IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	**Chapter 11**
WESTMORELAND COAL COMPANY, *et al.*[1]	§	**Case No. 18-35672 (DRJ)**
Debtors.	§	**(Jointly Administered)**

LIMITED OBJECTION OF TALEN MONTANA, LLC
TO CONFIRMATION OF JOINT CHAPTER 11 PLAN OF
WESTMORELAND COAL COMPANY AND CERTAIN OF ITS DEBTOR AFFILIATES

Talen Montana, LLC ("**Talen**"), by and through its undersigned counsel, hereby submits this objection (the "**Objection**") to confirmation of the *Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Docket No. 788] (the "**Plan**"), filed by the WLB Debtors (as such term is used in the Plan). In support of the Objection, Talen respectfully states as follows:

Preliminary Statement

1. Talen operates a coal-fired power plant located east of Billings, Montana (the "**Colstrip Plant**"), which it co-owns with Puget Sound Energy, Inc., Portland General Electric Company, Avista Corporation, PacifiCorp, and NorthWestern Corporation (collectively, the "**Co-Owners**" and together with Talen, the "**Buyers**"). Talen is the sole operator of the Colstrip Plant, and employs over 300 employees, many of whom reside in Colstrip, Montana—a town with a population of less than 2,500 people.

[1] Due to the large number of debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein (collectively herein "**Debtors**"). A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company's service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

2. Talen and the Co-Owners are effectively the exclusive purchasers of coal that Western Energy Company ("**WECO**"), a WLB Debtor, mines and sells from its coal mine in Rosebud County, Montana (the "**Rosebud Mine**"), adjacent to the Colstrip Plant. WECO is the Buyers' sole supplier of coal for operations of the Colstrip Plant, and has been since the 1970s.

3. WECO and the Buyers purchase and deliver coal pursuant to three long-term agreements for the sale and transportation of coal: (a) that certain *Coal Purchase and Sale Agreement*, dated as of March 21, 2007 (the "**U12 Coal Supply Agreement**"), (b) that certain *Amended and Restated Coal Supply Agreement*, dated as of August 24, 1998 (the "**U34 Coal Supply Agreement**"), and (c) that certain *Coal Transportation Agreement*, dated as of July 10, 1981, (together with the U12 Coal Supply Agreement and U34 Coal Supply Agreement, each as amended, supplemented, or modified, the "**Colstrip Coal Supply Agreements**").[2] Notwithstanding the WLB Debtors' numerous comments about the importance of their coal supply agreements and an explicit provision in the Plan that was served on stakeholders for solicitation providing for the assumption and assignment of the coal supply agreements to the WLB Debtors' purchasers, the WLB Debtors have recently indicated that they now intend to reject the Colstrip Coal Supply Agreements. Yet, the WLB Debtors have not met their burden for rejecting these agreements, as they have failed to articulate any legitimate business justification for doing so.

4. Nor can they. This is not a situation where a debtor has made a difficult, but reasonable business decision with which a counterparty simply disagrees. Rather, here, there is simply ***no*** possible legitimate business reason for the WLB Debtors to rid themselves of the Colstrip Coal Supply Agreements, as was clearly reflected in the Plan circulated for vote. The

[2] This Objection focuses on the U34 Coal Supply Agreement, attached hereto as **Exhibit A**, given the context of the commercial negotiations surrounding that contract. The general mechanics of the U12 Coal Supply Agreement are materially similar to those described herein with respect to the U34 Coal Supply Agreement.

WLB Debtors are not seeking to reject unprofitable contracts that burden their estates. To the contrary, the Colstrip Coal Supply Agreements are profitable contracts that ***guarantee*** WECO's profitability, as they are "cost-plus" agreements under which the Buyers pay WECO's annual costs of mining operations, a return on WECO's capital investment, and per-ton profit fees.

5. Instead, it appears that the WLB Debtors are threatening rejection and the withholding of vital coal to these captive Buyers to extract what in Talen's view are extremely unreasonable terms from them in the context of ongoing commercial negotiations focused on extending the U34 Coal Supply Agreement beyond its December 31, 2019 expiration date.[3] The terms reached under these coercive circumstances would be binding on the parties for many years, but at the very least would reduce actual operational time of the Colstrip Plant by a significant amount by virtue of inflated costs. Critically for the Buyers, the Colstrip Plant currently has one source of coal—WECO's Rosebud Mine—and the Rosebud mine has only one logical buyer of coal—the Colstrip Plant. This monopolistic situation, involving an important product affecting the public interest—coal for power for electricity for, among other things, warmth in the winter—creates an ability for WECO to squeeze the Buyers for greater and greater profits, potentially leaving the Buyers with no choice but to agree to pay exorbitant ransom prices for many years for this vital, single-source commodity. Such a situation could lead to a drastic curtailment of operations at the Colstrip Plant or potentially accelerate a permanent shutdown.

6. With the commercial negotiations over the extension being stuck, it is no coincidence that WECO has now threatened to reject these profitable agreements. The evidence

[3] The substance of the commercial negotiations is confidential. As a result, Talen is unable to provide the Court at this time with details of the negotiations that it believes would further bolster the facts and arguments set forth herein. Talen is willing to waive the confidentiality requirement for the limited purpose of the WLB Debtors, Talen, and the Co-Owners providing the Court, under seal, with information about the commercial negotiations for purposes of determining the merits of the relief the WLB Debtors are seeking.

will make plain that, rather than using rejection for a legitimate business purpose, the WLB Debtors are simply seeking to exert economic leverage on Talen and the Co-Owners and further increase their profits on ***already*** profitable contracts. It is a strategy that has threatened the continuing short-term and long-term operation of the Colstrip Plant, and has also put hundreds of employees (both at the Colstrip Plant and the Rosebud Mine) and the town of Colstrip at risk. By comparison, the as-of-yet-unidentified returns to WECO or its successor do not begin to justify such a strategy.

7. Indeed, the WLB Debtors' strategy also exposes WECO or its successor to significant risk of being unable to sell coal and satisfy its obligations. The parties depend on one another for coal supply and purchase. Their interdependence is not only contractual—[redacted]—but is also an economic and practical reality: the Rosebud Mine is adjacent to the Colstrip Plant, and both facilities were designed exclusively for one another. In fact, the Rosebud Mine was owned by one of the original owners of the Colstrip Plant. As described below in more detail, the Rosebud Mine (and thus any purchaser of the Rosebud Mine) lacks the ability to sell significant quantities of coal to third parties (*i.e.*, parties other than Talen and the Co-Owners) except at great cost, if at all possible.

