

**BRIEF FILED
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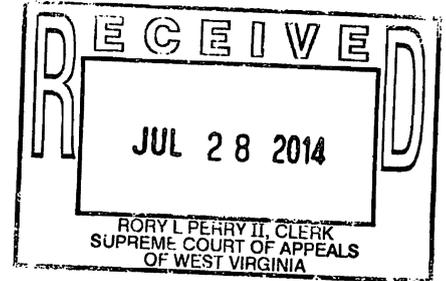
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0446

(Circuit Court of Ohio County, Civil Action No. 13-C-196)

**AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership; PLEASANT VALLEY
ENERGY COMPANY, a California corporation; and
AMERICAN HYDRO POWER PARTNERS, L.P., a
Pennsylvania limited partnership,**

**Defendants Below,
Petitioners,**



v.

**HORIZON VENTURES OF WEST VIRGINIA, INC.,
a West Virginia corporation,**

**Plaintiff Below,
Respondent.**

**BRIEF OF *AMICUS CURIAE* BANK GROUP
LENDERS IN SUPPORT OF PETITIONERS**

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Trust Indenture, The County Commission of Marion County to Security Pacific National Bank, as Trustee (Dated as of January 1, 1990) (the “Trust Indenture”) *passim*

Reimbursement and Loan Agreement among American Bituminous Power Partners, L.P., The Institutions Named Herein as Participating Banks and National Westminster Bank PLC acting through its New York Branch as Agent and LOC Issuer (Dated as of January 1, 1990, as amended by Amendment No. 1, dated as of July 1, 2006, Amendment No. 2., dated as of July 13, 2007)(the “Reimbursement Agreement”) *passim*

Amendment No. 12 To Irrevocable Transferable Letter of Credit No., DBS-15447 (Nov. 1, 2013).....5

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Buyer (Dated as of September 15, 1988) (as amended, supplemented, or otherwise modified, the “EEPA”) 6-10, 18

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Recognition Agreement among Monongahela Power Company, as Buyer, American Bituminous Power Partners, L.P., as Seller, The County Commission of Marion County (West Virginia), as Issuer, Security Pacific National Bank, as Bond Trustee, National Westminster Bank PLC, as Bank Agent, and National Westminster Bank PLC, as Collateral Agent (Dated as of January 1, 1990) (the “Recognition Agreement”).....6, 7, 10, 14, 17

I. STATEMENT OF AMICUS CURIAE¹

If allowed to stand, the Circuit Court of Ohio County's Order granting Horizon Ventures of West Virginia, Inc.'s ("Horizon") motion for summary judgment will trigger Events of Default under the financial agreements that provide the funding for the waste coal-fired generating facility (the "Plant") owned by American Bituminous Power Partners, L.P. ("AMBIT") and seriously jeopardize the Plant's future operating status. The parties associated with the Plant, including AMBIT as owner, the Bank Group² as lenders, Monongahela Power Company ("MonPower") as the buyer of the Plant's electricity, and Horizon as the site's landlord, established the priority of AMBIT's payment obligations approximately 25 years ago. Always critical to those payment obligations has been the principle that the Plant must remain operational to enable AMBIT to make all required payments under its various agreements, including rent payments to Horizon under its lease. *See Amended and Restated Lease of American Bituminous Power Partners, L.P. for Grant Town/Joanna Parcels* (as further amended, supplemented or otherwise modified, the "Lease"), *Amicus Curiae* Appendix Record ("AC App.") at 002-253.

Accordingly, the Lease specifically subordinates the payment of rent to certain other obligations, and has specific provisions about when and how Lease-defined "Subordinated Rent" is to be repaid and the applicable interest rate to the repayments. These provisions, which were not acknowledged or reconciled by the Circuit Court, protect the viability of AMBIT's various

¹ No counsel for any party to this appeal authored this *amicus curiae* brief, in whole or in part. No party to this appeal or its counsel, or any other person other than the *amicus curiae*, made a monetary contribution specifically intended to fund the preparation or submission of this *amicus curiae* brief.

