of the applicable Contract Notice (the “Objection Deadlines”).

6. On July 7, 2016, DVP received the *Notice Regarding (A) Executory Contracts and Unexpired Leases To Be Assumed or Assumed and Assigned Pursuant To Section 365 of the Bankruptcy Code, (B) Amounts Required To Cure Defaults Under Such Contracts and Leases and (C) Related Relief* (the “Notice to Assume”). Annex A – Assumed Agreements – to the Notice to Assume set for the following description:

- A. Counterparty Name/Address: Virginia Electric & Power Co, Attn Manager, Fuel Contracts, 120 Tredegar Street, DC-3, Richmond, VA 23219; Debtor Entity: Alpha Coal Sales Co., LLC; Assigned to Entity: Reorganized Debtor To Be Determined; Contract Description: Coal Sales Agreement/Coal Sales Agreement – Spot Sales Agreement (From 7/29/2014); Cure Payment: \$0

7. On July 7, 2016, DVP received the *Notice Regarding (A) Executory Contracts and Unexpired Leases To Be Assigned Pursuant To Section 365 of the Bankruptcy Code and (B) Related Procedures* (the “Notice to Assign”). Annex A – Assigned Agreements – to the Notice to Assign set for the following descriptions for three contracts:

- A. Counterparty Name/Address: Virginia Electric & Power Co, Attn Manager, Fuel Contracts, 120 Tredegar Street, DC-3, Richmond, VA 23219; Debtor Entity: Paramount Coal Company Virginia, LLC; Assigned

to Entity: Newco Entity To Be Determined; Contract Description: Coal Processing and Loading Agreement/Coal Processing and Loading Agreement Contract No. – 103911

B. Counterparty Name/Address: Virginia Electric & Power Co, Attn Manager, Fuel Contracts, 120 Tredegar Street, DC-3, Richmond, VA 23219; Debtor Entity: Alpha Coal Sales Co., LLC; Assigned to Entity: Newco Entity To Be Determined; Contract Description: Coal Sales Agreement/Spot Sales Contract No. 104163

C. Counterparty Name/Address: Virginia Electric & Power Co, Attn Manager, Fuel Contracts, 120 Tredegar Street, DC-3, Richmond, VA 23219; Debtor Entity: Alpha Coal Sales Co., LLC; Assigned to Entity: Newco Entity To Be Determined; Contract Description: Coal Sales Agreement/Spot Sales Contract No. 104298

8. On July 7, 2016, DVP received the *Notice Regarding (A) Executory Contracts and Unexpired Leases To Be Rejected Pursuant To Section 365 of the Bankruptcy Code, (B) the Bar Date For Claims Arising Therefrom and (C) Related Relief* (the “Notice to Reject”). Annex

A – Rejected Agreements – to the Notice to Reject set for the following description:

A. Counterparty Name/Address: Virginia Electric & Power Co, Attn Manager, Fuel Contracts, 120 Tredegar Street, DC-3, Richmond, VA 23219; Debtor Entity: Alpha Coal Sales Co., LLC; Contract Description: Coal Sales Agreement

Facts Regarding the Debtors’ Proposed Assumption, Assignment and Rejection of Alleged Contracts With DVP

9. The Amended Schedules list the following alleged DVP contracts to be assumed, assigned and/or rejected:

Assumption Schedule (Exhibit II.G.1.a.)

A. On page 259 of Docket No. 2886 - Coal Sales Agreement between Virginia Electric & Power Co. and Alpha Coal Sales Co., LLC – Coal Sales Agreement – Spot Sales Agreement (from 7/29/2014)

- i. Assigned to Entity – Reorganized Debtor To Be Determined
- ii. Cure - \$0

Previously Assumed/Assignment Schedule (Exhibit II.G.4.)

- A. On page 331 of Docket No. 2886 - Coal Sales Agreement between Virginia Electric & Power Co. and Alpha Coal Sales Co., LLC, dated 10/27/2015 – Spot Sales Contract No. 104163
 - i. Assigned to Entity – Newco Entity To Be Determined
- B. On page 331 of Docket No. 2886 - Coal Sales Agreement between Virginia Electric & Power Co. and Alpha Coal Sales Co., LLC, dated 5/2/2016 – Spot Sales Contract No. 104298
 - i. Assigned to Entity – Reorganized Debtor To Be Determined

Rejection Schedule (Exhibit II.G.5.)

- A. On page 683 of Docket No. 2886 - Coal Sales Agreement between Virginia Electric & Power Co. and Alpha Coal Sales Co., LLC, dated 7/24/2014 – Coal Sales Agreement

Facts Regarding DVP's Executory Contract With the Debtors

10. DVP and Alpha Coal Sales Co., LLC (“Alpha”) are parties to a Master Agreement for the Supply of Coal Effective January 1, 2009 (the “Master Agreement”), pursuant to which Alpha sells coal to DVP as memorialized by written confirmations (each a “Confirmation”) setting forth the applicable term, product, contract price, source(s), delivery method, delivery point, and other details of each transaction entered into pursuant to the Master Agreement.