8. In any event, WECO has not demonstrated any potential benefit from rejecting the Colstrip Coal Supply Agreements – by selling to third parties or otherwise, let alone benefits that would justify putting at risk the significant profits the WLB Debtors currently receive under the Colstrip Coal Supply Agreements. These are not the quintessential burdensome contracts a debtor typically seeks to shed in bankruptcy; quite the opposite.

Therefore, the WLB Debtors have not, and cannot, demonstrate that rejecting the Colstrip Coal Supply Agreements is a valid exercise of business judgment.

9. Further, even if the WLB Debtors were justified in rejecting the Colstrip Coal Supply Agreements on business or policy grounds, due to their convoluted Plan documents and mixed messages, they have failed to provide Talen (and the Co-Owners), or other creditors that would get diluted by new large, material rejection damage claims, the requisite notice for such rejection. As a matter of due process, the Bankruptcy Code and the Bankruptcy Rules require that (a) the WLB Debtors provide contract counterparties with sufficient notice as to whether the WLB Debtors will assume or reject their executory contracts and (b) the Plan that is sent to all creditors for solicitation, along with the disclosure statement, provides accurate information on key elements affecting creditors. The Plan clearly and explicitly states that the Colstrip Coal Supply Agreements will be assumed and assigned pursuant to the Plan. (Plan Art. V. Sec. A.) This is consistent with the WLB Debtors' representations throughout these cases that these agreements "are the lifeblood of [the WLB Debtors'] business." Oct. 9, 2018 Hr'g Tr. at 58:9–10 [Docket No. 134]. Yet, despite that Plan language, the WLB Debtors have now omitted the Colstrip Coal Supply Agreements from the lists of assumed contracts and leases filed in these cases (collectively, the "**Assumed Contracts and Leases Lists**").[4]

10. When pressed recently about the discrepancy between the Plan and the Assumed Contracts and Leases Lists, counsel to the WLB Debtors provided mixed messages on whether the Colstrip Coal Supply Agreements will or will not be assumed and assigned pursuant

[4] *See Notice to Contract Counterparties to Potentially Assumed Executory Contracts and Unexpired Leases*, Ex. A (the "**Initial Assumed List**") [Docket No. 874]; *Plan Supplement for the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* (the "**Plan Supplement**"), Ex. A [Docket No. 1102]; *Supplemental Notice of (A) Executory Contracts and Unexpired Leases to Be Assumed or Assumed and Assigned by Westmoreland Coal Company and Certain of Its Debtor Affiliates Pursuant to the Plan, (B) Cure Costs, If Any, and (C) Related Procedures in Connection Therewith*, Ex. A (the "**Supplemental Assumed List**") [Docket No. 1103].

to the Plan as written, alluding to assumption of the agreements being subject to the ongoing commercial negotiation between WECO and the Buyers relating to the extension of those agreements. Counsel to the WLB Debtors this week confirmed that the current intent is to reject the Colstrip Coal Supply Agreements notwithstanding the Plan language to the contrary. This ambiguity has left Talen with no choice but to object to the WLB Debtors' purported decision to reject the Colstrip Coal Supply Agreements.

11. As set out herein, there are multiple reasons not to authorize rejection of the Colstrip Coal Supply Agreements.

12. First, the Plan states that the WLB Debtors will assume and assign the Colstrip Coal Supply Agreements, consistent with representations the WLB Debtors have made to the Court, the creditors, and the public since they filed for chapter 11, including in their first day Coal Contract Performance Motion (as defined below). The WLB Debtors should not be permitted to manufacture uncertainty at this late juncture as to the otherwise clear and explicit language in the Plan in an attempt to exert leverage over Talen and the Co-Owners. Nor should the WLB Debtors be permitted to make any changes to the Plan at this eleventh hour after solicitation is complete and the objection deadline has passed. Enforcing the Plan's plain language is particularly important here given the WLB Debtors' recent settlement with the Creditors' Committee (defined below), whose "meaningful distribution" negotiated on behalf of unsecured creditors would be significantly diluted by a rejection of the Colstrip Coal Supply Agreements.

13. Second, the WLB Debtors cannot meet their burden of proof to justify rejection of the Colstrip Coal Supply Agreements. Put simply, rejection would not benefit the estate. There is no sound business justification for rejection, which could lead to significant

rejection damage claims diluting the recovery to general unsecured creditors, and the balance-of-equities test that applies in this situation pursuant to binding precedent from the Fifth Circuit Court of Appeals weighs against rejection. *See Mirant Corp. v. Potomac Electric Power Co. (In re Mirant Corp.)*, 378 F.3d 511 (5th Cir. 2004). The profitable nature of the Colstrip Coal Supply Agreements, the somewhat unusual monopolistic relationship between buyer and seller, the lack of any evidence of benefit to the estate from rejection, and the clear inference (which Talen believes the evidence will support) that the WLB Debtors are using the power of rejection to extract ransom pricing – not just for the remaining term of the agreement but on an extension that would last for many years – demonstrate that this is the rare case where rejection is not supported by a debtor's business judgment. The fact that what is at stake here – coal for electricity – is a vital public good and that rejection would put the operations of the Colstrip Plant and its hundreds of employees at risk (let alone the employees of the Rosebud Mine, which might no longer have a customer for its coal) should make the Court all the more reluctant to approve this risky tactic, especially when applying the *Mirant* balance-of-equities test.

14. Third, a rejection of the Colstrip Coal Supply Agreements would render the WLB Debtors unable to meet the feasibility standard for confirmation of the plan as to WECO given the uncertainty that WECO or its successor will be able to sell any coal and pay its costs and expenses absent assumption of the Colstrip Coal Supply Agreements.

15. Accordingly, Talen respectfully requests that the Court require that any order confirming the Plan (a "**Confirmation Order**") be conditioned upon inclusion of language in such order providing that the Colstrip Coal Supply Agreements are assumed and assigned pursuant to the Plan, consistent with the Plan that has been on file for months.