² The identity of the banks that have lent money and provided credit to AMBIT has changed over the course of the Plant's history. The five current lenders that form the "Bank Group" are Deutsche Bank AG (agent for the Bank Group), New York Branch; JPMorgan Chase Bank, N.A.; Merrill Lynch, Pierce, Fenner & Smith, Inc.; BNP Paribas; and Credit Agricole Corporate and Investment Bank.

financial arrangements, including the Trust Indenture and Reimbursement Agreement described in detail herein. The Circuit Court's Order, which does not attempt to determine how much of the outstanding rent is Subordinated Rent under the Lease, does not take into account the full context of the Lease's provisions, the Plant's financial structure, or AMBIT's contractual payment obligations. All of the outstanding rent that Horizon is claiming in this litigation is believed to be Subordinated Rent under the Lease, of a lower payment priority to many of AMBIT's other financial obligations discussed herein. As a result, any attempt by Horizon to execute on such a judgment would impede the rights of multiple secured creditors who would be forced to protect their rights accordingly.

This *amicus curiae* brief is intended to provide the Court with an overview of the inter-related agreements that govern the Plant's financial structure and operating status, which directly bear on the relief Horizon sought in the Circuit Court. Indeed, it is feared that neither party to the litigation will sufficiently inform the Court about the legal rights and interests of the Bank Group and how such rights and interests are impaired, even if inadvertently, by the Circuit Court's ruling. Accordingly, the Bank Group, as *amicus curiae*, respectfully requests that the Circuit Court's Order be vacated and the case remanded to the Circuit Court for consideration of all of the facts germane to the payment of rent to Horizon in the context of the Plant's operating status and its full financial structure.

II. ARGUMENT

A. Financing of the Plant

This case involves the 80-megawatt waste coal-fired power generating facility located in Grant Town, Marion County, West Virginia, about six miles northwest of Fairmont.³ Understanding how the Plant was financed is critical when considering the present dispute between AMBIT and Horizon. The Plant was substantially financed by \$150 million in tax-exempt Solid Waste Disposal Revenue Bonds, the proceeds of which were loaned to AMBIT to pay for the Plant's construction and other related costs. *See Trust Indenture, The County Commission of Marion County to Security Pacific National Bank, as Trustee*⁴ (Dated as of January 1, 1990) (the "Trust Indenture"), AC App. at 254-405. The County Commission of Marion County issued the bonds to create jobs and support the local economy. *See Trust Indenture, AC App. at 261* (issuance of bonds will "maintain or provide gainful employment and improve living conditions for the inhabitants of the County, will serve a public purpose of the Issuer by contributing to the prosperity, health and general welfare of the inhabitants of the County and will tend to aid and assist in the economic growth and development of the County").

As is common with bonds, a Trust Indenture governs the terms and conditions of the payment of principal and interest to the bondholders. *See W. Va. Code § 22C-4-14* (stating that Solid Waste Disposal Revenue Bonds may be secured by a trust indenture governing the rights and remedies of bondholders and the trustee). The Trust Indenture also provides for payment to the bondholders of certain amounts due and owing at specific times and sets forth explicit

³ It is not clear why this case was filed and litigated in the Circuit Court of Ohio County given that the plant is located in Marion County. The parties do not appear to have objected to venue, but the venue would presumably be more appropriate in Marion County.

⁴ The current trustee is The Bank of New York Mellon, formerly The Bank of New York, as successor-in-interest to Harris Trust Savings Bank, the successor-in-interest to Security Pacific National Bank.

instructions and requirements for the allocations of the Plant's revenues. *See* Trust Indenture, AC App. at 294-328, 357-365. The Trust Indenture provides that a letter of credit will assure payment of the bonds:

WHEREAS, the Borrower (AMBIT) will cause to be delivered to the Trustee a certain irrevocable, direct-pay letter of credit to assure payment of the principal and Purchase Price of, and interest on the 1990 Bonds (the "Initial Letter of Credit"). AC App. at 261.