11. Article 17 of the Master Agreement provides as follows:

This Agreement, ANNEXES [A through I], and Attachments [1 through 6 (if applicable)] attached hereto, that are hereby incorporated by reference, and any signed Confirmation Notices issued hereunder embody the entire agreement between the Parties with respect to the subject matter contained herein, supersede any prior or contemporaneous agreements or understandings between the Parties, and may not be amended or changed except as provided herein.

12. Section 2.2 of the Master Agreement states as follows:

The purpose of this Agreement is to establish the procedural guidelines and terms and conditions to be employed in periodic transactions between the Parties involving the sale and purchase of coal. This Agreement by itself does not obligate the Buyer to purchase any coal from Seller, or the Seller to sell any coal to Buyer. A Transaction shall only be entered into by means of a written Confirmation memorializing the sale or purchase of Coal that is fully executed by both Parties...substantially in the form attached hereto as Attachment 4. Each Party agrees that it is legally bound by the terms of a Transaction, as supplemented by this Master Agreement, only upon the full execution of a Confirmation by both Parties. Unless the Parties specifically agree otherwise each Transaction shall also be governed by this Master Agreement.

13. In accordance with the terms of the Master Agreement, DVP and Alpha entered into certain transaction Confirmations (collectively, the “Confirmations”; and all Confirmations together with the Master Agreement, the “Agreement”). The delivery terms for the following transaction Confirmations have not yet expired:

- A. Confirmation – VCHEC dated July 24, 2014 – DVP believes this to be the document listed on the Rejection Schedule on page 683 of Docket No. 2886

(Note: There are 4 amendments to this Confirmation, dated May 18, 2015; June 30, 2015; July 9, 2015; and May 2, 2016);

- B. Confirmation Notice dated July 29, 2014 – DVP believes this to be the document listed on the Assumption Schedule on page 259 of Docket No. 2886; and
- C. Confirmation Notice dated October 27, 2015 – DVP believes this to be the October 27, 2015 document listed on the Assumption Schedule on page 331 of Docket No. 2886

14. Each of the Confirmations entered into pursuant to the Master Agreement provides substantially as follows:

This Confirmation (including the Attachments) supplements, forms part of, and is subject to, the Master Agreement for the Supply of Coal between

the Parties, dated January 1, 2009, as it has or may be amended, and supplemented from time to time (the “Master Agreement”) between the Seller and Buyer. All provisions contained in the Master Agreement govern this Confirmation to the extent not in conflict with the terms hereof. Terms used but not defined herein shall have the meanings ascribed to them in the Master Agreement.

15. The Master Agreement is not listed in any of the Amended Schedules.

16. It is unclear what agreement and/or Confirmation is intended by the May 2, 2016 document listed on page 331 of Docket No. 2886. It appears, however, that it may be intended to be the May 2, 2016 amendment to the July 24, 2014 Confirmation, which is listed on the Rejection Schedule.

DISCUSSION

I. The Debtors Cannot Assume, Assign or Reject the Agreement in a Piecemeal Manner.

It is plain from the express language of both the Master Agreement and each Confirmation entered into thereunder that the Master Agreement and all Confirmations entered into thereunder constitute a single, integrated agreement and that the parties entered into the Confirmations in reliance on that understanding. Indeed, none of the Confirmations can stand alone, as they are all expressly subject to the terms set forth in the Master Agreement, except as such terms are expressly amended in the applicable Confirmation.

Further, it is well established in this and other circuits that a single, executory contract cannot be assumed in part and rejected in part. Rather, a debtor is required under Section 365 of the Bankruptcy Code to either reject the contract in full or assume the contract in full, including both the benefits and the burdens of the contract. *United States, Dep’t of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469, 1472 (4th Cir. 1990) (“When a debtor in possession assumes an