16. In the alternative, if the Court allows the WLB Debtors to reject the Colstrip Coal Supply Agreements, Talen respectfully requests that the Court condition such rejection upon the WLB Debtors' agreement to allow for an adequate transition period to wind down the Colstrip Coal Supply Agreements in light of the equities of the situation, including the inability of Talen to buy coal from an alternate source in the near-term.

Background

A. Prepetition Relationship between WECO, Talen, and the Co-Owners

17. Talen's primary asset is the Colstrip Plant, which sits immediately next to the WLB Debtors' Rosebud Mine. The Colstrip Plant consists of four separate electric generating units and related equipment.

18. WECO has been and continues to be the exclusive coal supplier for the Colstrip Plant, which was built on the premise of a symbiotic relationship between WECO and the Buyers—the Colstrip Plant would run on coal from the Rosebud Mine and the Rosebud Mine would be dedicated to supplying coal to the Colstrip Plant. Indeed, when the Colstrip Plant first began operations, the original operator of the plant—Montana Power Company—also owned the Rosebud Mine. To that end, the Colstrip Plant was designed specifically to burn coal from the Rosebud Mine and certain environmental permits of the Colstrip Plant mandate the use of coal from the Rosebud Mine.

19. The Buyers (and their predecessors) have purchased coal from WECO under some form of the Coal Supply Agreements since the 1970s. This relationship is mutually beneficial to both sides; [redacted]

20. As the WLB Debtors explained in the *Declaration of Jeffrey S. Stein, Chief Restructuring Officer of Westmoreland Coal Company, in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 54] (the "**First Day Declaration**"), their business model is to operate mines in niche coal markets, such as Colstrip, Montana, where they are able to enter into long-term, protected coal supply contracts that "take advantage of customer proximity and strategically located rail transportation." (First Day Declaration at ¶ 11.)

21. The WLB Debtors gain their "competitive advantage" because many of their buyers' power plants—including the Colstrip Plant—are specifically designed to use their coal. (First Day Declaration at ¶¶ 11, 14.) Further, the WLB Debtors' proximity to those plants reduces their transportation costs compared to other potential suppliers that would otherwise have to ship in coal via truck or train from longer distances. (*Id.*) Accordingly, in the context of the Rosebud Mine, it is not currently legally permissible for the Colstrip Plant to burn coal from another source under its environmental permits or operationally possible for the Colstrip Plant to receive coal deliveries via train. In turn, the Buyers designed and built their delivery infrastructure to receive coal only from WECO, rather than from other sources at longer distances by rail or truck. Likewise, the Rosebud Mine was designed to deliver coal only to the Buyers (at the Colstrip Plant), with whom WECO has entered into long-term, exclusive coal supply agreements. This symbiotic relationship has worked for over 40 years, and the Buyers had no reason to believe it would not continue into the future in the form of mutually advantageous extensions of the Colstrip Coal Supply Agreements.

B. History of U34 Coal Supply Agreement

22. On July 2, 1980, before "Units 3 & 4" of the Colstrip Plant became operational, WECO and the Buyers entered into a predecessor Coal Supply Agreement (the "**Original Coal Supply Agreement**"). (*See* U34 Coal Supply Agreement, at Recitals ¶ D.)

Relying on the original agreement and "the assurances of a dependable supply of coal from the Sellers," the Buyers constructed Units 3 & 4. (*Id.* at Recitals ¶ A.) Between 1981 and 1987, the parties amended the Original Coal Supply Agreement three times, and, in 1998, the parties re-negotiated an amended agreement to "align it better" with the parties' economic interests. (*Id.* at Recitals ¶ E.) The parties eventually executed the U34 Coal Supply Agreement, effective January 1, 1998 and with a term lasting through December 31, 2019. (*Id.* § 3.1.)

23. The U34 Coal Supply Agreement is a manifestation of the parties' interdependence, described above. [redacted]

24. As a result of this mutual interdependence, the Colstrip Plant does not have the physical infrastructure or legal authority to obtain coal from another source without substantial time, capital expenditures, and environmental permit amendments. WECO currently delivers coal to the Colstrip Plant either by conveyor belt or by truck. Thus, the Colstrip Plant has never had a need for facilities capable of unloading coal from rail cars, and no such facilities

exist today. WECO, in turn, does not have a rail loading facility capable of handling the volume of coal sold to the Colstrip Plant.

25. The Colstrip Coal Supply Agreements are plainly not a burden on WECO. To the contrary, the pricing structure of the Colstrip Coal Supply Agreements guarantees WECO's profitability, even when its costs increase. The pricing structure is "cost-plus," [redacted] In short, the Buyers pay for virtually ***everything*** under the Coal Supply Agreements and then pay WECO an additional profit. [redacted]

C. Negotiations over Extension to U34 Coal Supply Agreement

26. The term of current U34 Coal Supply Agreement is scheduled to expire at the end of 2019. In light of that, the parties have engaged in periodic, on-and-off, and sometimes contentious negotiations since 2012 regarding an extension to the contract term. The parties were engaged in such negotiations prior to the WLB Debtors' bankruptcy filing, and while those discussions resumed postpetition in November 2018, the parties have not yet been able to reach an agreement, in large part because WECO's negotiation position changed dramatically postpetition. Notwithstanding the highly profitable nature of the U34 Coal Supply Agreement to WECO and the fact that the Buyers are the only customers with the practical ability to purchase the volumes of coal being sold under the U34 Coal Supply Agreement, WECO has insisted on

what in Talen's view are unreasonable changes in the U34 Coal Supply Agreement beyond a simple extension of its term, which demands the Buyers have refused.

27. Having been unable to achieve these demands at the bargaining table, WECO apparently now seeks to use the Bankruptcy Code's rejection power, and the Buyers' captive status, not to reject an unprofitable and burdensome contract, but rather as economic leverage to impose terms on the Buyers that WECO could not obtain outside of bankruptcy. (All this notwithstanding explicit Plan language providing for assumption of these very contracts.) The threat is simple: if you do not agree to this exorbitant and uneconomic pricing—not just for the term of the contract, but for many years beyond that term—we may not ship you coal and you will not be able to operate your plant. Accordingly, Talen submits this Objection to confirmation, which it plans to supplement after full discovery—which has been served on the WLB Debtors simultaneously herewith—has been conducted.

