

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

Westmoreland Coal Company, et al.,¹

Debtors.

Chapter 11

Case No. 18-35672 (DRJ)

(Jointly Administered)

MOTION OF PUGET SOUND ENERGY, INC., PORTLAND GENERAL ELECTRIC COMPANY, PACIFICORP, AND AVISTA CORPORATION FOR ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. § 107(B)(1) AUTHORIZING MOVANTS TO FILE UNDER SEAL AGREEMENTS RELATING TO THE MOVANTS' OBJECTION TO JOINT CHAPTER 11 PLAN OF WESTMORELAND COAL COMPANY AND CERTAIN OF ITS DEBTOR AFFILIATES [DKT. NO. 1157]

1. Puget Sound Energy, Inc., a Washington corporation ("**PSE**"), Portland General Electric Company, an Oregon corporation ("**PGE**"), PacifiCorp, an Oregon corporation ("**PacifiCorp**"), and Avista Corporation, a Washington corporation ("**Avista**") (collectively, the "**Northwest Colstrip Owners**," or "**Public Utilities**"), move the Court for entry of an order under Section 107(b) of the Bankruptcy Code and Rule 9018 of the Federal Rules of Bankruptcy Procedure authorizing the Public Utilities to file, under seal, the Coal Supply Agreement (defined below). In support of this Motion, the Public Utilities respectfully represent as follows:

¹Due to the large number of debtors in these chapter 11 cases, for which joint administration has been requested, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' proposed 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.

JURISDICTION

2. This 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). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

3. Westmoreland Coal Company (“**WCC**”) and certain of its direct and indirect subsidiaries (collectively with WCC, the “**Debtors**”), including Western Energy Company (“**WECO**”), filed voluntary petitions for chapter 11 bankruptcy relief on October 9, 2016 and have continued to operate their businesses and affairs as debtors and debtors in possession.

4. Collectively, the Public Utilities hold a 70% ownership interest in two coal-fired steam-electric generating plants near Colstrip, Montana commonly referred to as Unit 3 and Unit 4 (the “**Colstrip Plants**”). The remaining 30% ownership interest is held by North Western Corporation (“**North Western**”) and Talen Montana, LLC (“**Talen**,” and together with the Public Utilities and North Western, the “**Co-Owners**”).

5. The Co-Owners source all of their supply of coal for the Colstrip Plants from WECO, which owns the Rosebud mine (“**Rosebud Mine**”), pursuant to the Amended and Restated Coal Supply Agreement (“**ARCSA**”) and Amendment No. 2 to the Coal Transportation Agreement (“**CTA**”). The Co-Owners and WECO are collectively referred to herein as the “**Parties**.” But for the ARCSA, the Parties would have no need for the CTA.²

6. Section 28.2 of the ARCSA requires the Parties to not disclose Confidential Information, described as information which is “confidential, proprietary, or not generally available to the public.” While the Transportation Agreement does not by its terms obligate the non-disclosure of Confidential Information, the commercial information contained therein falls

² The ARCSA and CTA are being filed under seal contemporaneously with this Motion.

within Confidential Information as defined by the ARCSA, and the Parties are therefore under a duty not to disclose. Accordingly, the Public Utilities hereby request authorization to file the agreements constituting the ARSCA and the CTA under seal and further request that, to the extent a hearing is held on the objections that requires the disclosure of the terms of these agreement, such portion of the hearing pertaining to such terms be conducted in camera.

ARGUMENT

7. “On request of a party in interest, the bankruptcy court shall . . . protect an entity with respect to a trade secret or confidential research, develop, or commercial information[.]” 11 U.S.C. § 107(b)(1); Fed. R. Bankr. P. 9018 (implementing section 107(b)(1)). If the movant can show that the information falls within the scope of section 107(b)(1), protection is mandatory. *Marigrove, Inc. v. De Arruda Pinto (In re Transbrasil S.A. Linhas Aereas)*, 644 F. App’x 959, 962 (11th Cir. 2016); *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.)*, 422 F.3d 1, 7 (1st Cir. 2005); *Video Software Dealers Ass’n v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994).