To repay the bondholders and secure the letter of credit contemplated in the Trust Indenture, AMBIT entered into a credit reimbursement agreement with a group of banks. *See Reimbursement and Loan Agreement among American Bituminous Power Partners, L.P., The Institutions Named Herein as Participating Banks and National Westminster Bank PLC acting through its New York Branch as Agent and LOC Issuer* (Dated as of January 1, 1990, as amended by Amendment No. 1, dated as of July 1, 2006, Amendment No. 2, dated as of July 13, 2007) (the "Reimbursement Agreement"), AC App. at 406-564. The Reimbursement Agreement provided AMBIT an irrevocable letter of credit to secure payment of the bonds, and made certain loans from the participating banks for purposes of 1) enabling AMBIT to meet its reimbursement obligations under the letter of credit, 2) providing additional financing for the cost of constructing and equipping the Plant, and 3) helping to refund the bonds. *See* Reimbursement Agreement, AC App. at 412-413.

National Westminster Bank PLC issued the initial letter of credit for the first seven-and-a-half years of the Plant's operation, and proceeded to re-issue a letter of credit on an annual basis to secure payment of the bonds. *See* Reimbursement Agreement, AC App. at 429, 450. On September 12, 2003, Deutsche Bank AG, New York Branch became the issuing bank of the letter of credit, which has been renewed on an annual basis. The current letter of credit issued by Deutsche Bank AG, New York Branch was issued on November 1, 2013 and is effective through

November 7, 2014. *See Amendment No. 12 To Irrevocable Transferable Letter of Credit No., DBS-15447* (Nov. 1, 2013), AC App. at 565-578. Repayment of all of AMBIT's obligations to the Bank Group under the Reimbursement Agreement is collateralized by security interests and liens on all of AMBIT's assets through a mortgage document in favor of the Bank Group. *See Credit Line Deed of Trust: Indenture of Mortgage, Credit Line Deed of Trust and Security Agreement between American Bituminous Power Partners, L.P., as Mortgagor, Community Bank & Trust, N.A., as Trustee, and National Westminster Bank PLC, acting through its New York Branch, as Collateral Agent for the benefit of the Secured Parties, as Beneficiary* (Dated as of January 1, 1990) (the "Project Mortgage"), AC App. at 579-632.⁵

The Reimbursement Agreement makes clear that any draws on the letter of credit are "immediately" reimbursable by AMBIT. Specifically, the Reimbursement Agreement provides in Section 3.04:

The Borrower's Obligations. On any day on which the [Letter of Credit] Issuer makes any Credit Payment with respect to the Letter of Credit, [AMBIT] shall make a payment ... to the Agent at the Principal Office, immediately after the [Letter of Credit] Issuer has made such Credit Payment, for the account of the Participating Banks in their Proportionate Shares and in an amount equal to the amount of such Credit Payment. ... If [AMBIT] does not reimburse any Credit Payment in full on the date when it is made ..., the amount thereof that is not reimbursed shall bear interest from and including the date of the making thereof until reimbursed by [AMBIT] in full ... on the unpaid amount thereof from time to time outstanding at a rate per annum equal to 2% above the Base Rate. Such interest shall be payable on demand and on the date on which [AMBIT] reimburses the principal amount of such Credit Payment.

Reimbursement Agreement § 3.04, AC App. at 452-453. AMBIT's obligations under the Reimbursement Agreement are funded by AMBIT's revenues, which are primarily created by its sale of the electricity that the Plant generates.

⁵ Pages two through nine of the Project Mortgage set forth in detail the obligations of AMBIT that are secured by the Project Mortgage and the list of all of AMBIT's assets that serves as collateral for the security interests. *See Project Mortgage*, AC App. at 583-590.

Pursuant to an Electric Energy Purchase Agreement approved by the West Virginia Public Service Commission, MonPower agreed to purchase the electricity generated by the Plant. *See Electric Energy Purchase Agreement between American Bituminous Power Partners, L.P., as Seller, and Monongahela Power Company, as Buyer* (Dated as of September 15, 1988) (as amended, supplemented, or otherwise modified, the “EEPA”), AC App. at 633-738. MonPower continues to purchase the Plant’s generated electricity. To secure performance of AMBIT’s obligations under the EEPA, AMBIT and MonPower executed a mortgage whereby AMBIT also granted a security interest to MonPower over most of its assets. *See Indenture of Mortgage, Deed of Trust and Security Agreement between American Bituminous Power Partners, L.P., as Mortgagor, City National Bank of Fairmont, as Trustee, and Monongahela Power Company, as Beneficiary* (Dated as of January 1, 1990) (the “Utility Mortgage”), AC App. at 739-816.