D. WECO's Chapter 11 Filing and Postpetition Actions

28. On October 9, 2018, the WLB Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). In connection with the commencement of these chapter 11 cases, the WLB Debtors filed the First Day Declaration, with a copy of the Plan Term Sheet annexed thereto as Exhibit B. Among other things, the Plan Term Sheet contemplates a chapter 11 plan premised on the sale of the WLB Debtors' "Core Assets," with an ad hoc group of the WLB Debtors' secured creditors (the "**Ad Hoc Group**") serving as the stalking horse purchaser. (Plan Term Sheet at 3–4.) The Plan Term Sheet expressly defines the term "Core Assets" to include "substantially all of the assets owned by the Colstrip Seller and used in the Colstrip Business as specifically identified in the Purchase and Sale Agreement, including the Colstrip Assumed Contracts . . . [which] include[s] ***all of the contracts, supply agreements, joint venture agreements, operating and joint operating***

agreements, leases, and other written obligations of the Colstrip Seller relating to the Colstrip Business, as set forth on a schedule to the Purchase and Sale Agreement." (Plan Term Sheet at 4–5.) In short, the Plan Term Sheet contemplates the assumption and assignment of the Colstrip Coal Supply Agreements.

29. On the same day, the WLB Debtors filed the *Debtors' Emergency Motion for Entry of Interim and Final Orders Authorizing the Debtors to Enter into and Perform Under Coal Sale Contracts in the Ordinary Course Of Business* (the "**Coal Contract Performance Motion**") [Docket No. 15]. Pursuant to the Coal Contract Performance Motion, the WLB Debtors sought emergency relief to continue performing under their existing coal sale contracts, such as the Colstrip Coal Supply Agreements, noting that "Performance under the Coal Sale Contracts represents a core and critical part of the Debtors' operations because coal sales generate virtually all of the Debtors' revenues." (Coal Contract Performance Motion at ¶ 6.)

30. On October 18, 2018, the WLB Debtors filed the *Motion of Westmoreland Coal Company and Certain of Its Subsidiaries for Entry of an Order (I) Authorizing Westmoreland Coal Company and Certain Debtor Affiliates to Enter into and Perform under the Stalking Horse Purchase Agreement, (II) Approving Bidding Procedures with Respect to Substantially All Assets, (III) Approving Contract Assumption and Assignment Procedures, (IV) Scheduling Bid Deadlines and an Auction, (V) Scheduling Hearings and Objection Deadlines with Respect to the Disclosure Statement and Plan Confirmation, and (VI) Approving the Form and Manner of Notice Thereof* [Docket No. 208], seeking approval of certain bidding and other procedures (collectively, the "**Bidding Procedures**") in connection with a sale of the WLB Debtors' Core Assets. On November 15, 2018, the Court entered an order approving the Bidding Procedures (the "**Bidding Procedures Order**") [Docket No. 519].

31. On October 25, 2018, the WLB Debtors filed the *Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Docket No. 294] and the *Disclosure Statement for Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* (as amended, the "**Disclosure Statement**") [Docket Nos. 293, 789]. Relevant to Talen, the Plan expressly provided:

> ***[N]otwithstanding anything to the contrary in the Plan***, to the extent any . . . ***contracts for the*** purchase, ***sale***, transportation or reclamation ***of coal*** . . . relating to the mines included in the Core Assets and Transferred Non-Core Assets to which any of the WLB Debtors is a party as of the Plan Effective Date are deemed to be, and treated as though they are, Executory Contracts or Unexpired Leases, such leases or contracts ***shall automatically be deemed assumed and assigned to the Purchaser on the Plan Effective Date***. (Plan, Art. V. Sec. A.) (emphasis added).

32. The Plan also included generic procedures for the assumption, assignment, and rejection of other contracts and leases, (*see generally* Plan, Art. V), as did the Bidding Procedures approved by the Court. (*See* Bidding Procedures Order at ¶ 9.) None of those procedures referred to the provision of the Plan deeming the coal sale contracts automatically assumed and assigned.

33. On December 19, 2018, the WLB Debtors publicly filed financial projections for coal sales revenues through 2028. *See* Westmoreland Coal Company, Current Report (Form 8-K) (Dec. 19, 2018). Within those projections, the WLB Debtors describe, albeit preliminarily, stable revenues from U.S. coal sales through 2022. *See id.*, Ex. 99.1 at 9. Upon information and belief, these projections assume continuation of the Colstrip Coal Supply Agreements at the current contract prices, at least during the term of the Colstrip Coal Supply Agreements.

34. On December 21, 2018, the WLB Debtors filed the Initial Assumed List on the docket. None of the Colstrip Coal Supply Agreements were listed on the Initial Assumed List.

35. On January 18, 2019, the WLB Debtors filed the Plan Supplement and the Supplemental Assumed List. Again, none of the Colstrip Coal Supply Agreement were listed on the Plan Supplement or the Supplemental Assumed List.

36. Accordingly, in early January 2019, and then again on January 22, 2019, counsel for Talen contacted counsel to the WLB Debtors for clarity as to whether the Colstrip Coal Supply Agreements were being assumed and assigned pursuant to the Plan (as the Plan expressly provides). In response to the January 22 email inquiry, WECO's counsel stated that the Colstrip Coal Supply Agreements were "intentionally left off the assumed list, as the Debtors ***currently intend to reject those agreements*** as of the Plan Effective Date, ***subject to the ongoing business discussions about those agreements***."[5] The very next day, WECO advised the Buyers' counsel that WECO was terminating negotiations and would not entertain any further offers from the Buyers. As such, months after the Plan was filed providing explicitly and unambiguously that the Colstrip Coal Supply Agreements were being assumed and assigned, the Debtors are suggesting the existence of wiggle room in that Plan language, forcing Talen to file this Objection.

37. On January 22, 2019, the Official Committee of Unsecured Creditors (the "**Creditors' Committee**") filed the *Second Stipulation and Agreed Order (A) Extending Challenge Period Termination Date in Final DIP Order and (B) Resolving Possible Confirmation Objections Pursuant to Settlement Term Sheet* (the "**GUC Settlement**") [Docket

5 *See* January 22, 2019 Email Correspondence (emphasis added), attached to this Objection as **Exhibit B**.