8. The Fifth Circuit has not ruled on what constitutes “commercial information” under section 107(b)(1). However, the Second Circuit has found that “commercial information” under section 107(b)(1) is information that “would cause ‘an unfair advantage to competitors by providing them information as to . . . commercial operations.’” *In re Orion Pictures Corp.*, 21 F.3d at 27 (citation omitted). This definition has been adopted by multiple bankruptcy courts situated in Texas considering motions to seal under section 107(b). *Wyndham Vacation Resorts, Inc. v. Faucett (In re Faucett)*, 438 B.R. 564 (Bankr. W.D. Tex. 2010); *In re Meyrowitz*, No. 06-31660-bjh-11, 2006 WL 6544093, at *2 (Bankr. N.D. Tex. Oct. 26, 2006); *In re Northstar Energy, Inc.*, 315 B.R. 425, 429 (Bankr. E.D. Tex. 2004). Furthermore, to qualify as

“commercial information,” the information is not required to rise to the level of a “trade secret,” and the movant is not required to show “good cause.” *In re Faucett*, 438 B.R. at 568 (citing *In re Orion Pictures Corp.*, 21 F.3d at 28; *In re Meyrowitz*, 2006 WL 6544093, at *2).

9. The ARSCA and the CTA contain highly sensitive commercial information, including information regarding pricing and pricing formulas, apportionment of fixed and variable costs, treatment of nonconforming coal, operational incentives, price adjustments based on coal quality, and coal conveyance methods. Public access to this information about the Public Utilities’ commercial operations would cause commercial injury to the Public Utilities and strategically disadvantage the Public Utilities relative to their competitors.

10. Because of the nature of the ARSCA and the CTA and the confidential commercial information contained therein, the Public Utilities respectfully requests the Court grant its motion to file these agreement under seal.

DATED: January 25, 2019
Portland, Oregon

Respectfully submitted,

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CERTIFICATE OF SERVICE

On January 25, 2019, a copy of the foregoing Motion to Seal was served on all parties receiving electronic notification in these cases from the Court's CM/ECF system.

/s/ Oren Buchanan Haker

Oren Buchanan Haker

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

Westmoreland Coal Company, et al.,³

Debtors.

Chapter 11

Case No. 18-35672 (DRJ)

(Jointly Administered)

**ORDER GRANTING MOTION OF PUGET SOUND ENERGY, INC., PORTLAND
GENERAL ELECTRIC COMPANY, PACIFICORP, AND AVISTA CORPORATION
FOR ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. § 107(B)(1) AUTHORIZING
MOVANTS TO FILE UNDER SEAL AGREEMENTS RELATING TO THE MOVANTS'
OBJECTION TO JOINT CHAPTER 11 PLAN OF WESTMORELAND
COAL COMPANY AND CERTAIN OF ITS DEBTOR AFFILIATES [DKT. NO. 1157]**

Before the Court for consideration is the *Motion For Entry Of An Order Pursuant to 11 U.S.C. § 107(B)(1) Authorizing Movants To File Under Seal Agreements Relating To The Movants' Objection to Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of its Debtor Affiliated* filed by Puget Sound Energy, Inc., Portland General Electric Company, PacifiCorp, and Avista Corporation (the "*Motion to File Under Seal*").⁴ The Court, having reviewed the Motion to File Under Seal and any response thereto, and finding that proper notice to all parties in interest has been given, determines that the Motion to File Under Seal has merit and finding that good cause exists to grant the relief requested in the Motion to File Under Seal.

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⁴ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion to File Under Seal.

Accordingly, it is therefore:

ORDERED that the Motion to File Under Seal is **GRANTED** and the movants are granted permission to file the ARSCA and the CTA under seal pursuant to Local Rule 9037-1(c).

DATED: _____, 2019
Houston, Texas

THE HONORABLE DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE