

**DENIED
MOOT**

Sep 24, 2014

Kathy A. Surratt - States
KATHY A. SURRATT-STATES
Chief United States Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

PATRIOT COAL CORPORATION, et al.,

Debtors.

Chapter 11

Case No. 12-12900 (SCC)

(Jointly Administered)

**DEBTORS' MOTION FOR AN ORDER (i) CONFIRMING
THE MASSEY PAYMENT AGREEMENT IS NOT AN
EXECUTORY CONTRACT OR, ALTERNATIVELY, (ii) APPROVING
REJECTION OF THE MASSEY PAYMENT AGREEMENT**

Patriot Coal Corporation and its subsidiaries that are debtors and debtors in possession in these proceedings (collectively, the "**Debtors**") respectfully represent:

Relief Requested

1. By this motion (the "**Motion**"), the Debtors seek an order in the form attached hereto as Exhibit A (i) confirming that the Massey Payment Agreement (as defined below) is not an executory contract for purposes of section 365 of title 11 of the

United States Code (the “**Bankruptcy Code**”) and (ii) approving the Debtors’ rejection of the Massey Payment Agreement, effective as of the date of this Motion, to the extent the Massey Payment Agreement is deemed an executory contract.

Background and Jurisdiction

2. On July 9, 2012 (the “**Petition Date**”), each Debtor commenced with this Court a voluntary case under chapter 11 of title 11 of the Bankruptcy Code (the “**Petition**”). The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. Contemporaneously with the Petition, the Debtors have filed a motion requesting joint administration of their chapter 11 cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure.

4. Additional information about the Debtors’ businesses and the events leading up to the Petition Date can be found in the Declaration of Mark N. Schroeder, Patriot Coal Corporation’s Senior Vice President and Chief Financial Officer, which is incorporated herein by reference.

5. The Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and may be determined by the Bankruptcy Court. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Basis for Relief

(A) The Massey Payment Agreement Is Not An Executory Contract Because Massey Has No Further Duty To Perform

6. The Payment Agreement dated August 31, 2005 (the “**Massey Payment Agreement**” or “**Agreement**”) was executed by and between Boone East Development Co., Performance Coal Company, and New River Energy Corporation, each a subsidiary of Alpha Natural Resources, Inc. (collectively, “**Massey**”), and Eastern Royalty LLC f/k/a Eastern Royalty Corp. (“**ERC**”), a Debtor entity. Attached hereto as Exhibit B is a redacted, true and correct copy of the Massey Payment Agreement and the exhibits attached thereto.

7. The Massey Payment Agreement provided that, upon execution of the Agreement, the Massey entities and ERC would separately execute five independent agreements pursuant to which the Massey entities would transfer their interests in certain West Virginia coal reserves to ERC. Specifically, the Massey entities and ERC entered into four separate Assignment and Assumption Agreements (the “**Assignment Agreements**”) by which Massey irrevocably assigned to ERC its entire interest, right and title to leasehold estates on four separate coal reserves. In the Assignment Agreements, ERC agreed, among other things, to assume Massey’s obligations under the assigned leases. Copies of the Assignment Agreements are attached as Exhibits A through D to the Massey Payment Agreement. One of the Massey entities (Boone East Development Co.) also entered into a lease agreement that provided ERC with coal and mining rights

on a fifth coal reserve in West Virginia (the “**Boone East Lease**”). A copy of the Boone East Lease is attached as Exhibit E to the Massey Payment Agreement.¹

8. Massey completed its performance under the Agreement once the Assignment Agreements and the Boone East Lease were executed.

9. The Massey Payment Agreement further provides that ERC will make ongoing “tonnage payments” to Massey for each ton of coal that ERC mines and sells from the five coal reserves that are the subject of the separate Assignment Agreements and Boone East Lease. The tonnage payments are commonly referred to as “override” payments in the coal mining industry. The tonnage payments are in addition to the rental payments that ERC makes directly to landowners pursuant to the underlying leases, including the rental payments that ERC pays to Massey under the Boone East Lease.²

10. Because the Massey Payment Agreement requires performance only by ERC – i.e., making the override payments to Massey – and requires no ongoing performance by Massey, the Massey Payment Agreement is not an executory contract. *See In re Worldcom, Inc.*, No. 02-13533, 2010 Bankr. LEXIS 1917 (Bankr. S.D.N.Y., June 11, 2010) (“Under the Countryman test, [a] contract is executory if performance is still required by both parties such that failure of either party to perform would excuse the other party’s performance.”). Massey’s performance under the Agreement was complete

¹ The Debtors reserve the right to assume or reject, as necessary and appropriate, the Assignment Agreements and the Boone East Lease, all of which are distinct agreements that are separate from each other and the Massey Payment Agreement.