To clarify how the rights and obligations of the Bank Group and MonPower as secured creditors relate to each other, the parties entered into a separate agreement called the Recognition Agreement. *See Recognition Agreement among Monongahela Power Company, as Buyer, American Bituminous Power Partners, L.P., as Seller, The County Commission of Marion County (West Virginia), as Issuer, Security Pacific National Bank, as Bond Trustee, National Westminster Bank PLC, as Bank Agent, and National Westminster Bank PLC, as Collateral Agent* (Dated as of January 1, 1990) (the “Recognition Agreement”), AC App. at 817-892. The execution of the Recognition Agreement was a condition to MonPower’s obligation to purchase the Plant’s energy under the EEPA, a condition to the County Commission’s obligation to issue the bonds, a condition to the Bank Group’s obligations to make the necessary loans, and a condition for issuance of the letter of credit. *See Recognition Agreement*, AC App. at 822

(“WHEREAS, the parties hereto desire to establish the relative rights and priorities of the parties and their successors and assigns under the agreements and instruments described above.”).

The various agreements that created the funding for the Plant and govern the Plant’s operations refer in many instances to the Lease entered into between AMBIT and Horizon for the property where the Plant was constructed and operates. Similarly, the Lease specifically refers to the aforementioned agreements in many instances. For example, the Lease specifically provides that its provisions related to “Tenant Financing; Leasehold Mortgages” are subject to the Recognition Agreement and that any inconsistencies are governed by the Recognition Agreement. *See Lease § 23, AC App. at 70-79.*

B. AMBIT’s Payment Obligations

The Plant must be operational for AMBIT to meet its obligations under the aforementioned agreements. If the Plant is not operating, it cannot generate the electrical power needed under the EEPA with MonPower, and as a result, cannot generate revenues necessary to meet AMBIT’s obligations under the Reimbursement Agreement to repay the bonds and reimburse draws on the letter of credit. This fundamental principle is best evidenced by the Trust Indenture’s provisions governing the order in which AMBIT’s revenues are to be allocated. *See Trust Indenture, AC App. at 331-352.*

The Trust Indenture requires AMBIT to pay all of its revenues to the Trustee promptly upon their receipt and requires the Trustee to deposit those amounts into the “Revenue Fund.”⁶ *See Trust Indenture § 5.4(A), AC App. at 335.* Each month, the Trustee is then obligated to pay certain parties based on a specific predetermined priority with the money in the Revenue Fund.

⁶ Although not relevant here, the only revenues that the Trustee is not required to deposit in the Revenue Fund are revenues “constituting that portion of Net Proceeds required, pursuant to Section 5.3 hereof, to be deposited into the Renewal Fund,” which include amounts the Trustee has obtained in insurance proceeds or similar actions. *See Trust Indenture §5.4(A), AC App. at 335.*

See id. § 5.4(B), AC App. at 335 (“[O]n the first Business Day of each month ..., the Trustee shall transfer from the Revenue Fund, and deposit into the following respective accounts or pay to the following Persons, the following amounts, in the following order of priority.”). The Trust Indenture sets forth 13 payment groups that are to be paid with AMBIT’s revenues every month, in order. *See id.*, AC App. at 335-338. The first payment group, which is not relevant here, requires payment of tax on the interest on the bonds to the federal government in the event the interest earnings from AMBIT’s various funds is not sufficient. *See id.*, AC App. at 336 (paragraph beginning First).