executory contract, it takes the ‘contracts *cum onere*, that is, subject to existing burdens’...In other words, ‘a debtor may not assume the favorable aspects of a contract...and reject the unfavorable aspects of the same contract.’”) (quoting *In re Chicago, R.I. & Pac. R.R.*, 860 F.2d 267, 272 (7th Cir. 1988) and *Lee v. Schweiker*, 739 F.2d 870, 876 (3d Cir. 1984)); *see also Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 849 (4th Cir. 1999) (debtor must assume executory contract *cum onere*, accepting its obligations along with its burdens); *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 798 (4th Cir. 1998) (“That the obligations of an executory contract be accepted along with its benefits is made plain by the Bankruptcy Code’s requirements that, as conditions of the contract’s assumption, the debtor cure any existing default and compensate all non-debtor parties for actual pecuniary losses that have resulted therefrom.”) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S.Ct. 1188, 1199 (1984)); *Schnelling v. Crawford (In re James River Coal Co.)*, 360 B.R. 139, 159 (Bankr. E.D. Va. 2007) (Huennekens, J.) (“[T]he debtor cannot assume the benefits of the contract while rejecting its burdens.”); *In re Giordano*, 446 B.R. 744, 749 (Bankr. E.D. Va. 2010) (Mitchell, J.) (“[A] trustee or debtor in possession cannot assume only the favorable part of a contract and reject the rest—the contract must be assumed or rejected as a whole.”); *In re Leslie Fay Cos., Inc.*, 166 B.R. 802, 808 (S.D.N.Y. 1994) (same); *In re Atlantic Computer Sys., Inc.*, 173 B.R. 844, 849 (S.D.N.Y. 1994) (same); *In re Plum Run Serv. Corp.*, 159 B.R. 496, 498 (Bankr. S.D. Ohio 1993) (noting that executory contract must be assumed or rejected by debtor in its entirety and cannot be dealt with in piecemeal fashion). Accordingly, “[t]he agreement becomes property of the estate in the same shape as it existed prior to bankruptcy, with all of its benefits and burdens. That is,...the debtor...is not free to retain the favorable features...and reject the

unfavorable ones.” *In re Village Rathskeller, Inc.*, 147 B.R. 665, 671 (Bankr. S.D.N.Y. 1992).

Contrary to the foregoing authorities, the Debtors appear to be attempting to cherry-pick only certain benefits and burdens under the Agreement and to assume and assign only those selected benefits and burdens to separate assignees. In doing so, the Debtors are seeking to thwart the parties’ express expectations upon entering into each Confirmation. As a result, the Debtors have failed to provide adequate assurances that all of the obligations under the Agreement, which includes the Master Agreement and all Confirmations entered into thereunder, will be performed in the future by any proposed assignee. Moreover, as a practical matter, it is unclear how the Debtors envision such a partial assignment working, as each Confirmation expressly incorporates the terms of the Master Agreement and thus cannot be interpreted without reference to its terms. Accordingly, if the Debtors wish to assume and/or assign the Agreement, they must assume and/or assign it as a whole, in its current form, including all of the Confirmations and amendments thereto, to only one assignee.

II. The Debtors Have Failed To Demonstrate Adequate Assurance of Any Assignee’s Future Performance Under the Agreement.

It is the debtor’s burden to show adequate assurance of future performance by the assignee of a contract. *See, e.g., Ramco-Gershenson Props., L.P. v. Serv. Merch. Co., Inc.*, 293 B.R. 169, 178 (M.D. Tenn. 2003) (“[T]he burden of proof on adequate assurance rests initially on the debtor....”). While there is no precise formula for determining precisely what information a debtor must provide to meet its burden on this issue, it is clear that they must make some showing in this regard. Here, the Debtors have made no showing whatsoever of adequate assurances that any assignee will be able to perform all of the Debtors’ obligations under the

Agreement. To the contrary, by selecting less than all of the Confirmations entered into under the Master Agreement for assignment to various assignees separate from the Master Agreement, and seeking to reject one Confirmation, the Debtors have indicated that no assignee is willing or able to meet all performance obligations under the Agreement. Accordingly, the Debtors have failed to meet their burden on this issue.

CONCLUSION

WHEREFORE, DVP respectfully requests that the Court: (1) deny the Debtors' attempt to assume and assign only portions of the Agreement, in a piecemeal fashion, to any assignee and to reject other portions of the Agreement; (2) in any order approving the assumption and assignment of the Agreement, requiring the Debtors to assume and assign the Agreement as a whole, including the Master Agreement and all Confirmations and amendments thereto, to a single assignee; and (3) requiring strict proof of adequate assurance of any assignee's future performance under the Agreement. In addition, the Court should grant such other and further relief that the Court deems just and appropriate.

Dated: July 8, 2016

Respectfully submitted,

LAW FIRM OF RUSSELL R. JOHNSON III, PLC

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CERTIFICATE OF SERVICE

I, John M. Craig, hereby certify that on July 8, 2016, I caused a true and correct copy of the foregoing *Objection of Virginia Electric and Power Company dba Dominion Virginia Power to the Debtors' Proposed Piecemeal Assumption, Assignment and Rejection of Executory Contract* to be served via the Court's electronic case filing system (CM/ECF) to all parties registered to receive such notice in the above-captioned case.

/s/ John M. Craig
John M. Craig