² In separate agreements entered into contemporaneously with the Massey Payment Agreement, ERC transferred certain coal reserves to Massey, with Massey agreeing to make override payments to ERC based on coal mined and sold from those reserves. Those agreements are wholly separate from the Massey Payment Agreement and do no reference the Massey Payment Agreement in any way. The Debtors reserve the right to assume or reject, as necessary and appropriate, the separate payment agreements entered into with Massey.

when it executed the independent and enforceable Assignment Agreements and Boone East Lease. Thereafter, Massey owed no further duty to perform under the Agreement, whereas ERC remains obligated to make override payments on an ongoing basis, without a termination date.³

11. Courts routinely conclude that agreements that provide solely for unilateral payment obligations, like the Massey Payment Agreement, are not executory contracts. *See In re Calpine Corp.*, 2008 Bankr. LEXIS 2152 (Bankr. S.D.N.Y. Aug. 4, 2008) (holding that a loan agreement is not executory where one party has already lent another party all of the funds called for under the agreement and, therefore, has no remaining performance obligations); *In re Chateaugay Corp.*, 102 B.R. 335, 347 (Bankr. S.D.N.Y. 1989) (holding that obligations for the payment of money only are insufficient to make an agreement executory); *see also In re Exide Technologies*, No. 02-11125 (KJC), 2007 Bankr. LEXIS 4014 (Bankr. D. Del. Dec. 5, 2007) (holding that a retirement agreement plan was not an executory contract where a debtor company was required to make annual payments to a retired employee, but the retired employee had already discharged all his duties thereunder); *In re Indian River Homes, Inc.*, No. 89-254-CMW, 1989 U.S. Dist. LEXIS 14964 (D. Del. Dec. 1, 1989) (holding that a brokerage agreement is not an executory contract where the sole remaining obligation of a debtor was to pay a broker's commissions and the agreement called for no further performance on the part of the broker).

³ Assumption of the Massey Payment Agreement would bring no benefit to the Debtors' estates, further evidence that this Agreement is not an executory contract. *See In re Worldcom*, 2010 Bankr. LEXIS 1917 at *14 (applying an alternative "functional" test which "finds an executory contract where assumption of a contract would benefit a debtor's estate").

(B) The Separate Boone East Lease And Assignment Agreements Do Not Make The Massey Payment Agreement An Executory Contract

12. Nothing in the separate Assignment Agreements or Boone East Lease makes the Massey Payment Agreement executory. Under each of those agreements, Massey's transfer of its leasehold interests in the coal reserves is not contingent on, and does not require, the payments by ERC pursuant to the Massey Payment Agreement.

13. Under the Assignment Agreements, Massey transferred to ERC "all of [Massey's] right, title and interest" in the assigned coal reserves, without a right of reversion, in exchange for ERC's assumption of the underlying leasehold interests and certain covenants. The Assignment Agreements do not reference the Massey Payment Agreement or ERC's obligation to make override payments thereunder. The Assignment Agreements transferred, for specified consideration that did not include the override payments, all of Massey's interests in the subject coal reserves to ERC, and the assignments cannot be revoked. *See* 6 AM. JUR. 2D ASSIGNMENTS § 122 ("[O]nce a valid and unqualified assignment is made, all interests and rights of the assignor are transferred to the assignee; the assignor loses all control over the thing assigned, and cannot do anything to defeat the assignee's rights."); *see also Easley Coal Co. v. Brush Creek Coal Co.*, 112 S.E. 512, 514 (W. Va. 1922) (holding that lessor and former assignee may not oust mining corporation's assignee because "[f]orfeitures of estates are not favored in law," and "[t]he right to forfeit must be clearly stipulated for in terms, else it does not exist").

14. Likewise, the Boone East Lease is a standalone agreement that fully sets forth the lease terms and consideration for ERC's leasehold interest in that coal

reserve. The Boone East Lease specifies rental rates for ERC's leasehold interest, and its termination provision provides for termination only if ERC defaults on amounts "required to be paid under the terms of this Lease" Boone East Lease, Sec. 19.1(a) (emphasis added). Massey cannot terminate the Boone East Lease if ERC fails to make the separate override payments; indeed, the Boone East Lease never references the Massey Payment Agreement at all. To the contrary, the Boone East Lease has an integration clause that provides that the lease "constitutes the sole and entire existing agreement between the parties and expresses all the obligations of and restrictions imposed upon the parties"—clear evidence that the parties did not intend ERC's rights under the Boone East Lease to be contingent on the override payments required by Massey Payment Agreement. Boone East Lease, Sec. 23.7; *see also Peirce v. New York Dock Co.*, 265 F. 148, 152 (2d Cir. N.Y. 1920) (citing *Henderson v. Carbondale Coal & Coke Co.*, 140 U.S. 25, 33 (1891) ("Equity always leans against [forfeitures], and only decrees in their favor when there is full, clear, and strict proof of a legal right thereto."); 5-44 THOMPSON ON REAL PROPERTY, Thomas Editions § 40.08(b)(3)(i) ("Forfeiture of a coal lease will not be decreed absent a forfeiture clause in the lease that possesses the requisite degree of specificity for enforcement by a court of equity.").

15. For all of these reasons, the Court should confirm the Debtors' view that the Massey Payment Agreement is not an executory contract.

(C) The Debtors Seek To Reject The Massey Payment Agreement Should It Be Deemed An Executory Contract

16. In the alternative, if the Court concludes that the Massey Payment Agreement is an executory contract, the Debtors seek to reject the Agreement pursuant to section 365 of the Bankruptcy Code.

17. The Debtors have determined that the Massey Payment Agreement provides no ongoing benefit to the Debtors' estates. Rejection of the Massey Payment Agreement would allow the Debtors to avoid the ongoing payment obligations required under the Massey Payment Agreement. While the actual savings to the Debtors' estates from terminating the Massey Payment Agreement will ultimately depend on, among other things, the amount of coal mined and changes in price over time, the savings could be as much as \$80 million or more over the next five years with additional savings thereafter.