The second payment group is critical, as it highlights the aforementioned fundamental principle that the Plant remain operational, for it next requires payment of the Plant’s essential operating costs. This payment is necessary to keep the Plant operating and thereby generate enough revenue to pay AMBIT’s other obligations. Specifically, this section provides:

Second: To or as directed by [AMBIT] to pay Actual Operating and Maintenance Expenses then due and payable or anticipated to become due and payable in such month for which no prior provision for payment has been made, as set forth in a certificate signed by an Authorized Representative of [AMBIT] not later than the preceding Business Day; provided that the amount paid by the Trustee pursuant to this paragraph Second shall not exceed (i) 110% of Budgeted Operating and Maintenance Expenses for such month and all prior months in the same calendar year minus (ii) the amount paid by the Trustee pursuant to this paragraph Second for all such prior months;

Id., AC App. at 336.⁷ If AMBIT cannot pay the Plant’s monthly operating expenses, the Plant cannot operate. If the Plant does not operate, AMBIT cannot meet its other obligations,

⁷ The Trust Indenture defines “Actual Operating and Maintenance Expenses” as “for any month, the Operating and Maintenance Expenses of the Borrower for such month (including monthly accruals for taxes and insurance premiums due in a later month) which are of a type included in the Budgeted Operating and Maintenance Expenses for such month.” Trust Indenture § 1.1, AC App. at 265. The Trust Indenture states that the definition of “Operating and Maintenance Expenses” is the same as its meaning in the EEPA. *Id.*, AC App. at 281. The EEPA defines the term as:

including those to the Bank Group and to Horizon. This fundamental principle guides AMBIT's payment obligations.

After the monthly operating expenses are paid in order to keep the Plant operational, the third through sixth payment groups require AMBIT to make monthly deposits into various funds, including a "Bank Payment Fund" and a "Debt Service Fund," which are used to make scheduled payments of principal and interest under the bonds, and to repay AMBIT's obligations to reimburse the Bank Group under the Reimbursement Agreement for draws on the letter of credit. *Id.*, AC App. at 336-337 (paragraphs beginning Third, Fifth, and Sixth); *id.* § 5.4A, Bank Payment Fund, AC App. at 338; *id.* § 5.5, Debt Service Fund, AC App. at 338-343.⁸

Only after the payments of the Plant's monthly operating expenses *and* the allocation of funds for payments to the Bank Group comes payment of rent to Horizon. Specifically, the seventh payment group provides payment for:

Seventh: To or as directed by [AMBIT] to pay the Actual Operating and Maintenance Expenses referred to in paragraph Second above which are in excess of the limit specified in paragraph Second and to pay all Other Lease Rent (including accruals of interest thereon) *which is then due and permitted to be paid pursuant to the provisions of Sections 7 and 7A of the Site Lease...*

Id. § 5.4(B) (emphasis added), AC App. at 337. The Trust Indenture defines "Other Lease Rent" to include the types of rent AMBIT owes Horizon under the Lease. *Id.* §1.1, AC App. at 281.

"Operating and Maintenance Expenses" means, with respect to [AMBIT] and the Project, those costs which are defined in FERC Accounts 500-507, inclusive, 510-514, inclusive, and 560-573, inclusive, as of the date hereof, and shall specifically include premiums on the insurance hereby required to be maintained and Impositions (as defined in the [Utility Mortgage] required to be paid pursuant to the terms of the [Utility Mortgage]; provided, however, that no fees or other amounts paid or payable to [AMBIT and related parties] shall constitute Operating and Maintenance Expenses. EEPA § 9.1, AC App. at 692.

⁸ These payment groups also cover the Trustee's expenses. Trust Indenture § 5.4(B), AC App. at 336 (paragraph beginning Fourth).

For the payments of the rent to be made, however, the Trust Indenture requires that the payments must be “due and permitted” under the Lease’s Sections 7 and 7A, which govern when and how rent is to be paid, and when rent is subordinated to the payment of AMBIT’s other obligations.⁹ For “Other Lease Rent” that is not due and permitted under the Lease, AMBIT is obligated to pay this amount to Horizon with any additional revenues as part of the twelfth payment group. *See id.* §5.4(B), AC App. at 338 (paragraph beginning Twelfth).