No. 1115]. Pursuant to the GUC Settlement, the Creditors' Committee, on behalf of the WLB Debtors' unsecured creditors, agreed to support the Plan in exchange for, among other things, $3,250,000 to the class of general unsecured claims. As would be expected to ensure that their constituents' recovery from the settlement is not diluted, the GUC Settlement provides for protections against increasing the number of contracts to be rejected by the WLB Debtors.

Argument

A. WLB Debtors Must Confirm that Plan Will Assume Colstrip Coal Supply Agreements

1. Plain Language of Plan Confirms that Colstrip Coal Supply Agreements Will Be Assumed and Assigned

38. Section A of Article V of the Plan provides in no uncertain terms that any contracts for the purchase or sale of coal relating to mines in the Core Assets shall automatically be deemed assumed and assigned on the Plan Effective Date "notwithstanding anything in the Plan to the contrary." This provision alone provides sufficient clarity as to the treatment of the Colstrip Coal Supply Agreements. The Court should require the WLB Debtors to uphold the expectations they set for the Buyers and their other stakeholders.

39. Yet, notwithstanding this plain language, the WLB Debtors have suggested to Talen's counsel the possibility that they may treat the Colstrip Coal Supply Agreements as rejected ***on a post-confirmation basis*** by virtue of their non-inclusion on the Assumed Contracts and Leases Lists. Presumably the WLB Debtors threaten rejection by relying on the more general language in the Bidding Procedures authorizing the WLB Debtors to assume or reject certain contracts on a post-confirmation basis. (*See* Bidding Procedures Order at ¶ 9.f.) But as a matter of contract interpretation, the WLB Debtors' position must fail.

40. First, under New York contract law[6] and case law in this Circuit, where there is a conflict between two provisions of an agreement, the specific controls over the general. *See Cnty. of Suffolk v. Alcorn*, 266 F.3d 131, 139 (2d Cir. 2001) (applying N.Y. law, "[i]t is axiomatic that courts construing contracts must give specific terms and exact terms . . . greater weight than general language.") (internal citations omitted); *United States Postal Service v. American Postal Workers Union, AFL-CIO*, 922 F.2d 256 (5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991). Here, Section A of Article V of the Plan very specifically sets forth the treatment of the Colstrip Coal Supply Agreements as a subset of executory contracts: they will be assumed and assigned ***notwithstanding anything to the contrary in the Plan***. Thus, that provision must control over the more general provisions of the Bidding Procedures, which are only generally incorporated into the Plan.

41. Second, contractual provisions should not be read to deprive such provisions of any meaning. *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005). Here, that is precisely what the WLB Debtors' preferred interpretation would accomplish. If the WLB Debtors were able to rely on the general provisions to change their mind at any time with respect to the treatment of the Colstrip Coal Supply Agreements, the entirety of Section A of Article V would have no meaning whatsoever. Accordingly, based on a textual analysis of the Plan (and ancillary documents), the Court should require the WLB Debtors to confirm that the Colstrip Coal Supply Agreements will be assumed and assigned.

42. To the extent the WLB Debtors attempt to change this key provision of the Plan at the literal eleventh hour, they should not be permitted to do so. As discussed below, various stakeholders, including Talen, and potentially the Creditors' Committee, have relied on

[6] The Plan is governed by the laws of the State of New York. (Plan, Art. I Sec. D.)

the Plan provision providing for assumption of the Coal Supply Agreements. Notice must mean something, and if they change the Plan provision now, notice will be insufficient.

2. WLB Debtors' Overtones of Possibly Rejecting Colstrip Coal Supply Agreement Are Inequitable and a Misuse of Assumption/Rejection Process

43. Even if the Court finds ambiguity in the text of the Plan, or that the WLB Debtors can change a key term of the Plan post-solicitation on a whim, the Court should require the WLB Debtors to confirm that the Colstrip Coal Supply Agreements are being assumed and assigned pursuant to the Plan based on the equities of the case. "The Bankruptcy Code is designed to shield debtors from creditor harassment, but it should not be used as sword by debtors to deprive creditors of that to which they are properly entitled." *In re Choate*, 184 B.R. 270, 273 (Bankr. N.D. Tex. 1995); *see also In re CBBT, L.P.*, No. 11–30036–H3–11, 2011 WL 1770438, at *1 (Bankr. S.D. Tex. May 9, 2011) (finding that using chapter 11 solely to force a counterparty to accept more favorable contract terms was a misuse of the bankruptcy process). Given the context of the commercial negotiations on extensions to the Colstrip Coal Supply Agreement, the profitable nature of those agreements to WECO, and the monopolistic power that WECO holds within the context of the Rosebud Mine, the WLB Debtors' attempt to squeeze Talen and the Co-Owners at the last minute to take advantage of the situation is impermissible. This behavior would be bad enough if their aims had been apparent from the beginning, but is worsened by having done so without providing those parties the notice to which they are entitled regarding the treatment of their executory contracts under the Plan and sending out a plan for solicitation that specifically said the opposite.

44. Particularly problematic is the fact that Talen is being squeezed not only for ransom pricing during the term of the contract, but apparently the WLB Debtors are seeking to extract ransom pricing for an extension of the U34 Coal Supply Agreement for a number of

years beyond its current term. Given the importance of coal to operations of the Colstrip Plant (the plant literally cannot operate without coal from the Rosebud Mine), the WLB Debtors could theoretically squeeze Talen by charging multiples of market prices for the coal – two, three, four, or even ten times WECO's cost of producing the coal – and lock those prices in for many years.

45. The situation here is different from ordinary contract rejection cases, and this is not an appropriate use of the Bankruptcy Code by a debtor. The Bankruptcy Code and the Bankruptcy Rules were designed to ensure that the benefits bestowed upon unfortunate debtors are balanced with the due process rights of non-debtor stakeholders. *See, e.g., Matter of Cybernetic Servs., Inc.*, 94 B.R. 951, 953 (Bankr. W.D. Mich. 1989) (holding that bankruptcy rules governing contract assumption recognized and protected due process rights of parties in interest). Bankruptcy courts are courts of equity, and the WLB Debtors should not be permitted to use the Court and the powers that are granted by the Bankruptcy Code for inequitable, unfair, and sharp practices. The WLB Debtors' eleventh hour tactics are antithetical to the principles underlying the chapter 11 process.