Notice

18. No trustee, examiner or creditors' committee has been appointed in these chapter 11 cases. The Debtors have served notice of this Motion on (a) the Office of the United States Trustee for the Southern District of New York, (b) those creditors holding the five largest secured claims against the Debtors' estates on a consolidated basis, (c) those creditors holding the 50 largest unsecured claims against the Debtors' estates on a consolidated basis, (d) attorneys for the administrative agents for Debtors' proposed postpetition lenders, (e) the Internal Revenue Service, (f) the Securities and Exchange Commission, (g) the United States Environmental Protection Agency, (h) the United States Attorney's Office for the Southern District of New York, and (i) Massey.

No Previous Request

19. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as is just and proper.

Dated: New York, New York
July 9, 2012

By: /s/ Jonathan D. Martin
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*Proposed Counsel to the Debtors
and Debtors in Possession*

Exhibit A

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

PATRIOT COAL CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 12-12900 (SCC)

(Jointly Administered)

ORDER REGARDING THE MASSEY PAYMENT AGREEMENT

Upon the motion (the “**Motion**”)¹ of Patriot Coal Corporation and its subsidiaries that are debtors and debtors in possession in these proceedings (collectively, the “**Debtors**”) for confirmation that the Massey Payment Agreement is not an executory contract or, alternatively, approval of the rejection of the Massey Payment Agreement; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. § 1334; and consideration of the Motion and the requested relief being a core proceeding the Bankruptcy Court can determine pursuant to 28 U.S.C. § 157(b); and due and proper notice of the Motion having been provided to (a) the Office of the United States Trustee for the Southern District of New York, (b) those creditors holding the five largest secured claims against the Debtors’ estates on a consolidated basis, (c) those creditors holding the 50 largest unsecured claims against the Debtors’ estates on a consolidated basis, (d) attorneys for the administrative agents for Debtors’ proposed postpetition lenders, (e) the Internal Revenue Service, (f) the Securities and

¹ Unless otherwise defined herein, each capitalized term shall have the meaning ascribed to such term in the Motion.

Exchange Commission, (g) the United States Environmental Protection Agency, (h) the United States Attorney's Office for the Southern District of New York, and (i) Massey, and it appearing that no other or further notice need be provided; and the relief requested in the Motion being in the best interests of the Debtors and their estates and creditors; and the Court having reviewed the Motion; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that the Massey Payment Agreement is deemed a separate and independent non-executory contract for the purpose of section 365 of title 11 of the United States Code; and it is further

ORDERED that, to the extent the Massey Payment Agreement is an executory contract, the Debtors' rejection of the Massey Payment Agreement pursuant to section 365 of title 11 of the United States Code is approved², effective *nunc pro tunc* to the Petition Date; and it is further

ORDERED that claims arising out of the treatment or rejection of the Massey Payment Agreement must timely be filed in accordance with any order pursuant to Bankruptcy Rule 3003(c) establishing a deadline by which prepetition general unsecured claims must be filed. Any claim not timely filed shall be irrevocably barred; and it is further

² This Order shall not alter or affect the rights of the parties to the Assignment Agreements and the Boone East Lease, which are attached as exhibits to the Massey Payment Agreement and which the Debtors have expressly reserved the right to seek to assume or reject.

ORDERED that the notice of the Motion is good and sufficient notice and satisfies Bankruptcy Rule 9014 by providing the counterparties with a notice and an opportunity to object and be heard at a hearing.

Dated: New York, New York

_____, 2012

THE HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Exhibit B

THIS PAYMENT AGREEMENT, effective as of August 31, 2005, between **BOONE EAST DEVELOPMENT CO.** ("Boone East"), a West Virginia corporation; **PERFORMANCE COAL COMPANY** ("PCC"); a West Virginia corporation, **NEW RIVER ENERGY CORPORATION** ("New River") a West Virginia corporation (collectively Boone East, PCC and New River are hereinafter referred to as the "Massey Entities") and "**EASTERN ROYALTY CORP.** ("ERC"), a Delaware corporation

RECITALS:

A. WEST FORK RESERVES (New River)

WHEREAS, New River is the owner of a leasehold estate in certain lands in REDACTED under Agreement of Lease dated August 15, 1995, between Berwind Land Company ("Berwind"), as lessor, and Federal Development Corporation, as lessee. Federal Development Corporation changed its name to New River Energy Corporation effective September 29, 2000. This Agreement of Lease is referred to herein as the "Berwind- New River Lease"; and

WHEREAS, New River will assign to ERC and ERC will assume a portion of the coal reserves covered by the Berwind- New River Lease.

B. WEST FORK RESERVES (PCC- Berwind)

WHEREAS, PCC is the owner of a portion of the leasehold estate in certain lands in REDACTED under a Supplemental Agreement of Lease dated March 10, 1978, between Berwind Land Company ("Berwind"), as lessor, and Armco Steel Corporation, as lessee. This Supplemental Agreement of Lease as amended, supplemented, partially subleased and assigned, is referred to herein as the "Berwind- Performance Lease"; and

WHEREAS, Performance will assign to ERC and ERC will assume a portion of the coal reserves covered by the Berwind- Performance Lease.

C. WEST FORK RESERVES (WPP)

WHEREAS, PCC is the owner of a leasehold estate in certain lands in REDACTED Coal Mining Lease dated October 15, 1994, between Western Pocahontas Properties Limited Partnership, as lessor, and Performance Coal Company, as lessee, as amended by Letter Agreement dated June 26, 1997 between Western Pocahontas Properties Limited Partnership. Western Pocahontas Properties Limited Partnership conveyed the lands and the leasehold estate to WPP LLC by Deed dated October 14, 2002. This Coal Mining Lease, as amended, is referred to herein as the "WPP – Performance Lease"; and

WHEREAS, PCC will assign to ERC and ERC will assume a portion of the coal reserves covered by the WPP - Performance Lease.