Finally, in the thirteenth and last payment group, any additional remaining monthly revenues are paid to AMBIT’s owners. *See id.*, AC App. at 338 (paragraph beginning Thirteenth).

AMBIT’s payment obligations and the priority of its revenue allocation as set forth in the Trust Indenture have formed the basis of all parties’ respective rights to AMBIT’s revenues since the Plant commenced operation and have governed the parties’ payment priority for the last 25 years. All of the agreements discussed herein relating to the various inter-creditor arrangements, including the Reimbursement Agreement, together with its collateral security documents including the Project Mortgage; the EEPA, together with its collateral security documents including the Utility Mortgage; the Recognition Agreement; and the Trust Indenture were all entered into in reliance on these provisions relating to the payment obligations of AMBIT and the allocation of its revenues. Consistent with this principle, the Lease between AMBIT and Horizon specifically limits Horizon’s remedies to collect rent until AMBIT’s other monthly obligations are paid and the Lease subordinates the payment of rent to these other obligations.

C. Subordination of Rent

Specifically to provide greater assurance of the Plant’s ability to sell electric power to MonPower and thereby provide the funds necessary to make the required payments to its lenders,

⁹ These sections of the Lease are explained in detail below.

the payment of rent under the Lease is specifically subordinated to these other obligations. Section 6 of the Lease defines how rent is calculated. *See* Lease § 6, AC App. at 021-027. Given the importance of the Plant remaining operational, even the calculation of rent is based on a percentage of the Plant’s gross revenues. *See id.*, AC App. at 023-025 (defining this primary rent obligation as “Percentage Rent”). In any given fiscal year, AMBIT must pay at least \$225,000 in rent (if the Percentage Rate does not reach \$225,000, AMBIT makes up the difference through Lease-defined “Post-Startup Minimum Rent”). *See id.*, AC App. at 026.¹⁰

The Lease, however, conditions the payment of *any* rent “[s]ubject to the provisions of Section 7A [Subordination of Rent].” *See id.* § 7(b), AC App. at 027-028. If any rent constitutes “Subordinated Rent” as defined by the Lease, the Lease’s general provisions on timing of and calculation of interest on the payment of rent are not applicable. Critically, all rent that Horizon is claiming in this case is believed to be Subordinated Rent under the Lease and is governed by Section 7A of the Lease. *See id.* § 7A, AC App. at 031-039. This section provides, “All Percentage Rent, any and all interest with respect to Percentage Rent and all Post-Startup Minimum Rent (hereinafter collectively called the “Subordinated Rent”) is subordinated and subject in right of payment to the prior payment in full when due of all Senior Debt of Tenant in accordance with the provisions of this Section 7A.” *Id.* § 7A(a), AC App. at 031 (emphasis in original). The same section defines “Senior Debt” as follows:

As used herein, the term “Senior Debt” shall mean all indebtedness, obligations, and liabilities of Tenant pursuant to all notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees (collectively, “Credit Agreements”) between (i) [AMBIT] ... and (ii) any

¹⁰ Percentage Rent is due to Horizon within ten days “after the date [AMBIT] actually receives the revenue on which the Percentage Rent is based.” *See* Lease §7(b), AC App. at 027. If the Percentage Rent does not reach \$225,000 for the fiscal year and Post-Startup Minimum Rent is triggered, payments of Post-Startup Minimum Rent are due “without interest, in 16 equal, consecutive, quarterly installments commencing on the first day of the fourth month following the end of the such Fiscal Year [of the deficiency] and continuing quarterly thereafter until paid in full.” *See id.*, AC App. at 028.

banks or other financial institutions providing a letter of credit or other form of security or credit enhancement for the tax-exempt bonds being used to finance a portion of the [Plant] ... including, without limitation, all principal, premium (if any) and interest on all loans and other extensions of credit made pursuant to the Credit Agreements and any and all refinancings, renewals or extensions thereof ...