B. To Extent Plan Contemplates Rejection of Colstrip Coal Supply Agreements, WLB Debtors Cannot Meet Standard of Proof to Justify Rejection

46. The WLB Debtors bear the burden of proving that the rejection of an executory contract is warranted. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 429 (Bankr. N.D. Tex. 2009). To satisfy that burden of proof, a debtor must at minimum show that rejecting the executory contract would satisfy the "business judgment test." *In re Pisces Energy, LLC*, Nos. 09–36591–H5–11, 09–36593–H5–11, 2009 WL 7227880, at *6 (Bankr. S.D. Tex. Dec. 21, 2009) (citing *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985)). Where the treatment of an executory contract gives rise to material public policy implications, however, a debtor must further demonstrate that the contract burdens the debtor's

estate and the balance of equities weighs in favor of rejection. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 526–27 (1984); *Mirant*, 378 F.3d at 525. The WLB Debtors have not carried their burden of satisfying either standard.

1. Rejection of Colstrip Coal Supply Agreement Fails Business Judgment Test

47. Ordinarily, to reject an executory contract, a debtor must show that doing so "will be advantageous to the bankruptcy estate and the decision will be based on sound business judgment." *In re Idearc Inc.*, 423 B.R. 138, 162 (Bankr. N.D. Tex. 2009); *see also Pisces*, 2009 WL 7227880, at *6. Where a debtor can articulate a legitimate business justification, its decision to reject an executory contract will not be altered in the absence of a showing bad faith or an abuse of business discretion. *Idearc*, 423 B.R. at 162.

48. Nonetheless, under the business judgment test, a debtor is still subject to limitations on when it may reject an executory contract. Courts are vigilant to ensure that a debtor is not simply hiding behind the shield of the Bankruptcy Code as a means to engage in conduct that would be improper in a non-bankruptcy context. *Pilgrim's Pride*, 403 B.R. at 426. Indeed, a debtor is a fiduciary that must administer its case and conduct its business "in a fashion amenable to scrutiny to be expected from creditor and court oversight." *Id.* A debtor should exercise its powers consistent with the purposes of the Bankruptcy Code.

49. Courts consider a variety of factors in determining whether rejection of an executory contract is in the sound business judgment of the debtor. For example, as articulated in *In re G Survivor Corp.*, 171 B.R. 755, 758 (Bankr. S.D.N.Y. 1994), courts may examine (a) whether the contract burdens the debtor's estate financially; (b) whether the debtor can show real economic benefit resulting from the rejection; and (c) whether rejection would result in a large claim against the estate. Other courts have also focused on whether rejection would benefit the general unsecured creditors, sometimes noting that the primary beneficiaries of rejection

should be the debtor's general unsecured creditors. *See, e.g.*, *In re Pomona Valley Med. Grp., Inc.*, 476 F.3d 665 (9th Cir. 2007); *In re Stable Mews Assocs., Inc.*, 41 B.R. 594 (Bankr. S.D.N.Y. 1984).

50. Here, far from being burdensome, the cost-plus, profitable Colstrip Coal Supply Agreements are valuable to WECO's estate, its "lifeblood." Oct. 9, 2018 Hr'g Tr. at 58:9–10 [Docket No. 134]. Indeed, the WLB Debtors have represented that during the fiscal year of 2017, approximately 36% of their coal sales from U.S. mines were attributable to the proceeds from sales to the Colstrip Plant. *See* Westmoreland Coal Company, Annual Report (Form 10-K) (Apr. 2, 2018) at 12. The WLB Debtors have further represented that the lack of a contract for the sale of coal ***would*** have adverse financial consequences on them; specifically:

> Should [the WLB Debtors] be unable to successfully renew any of [their] expiring contracts [including the Colstrip Coal Supply Agreements], the reduction in the sale of [the WLB Debtors'] coal would adversely affect [their] operating results and liquidity and could result in significant impairments to the affected mine should the mine be unable to execute a new long-term coal supply agreement.

Id. at 32. This makes sense and it demonstrates the WLB Debtors' view that in lieu of a profitable, guaranteed source of revenue, rejection would leave the Rosebud Mine with no certainty as to ongoing revenues to pay its workers or satisfy its other obligations.

51. Further, to the extent that WECO argues that its Rosebud Mine operations have become more costly over time, these costs are passed through to the Buyers. (*See* U34 Coal Supply Agreement, § 12.) [redacted] As such, there is no basis to argue that commercial realities have rendered the contract burdensome to the estate. WECO will continue to profit under the Colstrip Coal Supply Agreements while in effect.

52. Nor have the WLB Debtors demonstrated potential economic gain from rejecting the Colstrip Coal Supply Agreements, as there is likely no such gain to be had. As

explained above, the Rosebud Mine and the Colstrip Plant were each designed in a manner that effectively precludes both WECO and the Buyers from operating without one another. Further, upon information and belief, WECO lacks the necessary shipping infrastructure to sell to third parties on the open market, at least at the current cost and volume WECO currently sells to the Talen and the Co-Owners. It would take a significant amount of time and money for WECO to build the infrastructure needed to ship coal to purchasers other than the Buyers. Similarly, Talen and the Co-Owners currently have no other practical source of supply for the Colstrip Plant. Even if another source of coal were available, the various environmental permits currently in effect prohibit the Colstrip Plant from burning any coal other than coal from the Rosebud Mine.

53. Even if WECO (or the Ad Hoc Group, as the successful bidder for WECO's assets) were to spend the time and capital investment to develop the necessary infrastructure to deliver to third parties, WECO would incur greater shipping costs by virtue of having to ship to distant plants by train. In addition, WECO's costs to mine coal are above market even before considering shipping costs to reach third parties. Under these circumstances, it is unlikely that another party would be willing pay WECO's costs, as the Buyers currently do, or otherwise guarantee the same profit margin that WECO is guaranteed under the Colstrip Coal Supply Agreements.

54. In light of these capital expenditures, as well as increased costs of shipping for delivery beyond the Colstrip Plant, it is commercially infeasible for WECO to enter into a profitable coal supply agreement with another purchaser. [redacted]

[redacted]

55. In any event, the WLB Debtors have not put forth any evidence that rejection of these contracts would provide a benefit to WECO's estate. Their statements have suggested just the opposite – that the Colstrip Coal Supply Agreements are necessary and valuable to their business.