D. VAN RESERVES (WPP)

WHEREAS, Boone East is the owner of a portion of the leasehold estate in certain lands in REDACTED under a Coal Mining Lease dated January 1, 1956, between Western Pocahontas Corporation, as lessor, and Traux-Traer Coal Company, as lessee. This coal lease has been amended, supplemented, subleased and assigned. This Coal Mining Lease as so amended, supplemented, partially subleased and assigned, is referred to herein as the "WPP – Boone East Lease;"

WHEREAS, Boone East will assign to ERC and ERC will assume a portion of the coal reserves covered by the WPP-Boone East Lease; and

E. VAN RESERVES (Boone East)

WHEREAS, Boone East is the owner of certain tracts or parcels of land located in REDACTED and Boone East will lease to ERC certain coal and mining rights on a portion of said tracts or parcels of land by Coal Lease of even date hereof and is referred to herein as the "Boone East – Van Lease".

WITNESSETH:

NOW THEREFORE, as additional consideration for the coal reserves to be assign and leased to ERC by the Massey entities pursuant to this agreement, the parties agree as follows:

1. Partial Assignments.

Upon execution of this Agreement:

- a. New River and ERC will execute the partial assignment and assumption agreement, attached as Exhibit A, (“Berwind-New River Partial Assignment”);
- b. Performance and ERC will execute the partial assignment and assumption agreement, attached as Exhibit B, (“Berwind-Performance Partial Assignment”);
- c. Performance and ERC will execute the partial assignment and assumption agreement, attached as Exhibit C, (“WPP-Performance Partial Assignment”);
- d. Boone East and ERC will execute the partial assignment and assumption agreement, attached as Exhibit D, (“WPP-Boone East Partial Assignment”); and
- e. Boone East and ERC will execute the Boone East – Van Lease, attached as Exhibit E.

2. Tonnage Payments.

ERC agrees to pay the respective Massey Entities for each ton of coal mined and sold from (a) the Assigned Reserves (as defined in the Berwind-New River Partial Assignment), (b) the Assigned Reserves (as defined in the Berwind-Performance Partial Assignment), (c) the Assigned Reserves (as defined in the WPP-Performance

Partial Assignment), (d) the Assigned Reserves (as defined in the WPP-Boone East Performance Partial Assignment), and (e) the Leased coal (as defined in the Boone East – Van Lease) REDACTED

REDACTED

Additionally, ERC further agrees to pay New River for each ton of coal mined and sold from only those Assigned Reserves specified in and subject to the Berwind-New River Partial Assignment) REDACTED

REDACTED

Subject to the qualification hereinafter stated in this paragraph, "gross sales price per ton" shall, for all purposes herein, mean the actual average weighted sales price for steam coal for sales in the steam market (unless the steam coal is commingled with coal of substantially different quality from the coal covered by the Payment Agreement, in which case, the "gross sales price per ton" shall mean the actual average weighted sales price for sales of similar quality coals) or met coal (unless the met coal is commingled with coal that is substantially different from No. 2 Gas, Eagle, Hernshaw, and/or Powellton seam coals, in which case, the "gross sales price per ton" shall mean the actual average weighted sales price for sales of similar quality coal) for sales in the met market from the Assigned Reserves and the Leased coal by ERC or its parent company, or any of their affiliates,

associates, subsidiaries, contractors or lessees to bona fide arms-length purchasers, f.o.b. ERC's tipple, cleaning plant or other shipping point from the Assigned Reserves and the Leased coal after final preparation and loading, during any certain calendar month without any deductions whatsoever.

Tonnage Payments will be REDACTED
REDACTED

3. **Records/Audit.**

ERC shall furnish unto the Massey Entities on or before the 20th day of each month, a complete, correct and itemized statement, in a form or forms reasonably acceptable to the Massey Entities showing for the preceding calendar month the total number of tons of coal mined and sold from the Assigned Reserves and the Leased coal and the gross sales price per ton for such coal mined and sold. ERC shall keep and preserve for a period of not less than five years full and complete records satisfactory to the Massey Entities, which shall be open to a nationally recognized independent audit firm selected by the Massey Entities at all reasonable times and upon reasonable prior written notice from the Massey Entities, at the offices of ERC, to permit verification of the Tonnage Payments provided for under the terms of this Agreement.

IN WITNESS WHEREOF, the parties have each caused this Agreement to be executed and delivered in its name and on its behalf by officers who are duly authorized.

BOONE EAST DEVELOPMENT CO.

By: R. Fred Maje
Its: PRESIDENT

PERFORMANCE COAL COMPANY

By: Bill Potter
Its: President

NEW RIVER ENERGY CORPORATION

By: R. Fred Mize
Its: VICE PRESIDENT

EASTERN ROYALTY CORP.