Id., AC App. at 031. “Senior Debt” under the Lease, therefore, includes AMBIT’s obligations under the Trust Indenture and Reimbursement Agreement, which are obligations of AMBIT under the Lease-defined “Credit Agreements” between AMBIT and banks providing letters of credit and other security for the tax-exempt bonds. These provisions of the Lease ensure that the payment of rent is consistent with the provisions of the Trust Indenture that mandate how AMBIT’s revenues are to be allocated, and ensure that the Plant can remain operational in order to generate the revenues necessary to pay its obligations on an ongoing basis.

The payment of rent to Horizon, therefore, is *always* subordinated to the payment of Senior Debt. If there is any rent due at any time when any Senior Debt is due, regardless of how long any unpaid rent has been outstanding, the rent is “Subordinated Rent” under the Lease. *See id.*, AC App. at 031. If any obligation pertaining to AMBIT’s Senior Debt has not been met, the Lease prohibits AMBIT from making any payment of any Subordinated Rent *and* prohibits Horizon from accepting any payment of Subordinated Rent until the obligation with respect to Senior Debt is met. *See id.* § 7A(b), AC App. at 033; *see also id.* § 7A(f), AC App. at 036 (requiring Horizon to turn over Subordinated Rent to the parties owed the Senior Debt if payments are received). The Lease further provides, “Unless and until all Senior Debt shall have been paid when due ... in full in accordance with its terms, [Horizon] shall not, without the prior written consent of the holders of Senior Debt, have any right to demand payment of, or institute any proceedings to enforce, any Subordinated Rent if at such time a default in payment of any Senior Debt when due shall have occurred and be continuing.” *Id.* § 7A(g), AC App. at 036.

Moreover, Horizon explicitly agreed that if, at any point in time, the letter of credit expires and is not renewed, a “default” is triggered on the payment of all Lease-defined Senior Debt due and owing at that time. Even though such a default does not require an acceleration of the Senior Debt, AMBIT is prohibited from making any payment of Subordinated Rent to Horizon until the Senior Debt is paid in full. *See* Lease, Second Amendment to Amended and Restated Lease § 2 “Amendments to Section 7A [Subordination of Rent]” (Jan. 11, 1990), AC App. at 236-253.¹¹ If, for example, the Bank Group elected not to renew the letter of credit this Fall, the letter of credit will be drawn to pay off the bonds, and the entire remaining unreimbursed amount would require the issuance of “refunding loans” that would carry the same interest and amortization schedule as the bonds, with a maturity date in 2017. Consistent with the Lease’s provisions, all rent would be subordinated as Subordinated Rent until these refunding loans were paid in full.

When Subordinated Rent exists, the Lease provides specific terms and conditions of how the Subordinated Rent is to be repaid, at a specific interest rate and on a unique repayment schedule. *First*, with respect to interest, Subordinated Rent accumulates interest at a rate equal to the average rate of interest payable under the bonds. *See* Lease § 7(c), AC App. at 028-029

¹¹ The full text of Horizon’s acknowledgement is as follows:

Landlord [Horizon] acknowledges and agrees that the occurrence of a Letter of Credit Expiration Event (as defined below) shall constitute a default in the payment of Senior Debt within the meaning of this subsection b. and the other provisions of this Section 7A until the Senior Debt is paid in full, and that after such event, pursuant to this subsection b., [AMBIT] shall be prohibited from, directly or indirectly, making or agreeing to make any payment (in cash or property, by set-off or otherwise), direct or indirect, of or on account of any Subordinated Rent, and no such payment of Subordinated Rent shall be accepted by Landlord until the Senior Debt is paid in full. As used in this subsection b., the term ‘Letter of Credit Expiration Event’ means the expiration of the letter of credit securing the Project Bonds prior to the payment in full of such Project Bonds and the making of refunding loans to pay the reimbursement obligations for the resulting draw on such letter of credit. AC App. at 237-238.