56. In contrast to the lack of economic benefit to the estate, rejection would lead to many millions of dollars of rejection damages claims, further diluting the recently settled recovery to general unsecured creditors. As noted above, large potential rejection damage claims are an important consideration for a court in making the decision to approve a rejection. Moreover, until just now, the Creditors' Committee, representing the interests of unsecured creditors, may not have had prior notice of the fact that the Colstrip Coal Supply Agreements might be rejected, which would result in the substantial dilution to their recoveries—a particularly concerning issue given its recent GUC Settlement with the WLB Debtors. Instead, the Creditors' Committee may have relied on the clear language in the Plan—that those agreements would be assumed by the purchaser of the Rosebud Mine, resulting in zero dollars of dilutive rejection damage claims.

2. Rejection of Colstrip Coal Supply Agreement Fails "Balance of Equities" Test

57. Additionally, where rejection of an executory contract would adversely affect public interests, courts require the debtor to make a higher showing that the contract burdens the estate and the balance of equities favors rejection. For instance, in *Bildisco*, the U.S. Supreme Court held that rejection of an executory collective bargaining agreement should be permitted only if the debtor could show that the collective bargaining agreement to be rejected

burdened the estate, and that the equities balanced in favor of rejecting the contract. *Bildisco*, 465 U.S. at 526. There, the Court reasoned that a higher standard for rejection of a collective bargaining agreement was warranted given the "special nature" of such a contract, while also acknowledging the federal regulatory regime governing such contracts. *Id.* at 524.

58. Similarly, in *Mirant Corp.*, the Court of Appeals for the Fifth Circuit addressed the standard by which a court should analyze the rejection of an executory contract for the purchase of electricity. There, the debtor was a regulated public utility whose electricity contracts were subject to the jurisdiction of the Federal Energy Regulatory Commission ("**FERC**") under the Federal Power Act. Noting that the regulatory framework governing these contracts indicated a public interest in them, the Court determined that it would be inappropriate to use the business judgment standard to analyze their rejection because doing so would not "account for the public interest inherent in the transmission and sale of electricity." *Mirant*, 378 F.3d at 525.

59. Here, the WLB Debtors are not regulated public utilities as in *Mirant*, but the Co-Owners are. Talen, while not a regulated public utility, is authorized by FERC to engage in wholesale power transactions at market-based rates. The Co-Owners' regulation by various state public utility commissions raises similar concerns.

60. This overlay of federal statutes and regulatory authority, particularly with respect to interstate sale of electricity, requires that WECO meet a higher standard for rejection than the usual business judgment test.

61. Even beyond the overlay of federal law and regulation, at least one court has explained that "it would [not] make sense to limit application of a higher standard for rejection to just those cases where unfettered rejection is inconsistent with a federal statute or

would encroach on the turf of a federal regulator. The court can easily conceive of a case where rejection of a contract could have a significant impact upon, say, public health, such that its rejection should be allowed only after a more critical review by the court than is contemplated under the ordinary business judgment rule." *Pilgrim's Pride Corp.*, 403 B.R. at 424.

62. Here, the rejection of the Colstrip Coal Supply Agreements would have far-reaching and potentially significant consequences. For context, the Colstrip Plant's approximately 2,100 megawatts are sufficient to power approximately 1.6 million homes across Montana, Washington, Oregon, Idaho, Wyoming, and Utah. The Colstrip Plant would likely cease operations on a temporary basis soon after rejection, and could ultimately lead to a substantial reduction in its operations or accelerate a permanent shutdown. Given the size of the Colstrip Plant relative to the total available generation in the Northwest, power prices would likely increase in the region if the Colstrip Plant is not operating for an extended period of time, as has occurred during past plant outages in periods of significant demand for electricity. Depending on total electricity demand and available generation, an extended outage of the Colstrip Plant could significantly impact wholesale and retail customers in Montana, where generation is at times limited. In addition to providing electricity, the Colstrip Plant also provides critical ancillary services to maintain stability of the electrical grid in Montana and the Northwest. Its inability to operate increases the likelihood of grid instability, which could contribute to blackouts or other reliability problems.

63. The financial impact on the State of Montana, the town of Colstrip, and the employees and contractors at the Rosebud Mine and Colstrip Plant would be no less severe. A temporary or permanent shutdown of the plant could result in employees of the Rosebud Mine and Colstrip Plant being furloughed and/or terminated. In a town of less than 2,500 people, the

Colstrip Plant and Rosebud Mine combined employ over 700 people who live either in Colstrip or the surrounding area. The State of Montana could be deprived of significant tax revenues, including the coal severance tax that WECO pays on every ton of coal sold to the Buyers. The millions of dollars that WECO paid in coal severance taxes in 2017 would vanish if the mine ceased operation. A study conducted in June 2018 by the University of Montana's Bureau of Business and Economic Research attempted to quantify the financial impact a premature shutdown of Units 3 & 4 would have within Montana. The study concluded, among other things, that a premature shutdown (defined in the study to mean a shutdown in 2028) would be expected to result in (i) almost 3,300 fewer jobs compared to a shutdown in 2043; (ii) a loss of income received by Montana households varying between $250 and $350 million per year (or $5.2 billion over the period); (iii) a decline in annual gross sales by businesses and other organizations of between $700 and $800 million; (iv) a decline in population growing to more than 7,000 people by 2043; and (v) a loss of more than $1.2 billion dollars in Montana tax and nontax revenues that would not be collected between 2028 and 2043. Rejection of the Colstrip Coal Supply Agreements would produce a result that is inconsistent with the public interest, particularly during the winter months and other periods of peak electricity demand.

C. To Extent Plan Contemplates Rejection, Plan Fails Feasibility Confirmation Requirement

64. Section 1129(a)(11) of the Bankruptcy Code sets forth a "feasibility requirement," such that a debtor must demonstrate that the confirmation of a plan "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor ***or any successor*** to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11) (emphasis added). In the context of a chapter 11 plan premised on the sale of substantially all of the debtor's assets, section 1129(a)(11) applies

equally to the purchaser of such assets. *See, e.g.*, *In re Temple Zion*, 125 B.R. 910, 915–17 (Bankr. E.D. Pa. 1991) (finding debtor's chapter 11 plan was feasible pursuant to section 1129(a)(11) where proposed purchaser of debtor's assets had established likely ability to timely acquire necessary variances needed to develop debtor's realty following sale); *In re Elm Creek Joint Venture*, 93 B.R. 105, 110 (Bankr. W.D. Tex. 1988) (finding that debtor's chapter 11 plan was feasible where there was a reasonable expectation that debtor's assets would be sold pursuant to plan and debtor's claims would be paid through the proceeds from the sale, and that "[t]here is no requirement that such payments will be guaranteed."); *In re Mount Vernon Plaza Cmty. Urban Redevelopment Corp. I*, 79 B.R. 306, 309 (Bankr. S.D. Ohio 1987) (finding debtor's chapter 11 plan was feasible where court held that proposed purchaser of debtor's assets was an "institution . . . of good reputation, other viable parties exist, and the time within which the transactions are likely to occur is relatively short.").