By: John M. Egan
Its: Vice President

REDACTED

Exhibit F

Tonnage Payment Schedules for Metallurgical Coal Sales

Base Threshold & Sales Price Table		Example Revised Threshold & Sales Price Table	
REDACTED	REDACTED	REDACTED	REDACTED
Base Gross Sales Price Values (\$/ton)	Base Tonnage Payment (\$/ton)	Hypothetical Percent Change from Attachment I (%)	Adjusted Gross Sales Price Values (\$/ton)
			Adjusted Tonnage Payment (\$/ton)

REDACTED

Notes:

1. REDACTED

2. REDACTED REDACTED

3. REDACTED

Attachment I

Threshold Adjustments for Inflation and Government Impositions
(Underground Coal)

REDACTED

REDACTED

REDACTED

Subtotal

REDACTED

Total

REDACTED

EXHIBIT A

PARTIAL ASSIGNMENT AND ASSUMPTION AGREEMENT
REDACTED

THIS PARTIAL ASSIGNMENT AND ASSUMPTION AGREEMENT (“Partial Assignment”), dated this ___ day of _____, 2005, by and between **NEW RIVER ENERGY CORPORATION**, a West Virginia corporation (“Assignor”); and **EASTERN ROYALTY CORP.**, a Delaware corporation (“Assignee”):

RECITALS:

WHEREAS, Assignor is the owner of a leasehold estate in certain lands in ^{REDACTED} _{TFD} ^{REDACTED} under Agreement of Lease dated August 15, 1995, between Berwind Land Company (“Berwind”), as lessor, and Federal Development Corporation, as lessee. Federal Development Corporation changed its name to New River Energy Corporation effective September 29, 2000. (This Agreement of Lease is referred to herein as the “Berwind Lease”);

WHEREAS, by Conditional Consent to Partial Assignment of Lease and Assumption Agreement ^{REDACTED} dated _____, 2005 between Berwind, Assignor and Assignee, Berwind consented to this Partial Assignment;

WHEREAS, subject to the terms and conditions of this Partial Assignment, Assignor desires to sell and assign to Assignee and Assignee desires to accept all of Assignor’s right, title and interest to ^{REDACTED} covered by the Berwind Lease which is shown on the map attached hereto as Exhibit A (referred to hereinafter as the “Assigned Reserves”), together with the non-exclusive right to use the surface overlying the Assigned Reserves, and to accept and assume the obligations under the Berwind Lease relating thereto;

WHEREAS, it is understood that the ^{REDACTED} may be known by different names, and thus, for purposes of this Partial Assignment, ^{REDACTED} shall be deemed to be that seam of coal at ^{REDACTED} regardless of any other names for the seam; and

WHEREAS, Assignor is retaining all other coal reserves, property and rights covered by the Berwind Lease not assigned hereby (the "Retained Premises").

Agreements

NOW THEREFORE, in consideration of the mutual covenants contained herein, Assignor and Assignee agree as follows:

1. **Interest Assigned.** Subject to the terms of this Partial Assignment, Assignor hereby grants, assigns, sells and transfers to Assignee all of Assignor's right, title and interest to the Assigned Reserves, together with all related rights and privileges under the Berwind Lease to mine and remove the Assigned Reserves except for the right of recoupment of any previously paid Minimum Annual Rental and other royalties and/or payments to which it is or hereafter will be entitled under the Berwind Lease, without proration or allocation to the Assigned Reserves.

2. **Assumption.** Assignee hereby accepts the assignment of the Assigned Reserves made herein and hereby expressly assumes and agrees to abide by all the terms, covenants, conditions, and obligations of the Berwind Lease pertaining to the Assigned Reserves that are allocable to the period on and after the date hereof.

Assignee does not assume liability for acts or events occurring prior to the date hereof.

Assignor is not assigning and Assignee does not assume any of Assignor's obligation to pay Minimum Annual Rental due under the current terms of the Berwind Lease and Assignor shall be solely responsible therefor.

3. **Indemnity.** Assignee agrees to indemnify and hold harmless Assignor, its successors, assigns, parent and affiliated companies, from and against any all claims, losses, damages (including personal injury or death), causes of actions, fines, penalties, violations, costs and expenses, including reasonable attorney fees, arising out of or related to Assignee's, its employees', agents' or contractors' negligence in the conduct of operations on the Assigned Reserves, failure to comply with any provision of the Berwind Lease (except for those provisions

pertaining to payment of minimum royalties) or the terms of this Partial Assignment, or failure to comply with any applicable federal or state law or regulation allocable to the period on and after the date hereof; provided that Assignee shall not be required to indemnify and hold Assignor harmless from those portions of any claims, losses, damages (including personal injury or death), causes of actions, fines, penalties, violations, costs and expenses, including reasonable attorney fees, arising out of or caused or contributed to by the negligence of Assignor, its successors, assigns, parent and affiliated companies, employees, agents and/or contractors. The provisions of this paragraph shall survive the surrender, cancellation or termination of this Partial Assignment.

Assignor agrees to indemnify and hold harmless Assignee, its successors, assigns, parent and affiliated companies, from and against any and all claims, losses, damages (including personal injury or death), causes of actions, fines, penalties, violations, costs and expenses, including reasonable attorney fees, arising out of or related to Assignors', its employees', agents' or contractors' negligence in the conduct of operations on the Retained Premises, failure to comply with any provision of the Berwind Lease or the terms of this Partial Assignment, or failure to comply with any applicable federal or state law or regulation; provided that Assignor shall not be required to indemnify and hold Assignee harmless from those portions of any claims, losses, damages (including personal injury or death), causes of actions, fines, penalties, violations, costs and expenses, including reasonable attorney fees, arising out of or caused or contributed to by the negligence of Assignee, its successors, assigns, parent and affiliated companies, employees, agents and/or contractors. The provision of this paragraph shall survive the surrender, cancellation or termination of this Partial Assignment.

4. **Retained Premises and Rights.** In making this Partial Assignment, Assignor expressly retains the Retained Premises together with the right to exercise all rights under the Berwind Lease, including but not limited to: (i) rights for the mining and removal of the coal underlying or within the Retained Premises, and (ii) rights for the use of the Retained Premises, other surface and other property covered by the Berwind Lease for the mining and removal of the coal contained in the Retained Premises and use thereof for construction of plants, facilities, impoundments, refuse areas and any other improvements and operations authorized by the Berwind Lease on the Retained Premises.

Assignor and Assignee each waive and release Berwind from any claims, liabilities or actions arising from or relating to their respective operations in and use of the Assigned Reserves or the operations in and use of the Assigned Reserves by their respective contractors, sublessees and assignees, and neither Assignor or Assignee shall assert any such claim, liability or action against Berwind with regard to their operations in and use of the Assigned Reserves or the operations in and use of the Assigned Reserves by their respective contractors, sublessees and assigns.

5. **Representations and Warranties.** This Partial Assignment is expressly made subject to the terms and conditions of the Berwind Lease (except those pertaining to payment of minimum annual royalties) and as to the Assigned Reserves; Assignor assigns and conveys only those interests and rights it owns as the lessee under the Berwind Lease. This Partial Assignment is further made subject to any and all rights of way, easements, reservations, exceptions, covenants, restrictions, or out conveyances as may have been previously made or as could be ascertained from a physical inspection or current survey of the premises covered by the Berwind Lease.

ASSIGNOR EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES, EXCEPT THOSE SPECIFICALLY STATED HEREIN, INCLUDING ANY WARRANTY AS TO (I) THE MINEABILITY AND MERCHANTABILITY OF THE ASSIGNED RESERVES; (II) THE CONDITION, QUALITY AND QUANTITY OF THE ASSIGNED RESERVES; (III) THE PHYSICAL AND ENVIRONMENTAL CONDITION OF THE ASSIGNED RESERVES AND PREMISES COVERED BY THE BERWIND LEASE; AND (IV) FITNESS FOR ANY PARTICULAR PURPOSE; HOWEVER, ASSIGNOR REPRESENTS AND WARRANTS THAT IT HAS NOT CONDUCTED ANY MINING OPERATIONS OR MINED ANY COAL IN THE ASSIGNED RESERVES. ASSIGNEE REPRESENTS AND WARRANTS UNTO ASSIGNOR THAT ASSIGNEE HAS HAD AMPLE OPPORTUNITY TO INSPECT THE ASSIGNED RESERVES AND ACCEPTS THE SAME AS IS, WHERE IS, IN THEIR PRESENT CONDITION, AND WITH ALL FAULTS AND DEFECTS, IF ANY.

6. **Arbitration.** Any dispute, claim or need for interpretation arising out of or relating to this Partial Assignment, or the breach thereof, including, but not limited to, a claim based on or arising out of an alleged tort, shall be settled by binding arbitration conducted by three neutral arbitrators. In the event the parties are unable to agree on the panel of arbitrators within 15 days after a demand, either party may seek administration by the American Arbitration Association in accordance with its Commercial Arbitration Rules, including any emergency, expedited and interim relief procedures. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted at a neutral site in Charleston, West Virginia.

Consistent with the expedited nature of arbitration, each party will, upon written request to the other party, promptly provide the other with copies of documents relevant to the issues raised by any claim or counterclaim. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the arbitrators. All discovery shall be completed within deadlines set by the arbitrators.

At the request of a party, the arbitrators shall have the discretion to order examination by deposition of witnesses to the extent the arbitrators deem such additional discovery relevant and appropriate. The arbitrators shall limit the number and duration of depositions and shall provide for a schedule.

Each party shall bear its own costs and expenses and an equal share of the arbitrators' fees and the administrative expenses of arbitration. The award of the arbitrators shall be made within a reasonable time after submission of all evidence and the arbitrators shall agree to this in advance. The award shall be in writing in a form sufficient to have a court enter it as a judgment, shall be final and binding and judgment may be entered by a court having jurisdiction.

7. **Further Action.** Assignor agrees duly to execute and deliver such further instruments or documents or take such further action as Assignee may reasonably request in writing in order to obtain full benefit of this Partial Assignment and the rights and powers herein granted.

8. **Governing Law.** This Partial Assignment shall be governed by and construed in accordance with the laws of the State of West Virginia.

IN WITNESS WHEREOF, the parties have each caused this Partial Assignment and Assumption Agreement to be executed by their respective officers thereunder duly authorized as of the date first above written.

NEW RIVER ENERGY CORPORATION

By _____
Its _____

EASTERN ROYALTY CORP.

By _____
Its _____

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

The foregoing instrument was acknowledged before me this _____ day of _____, 2005, by _____, the _____ of NEW RIVER ENERGY CORPORATION, a West Virginia corporation, on behalf of the corporation.

My commission expires: _____.

Notary Public

[SEAL]

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

The foregoing instrument was acknowledged before me this _____ day of _____, 2005, by _____, the _____ of EASTERN ROYALTY CORP., a Delaware limited liability company, on behalf of the company.

My commission expires: _____.