65. We anticipate that the WLB Debtors may argue that there is no feasibility issue here because Talen and other counterparties to the Colstrip Coal Supply Agreements all need coal and will have to buy it from the Rosebud Mine regardless of whether there is an agreement. But this is speculation at best and in direct contravention to public statements the WLB Debtors have made. It is simply a reality that parties are frequently unable to come to agreement even when it would be in their separate interests to do so. A stand-off may be as likely as a deal. Given such a risk, aside from potential harm to the parties, rejecting the Colstrip Coal Supply Agreements has the potential to cause damage to the public, including the hundreds of Montana-based employees of the Rosebud Mine, and potentially also the hundreds of employees of the Colstrip Plant if it results in a prolonged impasse and a curtailment of operations or potential accelerated shutdown of the Colstrip Plant.

66. The WLB Debtors have perfectly profitable contracts for the sale of coal that they could assume and ensure feasibility; instead, they are threatening to reject these contracts with the apparent hope that they will be able to sell coal at prices above those that are merely profitable and that their hostage Buyers will pay the ransom prices demanded. But hope and speculation are insufficient to ensure WECO's successor will have buyers for coal and receive revenue without assuming the Colstrip Coal Supply Agreements. The WLB Debtors are therefore unable to meet their burden to satisfy the feasibility standard of section 1129(a)(11) of the Bankruptcy Code.

D. If Court Authorizes Rejection of Colstrip Coal Supply Agreements, Court Should Condition such Rejection upon an Adequate Transition Period for Wind-down of Colstrip Coal Supply Agreements

67. If the Court grants the WLB Debtors' rejection of the Colstrip Coal Supply Agreements, it can and should do so only subject to clearly defined terms and conditions that will minimize harm to Talen, the Co-Owners, and their stakeholders. In particular, the Court should permit rejection only once Talen and the Co-Owners have entered into a coal supply agreement with a third party, has acquired the permitting necessary to burn non-WECO coal at the Colstrip Plant, and has completed construction of the infrastructure needed to receive coal under a new agreement. Before those conditions are satisfied, WECO should be obligated to continue performing under the Colstrip Coal Supply Agreements. Alternatively, the Court could set a future deadline at which point rejection would become effective, giving Talen and the Co-Owners a reasonable time to begin operations under a third-party supply contract.

68. Without these conditions, Talen and the Co-Owners would suffer irreparable harm from rejection, as they would be incapable of providing electricity to their customers and would not have an opportunity to prepare operations for a third-party supplier. Moreover, because WECO would continue to pass its costs through to Talen and the Co-Owners

and would continue to receive per-ton profits under the Colstrip Coal Supply Agreements during this transition period, such a condition would not burden the estate or the purchasers of WECO's assets.

[*Remainder of page intentionally left blank*]

Conclusion

For the foregoing reasons, the Court should condition confirmation of the Plan upon assumption of the Colstrip Coal Supply Agreements or, in the alternative, grant relief to the parties in the manner described above to prevent the WLB Debtors from abusing the chapter 11 process for opportunistic gain and to minimize harm to Talen and other stakeholders.

Dated: January 25, 2019
Houston, Texas

/s/ Christopher M. Lopez

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Certificate of Service

I hereby certify that on January 25, 2019, a true and correct copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas, and will be served as set forth in the Affidavit of Service to be filed by the Debtor's proposed claims, noticing, and solicitation agent.

/s/ Christopher M. Lopez
Christopher M. Lopez

Exhibit A

U34 Coal Supply Agreement

FILED UNDER SEAL

Exhibit B

January 22, 2019 Email Correspondence

From: Koenig, Chris
To: Berkovich, Ronit; gregory.pesce@kirkland.com; Bow, Timothy Robert
Cc: Barr, Matt; Welch, Alexander; Li, David
Subject: RE: WECO/Talen
Date: Tuesday, January 22, 2019 10:49:52 AM

SUBJECT TO FRE 408

The below-referenced coal supply agreements were intentionally left off the assumed list, as the Debtors currently intend to reject those agreements as of the Plan Effective Date, subject to the ongoing business discussions about those agreements. We will adjust that plan provision accordingly to be more clear.

Christopher S. Koenig

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From: Berkovich, Ronit <Ronit.Berkovich@weil.com>
Sent: Tuesday, January 22, 2019 9:43 AM
To: Pesce, Gregory F. <gregory.pesce@kirkland.com>; Koenig, Chris <chris.koenig@kirkland.com>; Bow, Timothy Robert <timothy.bow@kirkland.com>
Cc: Barr, Matt <Matt.Barr@weil.com>; Welch, Alexander <Alexander.Welch@weil.com>; Li, David <David.Li@weil.com>
Subject: [EXT] WECO/Talen

K&E Team,

As you recall, we represent Talen Montana in the Westmoreland proceedings. We saw that the Debtors filed the auction cancellation notice on the docket yesterday, which means that the stalking horse bidders will be taking the assets. We reviewed the WLB Debtors' Plan Supplement filed on Friday and noticed that the assumed contracts schedule doesn't list the coal supply agreements between WECO and Talen (and other Colstrip owners). The Plan (Art. V Sec. A) that was negotiated with the stalking horse bidders and filed on the docket seems to pretty clearly state that coal purchase/sale contracts relating to Core Assets (which includes the Rosebud mine) will be deemed assumed and assigned pursuant to the Plan, so perhaps the thought was that you didn't also need to include those on the assumption schedule.

In light of the imminent objection deadline, could you please confirm that the Debtors are assuming and assigning those agreements pursuant to the Plan?

Thanks,
Ronit

Ronit J. Berkovich

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