Notary Public

[SEAL]

This instrument prepared by:
J. Thomas Lane
BowlesRiceMcDavidGraff&Love
600 Quarrier St.
Charleston, West Virginia 25301

REDACTED

EXHIBIT B

PARTIAL ASSIGNMENT AND ASSUMPTION AGREEMENT
REDACTED

THIS PARTIAL ASSIGNMENT AND ASSUMPTION AGREEMENT
("Partial Assignment"), dated this ___ day of _____ 2005, by and between
PERFORMANCE COAL COMPANY, a West Virginia corporation ("Assignor"); and
EASTERN ROYALTY CORP., a Delaware corporation ("Assignee"):

RECITALS:

WHEREAS, Assignor is the owner of a portion of the leasehold estate in certain
lands in REDACTED
under a Supplemental Agreement of Lease dated March 10, 1978, between Berwind Land
Company ("Berwind"), as lessor, and Armco Steel Corporation, as lessee. This coal lease has
been amended, supplemented, subleased and assigned in the following instruments: (a) Consent
to Assignment of Lease and Conditional Amendment of Lease dated October 24, 1983, among
Berwind, Armco Inc. and Peabody Coal Company, (b) Lease Assignment and Assumption dated
February 13, 1984, between Armco Inc. and Peabody Coal Company, (c) Consent to Assignment
of Lease dated February 16, 1984, between Berwind and Peabody Coal Company, (d) Agreement
dated July 22, 1985, among Berwind, Bethlehem Steel Corporation and Peabody Coal Company,
(e) Sublease dated July 1, 1987, between Peabody Coal Company and Eastern Associated Coal
Corp., (f) Agreement of Lease dated September 6, 1991, between Berwind and Peabody Coal
Company, (g) Berwind Lease Assignment and Assumption Agreement dated October 15, 1994,
between Peabody Coal Company and Performance Coal Company, (h) Conditional Consent to
Assignment of Berwind Lease and Agreement dated September 29, 1994, among Berwind,
Peabody Coal Company and Performance Coal Company, (i) Letter Agreement dated September
24, 1994, between Berwind and Performance Coal Company, (j) Amendment to Berwind Lease
dated June 26, 1995, between Berwind and Performance Coal Company, (k) Partial Surrender
and Amendment of Lease dated August 15, 1995 between Berwind and Performance Coal
Company, (l) Amendment to Berwind Lease dated January 26, 2000, between Berwind and
Performance Coal Company, and (m) Amendment to Berwind Lease dated November 13, 2000,
among Berwind, Pine Ridge Coal Company and Performance Coal Company. (This

Supplemental Agreement of Lease as so amended, supplemented, partially subleased and assigned, is referred to herein as the "Berwind Lease");

WHEREAS, by Conditional Consent to Partial Assignment of Lease and Assumption Agreement (Berwind No. 2 Gas Reserves) dated _____, 2005 between Berwind, Assignor and Assignee, Berwind consented to this Partial Assignment;

WHEREAS, subject to the terms and conditions of this Partial Assignment, Assignor desires to sell and assign to Assignee and Assignee desires to accept all of Assignor's right, title and interest to that portion of the REDACTED coal covered by the Berwind Lease which is shown on the Map attached hereto as Exhibit A (referred to hereinafter as the "Assigned Reserves"), together with the non-exclusive right to use the surface overlying the Assigned Reserves, and to accept and assume the obligations under the Berwind Lease relating thereto;

WHEREAS, it is understood that the REDACTED may be known by different names, and thus, for purposes of the Partial Assignment, REDACTED shall be deemed to be that REDACTED regardless of any other names for the seam; and

WHEREAS, Assignor is retaining all other coal reserves, property and rights covered by the Berwind Lease not assigned hereby (the "Retained Premises").

Agreements

NOW THEREFORE, in consideration of the mutual covenants contained herein, Assignor and Assignee agree as follows:

1. **Interest Assigned.** Subject to the terms of this Partial Assignment, Assignor hereby grants, assigns, sells and transfers to Assignee all of Assignor's right, title and interest to the Assigned Reserves, together with all related rights and privileges under the Berwind Lease to mine and remove the Assigned Reserves.

2. **Assumption.** Assignee hereby accepts the assignment of the Assigned Reserves made herein and hereby expressly assumes and agrees to abide by all the terms,

covenants, conditions, and obligations of the Berwind Lease pertaining to the Assigned Reserves that are allocable to the period on and after the date hereof.

Assignee does not assume liability for acts or events occurring prior to the date hereof.

Assignor is not assigning and Assignee does not assume any of Assignor's obligation to pay minimum rent due under the current terms of the Berwind Lease and Assignor shall be solely responsible therefor.

3. **Indemnity.** Assignee agrees to indemnify and hold harmless Assignor, its successors, assigns, parent and affiliated companies, from and against any all claims, losses, damages (including personal injury or death), causes of actions, fines, penalties, violations, costs and expenses, including reasonable attorney fees, arising out of or related to Assignee's, its employees', agents' or contractors' negligence in the conduct of operations on the Assigned Reserves, failure to comply with any provision of the Berwind Lease (except for those provisions pertaining to payment of minimum royalties) or the terms of this Partial Assignment, or failure to comply with any applicable federal or state law or regulation allocable to the period on and after the date hereof; provided that Assignee shall not be required to indemnify and hold Assignor harmless from those portions of any claims, losses, damages (including personal injury or death), causes of actions, fines, penalties, violations, costs and expenses, including reasonable attorney fees, arising out of or caused or contributed to by the negligence of Assignor, its successors, assigns, parent and affiliated companies, employees, agents and/or contractors. The provisions of this paragraph shall survive the surrender, cancellation or termination of this Partial Assignment.

Assignor agrees to indemnify and hold harmless Assignee, its successors, assigns, parent and affiliated companies, from and against any and all claims, losses, damages (including personal injury or death), causes of actions, fines, penalties, violations, costs and expenses, including reasonable attorney fees, arising out of or related to Assignors', its employees', agents' or contractors' negligence in the conduct of operations on the Retained Premises, failure to comply with any provision of the Berwind Lease or the terms of this Partial Assignment, or failure to comply with any applicable federal or state law or regulation; provided that Assignor shall not be required to indemnify and hold Assignee harmless from those portions of any claims,

losses, damages (including personal injury or death), causes of actions, fines, penalties, violations, costs and expenses, including reasonable attorney fees, arising out of or caused or contributed to by the negligence of Assignee, its successors, assigns, parent and affiliated companies, employees, agents and/or contractors. The provision of this paragraph shall survive the surrender, cancellation or termination of this Partial Assignment.

4. **Retained Premises and Rights.** In making this Partial Assignment, Assignor expressly retains the Retained Premises together with the right to exercise all rights under the Berwind Lease, including but not limited to: (i) rights for the mining and removal of the coal underlying or within the Retained Premises, and (ii) rights for the use of the Retained Premises, other surface and other property covered by the Berwind Lease for the mining and removal of the coal contained in the Retained Premises and use thereof for construction of plants, facilities, impoundments, refuse areas and any other improvements and operations authorized by the Berwind Lease on the Retained Premises.

Assignor and Assignee each waive and release Berwind from any claims, liabilities or actions arising from or relating to their respective operations in and use of the Assigned Reserves or the operations in and use of the Assigned Reserves by their respective contractors, sublessees and assignees, and neither Assignor or Assignee shall assert any such claim, liability or action against Berwind with regard to their operations in and use of the Assigned Reserves or the operations in and use of the Assigned Reserves by their respective contractors, sublessees and assigns.

5. **Representations and Warranties.** This Partial Assignment is expressly made subject to the terms and conditions of the Berwind Lease (except those pertaining to payment of minimum royalties) and as to the Assigned Reserves Assignor assigns and conveys only those interests and rights it owns as the lessee under the Berwind Lease. This Partial Assignment is further made subject to any and all rights of way, easements, reservations, exceptions, covenants, restrictions, or out conveyances as may have been previously made or as could be ascertained from a physical inspection or current survey of the premises covered by the Berwind Lease.

ASSIGNOR EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES, EXCEPT THOSE SPECIFICALLY STATED HEREIN, INCLUDING ANY WARRANTY AS TO (I) THE MINEABILITY AND MERCHANTABILITY OF THE ASSIGNED RESERVES; (II) THE CONDITION, QUALITY AND QUANTITY OF THE ASSIGNED RESERVES; (III) THE PHYSICAL AND ENVIRONMENTAL CONDITION OF THE ASSIGNED RESERVES AND PREMISES COVERED BY THE BERWIND LEASE; AND (IV) FITNESS FOR ANY PARTICULAR PURPOSE; HOWEVER, ASSIGNOR REPRESENTS AND WARRANTS THAT IT HAS NOT CONDUCTED ANY MINING OPERATIONS OR MINED ANY COAL IN THE ASSIGNED RESERVES. ASSIGNEE REPRESENTS AND WARRANTS UNTO ASSIGNOR THAT ASSIGNEE HAS HAD AMPLE OPPORTUNITY TO INSPECT THE ASSIGNED RESERVES AND ACCEPTS THE SAME AS IS, WHERE IS, IN THEIR PRESENT CONDITION, AND WITH ALL FAULTS AND DEFECTS, IF ANY.

6. **Arbitration.** Any dispute, claim or need for interpretation arising out of or relating to this Partial Assignment, or the breach thereof, including, but not limited to, a claim based on or arising out of an alleged tort, shall be settled by binding arbitration conducted by three neutral arbitrators. In the event the parties are unable to agree on the panel of arbitrators within 15 days after a demand, either party may seek administration by the American Arbitration Association in accordance with its Commercial Arbitration Rules, including any emergency, expedited and interim relief procedures. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted at a neutral site in Charleston, West Virginia.

Consistent with the expedited nature of arbitration, each party will, upon written request to the other party, promptly provide the other with copies of documents relevant to the issues raised by any claim or counterclaim. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the arbitrators. All discovery shall be completed within deadlines set by the arbitrators.

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7. **Further Action**. Assignor agrees duly to execute and deliver such further instruments or documents or take such further action as Assignee may reasonably request in writing in order to obtain full benefit of this Partial Assignment and the rights and powers herein granted.

8. **Governing Law**. This Partial Assignment shall be governed by and construed in accordance with the laws of the State of West Virginia.

IN WITNESS WHEREOF, the parties have each caused this Partial Assignment and Assumption Agreement to be executed by their respective officers thereunder duly authorized as of the date first above written.

PERFORMANCE COAL COMPANY

By Bill Potts
Its President

EASTERN ROYALTY CORP.

By _____
Its _____

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

The foregoing instrument was acknowledged before me this _____ day of _____, 2005, by _____, the _____ of PERFORMANCE COAL COMPANY, a West Virginia corporation, on behalf of the corporation.

My commission expires: _____.

Notary Public

[SEAL]

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

The foregoing instrument was acknowledged before me this _____ day of _____, 2005, by _____, the _____ of EASTERN ROYALTY CORP., a Delaware limited liability company, on behalf of the company.

My commission expires: _____.

Notary Public

[SEAL]

This instrument prepared by:
J. Thomas Lane
BowlesRiceMcDavidGraff&Love
600 Quarrier St.
Charleston, West Virginia 25301

REDACTED