(“Interest shall accrue on Subordinated Rent (as defined in Section 7A [Subordination of Rent]) which would have been payable to, or collectible by, Landlord but for the provisions of Section 7A [Subordination of Rent] (“Unpaid Accrued Subordinated Rent”) ... at rate equal to the average rate of interest payable from time to time under any then outstanding Project Bonds...”). *Second*, with respect to the repayment schedule, the Lease specifically dictates that any Subordinated Rent is to be repaid by AMBIT in 96 equal monthly installments or, if that monthly number would be less than \$33,333, then \$33,333 per month until the Subordinated Rent is repaid. *See id.*, AC App. at 029-030. If during that time of repayment, the provisions of Section 7A are triggered again (*i.e.*, AMBIT fails to meet another obligation with respect to Senior Debt, creating additional Subordinated Rent), a new 96-month amortization period is used to recalculate the payment of the Subordinated Rent. *See id.*

D. Affirming the Circuit Court’s Decision Will Cause Significant Harm

These subordination provisions in the Lease, including when and how Subordinated Rent is to be repaid and the applicable interest rate for the repayments, protect the viability of the financial arrangements explained above, including the Trust Indenture and Reimbursement Agreement. At no time, either pursuant to the instant litigation or the “Agreement to Resolve Pending Litigation” referred to in the Circuit Court of Ohio County’s March 26, 2014 Order, has Horizon challenged or disaffirmed the subordination provisions of Section 7A of the Lease, or the provisions of Section 23 of the Lease with respect to the rights of the Bank Group and MonPower under the leasehold mortgages and the Recognition Agreement. Deciding any dispute involving AMBIT and Horizon over unpaid rent must take into account the entire Lease, including the provisions for Subordinated Rent, and the financial arrangements discussed above.

When deciding Horizon’s motion for summary judgment, the Circuit Court of Ohio County erroneously failed to consider the full context of the Lease’s provisions, the Plant’s financial structure, and AMBIT’s contractual payment obligations. *See* Syl. pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 190, 451 S.E.2d 755, 756 (1994) (“Summary judgment is appropriate where the *record taken as a whole* could not lead a rational trier of fact to find for the nonmoving party”) (emphasis added); *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (“this Court will reverse summary judgment if we find, after reviewing *the entire record*, a genuine issue of material fact exists or if the moving party is not entitled to judgment as a matter of law. In cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial.”) (emphasis added).

Instead of considering the entire record, the Circuit Court erroneously relied upon its finding that Horizon was not a “party” to the Trust Indenture, overlooking that the Lease itself, and not the Trust Indenture, subordinates the payment of rent to AMBIT’s obligations under the Reimbursement Agreement and the Trust Indenture. *See* Syllabus, *Clayton v. Nicely*, 116 W.Va. 460, 182 S.E. 569 (1935) (when interpreting a contract between a borrower and lender “[i]t is well-settled law that “[a] contract must be considered as a whole, effect being given, if possible, to all parts of the instrument.”); *White v. AAMG Construction Lending Center*, 226 W. Va. 339, 346, 700 S.E.2d 791, 798 (2010) (reversing summary judgment based upon contract interpretation and finding that “The [defendant’s] argument is, essentially, that one part of the construction loan agreement (that the [defendant] drafted) trumps another part. We reject this argument in favor of an interpretation that gives effect to all parts of the loan agreement.”).

As a consequence of the Circuit Court’s failure to consider the entire record, the Circuit Court’s Order does not purport to determine how much of the outstanding rent owed to Horizon

is Subordinated Rent under the Lease, which is particularly concerning given that all of the outstanding rent sought by Horizon in this litigation is believed to be Subordinated Rent under the Lease. In 2013, AMBIT advised the Bank Group that it had insufficient funds to make the required monthly deposits under the Trust Indenture for the payment of Senior Debt, and on October 1, 2013, the annual payment of principal and interest on the bonds had to be made pursuant to a draw under the letter of credit. Such draw was only partially reimbursed by AMBIT, and the reimbursement shortfall resulted in an Event of Default under the Reimbursement Agreement. The Bank Group conditionally waived the Event of Default, subject to the repayment of unreimbursed principal amounts in excess of \$3.6 million, which were eventually paid on May 1, 2014. From the time that AMBIT stopped making its monthly deposits for payment to its lenders in 2013, through the time when AMBIT paid the Bank Group on May 1, 2014, Senior Debt existed as defined in the Lease,¹² of which any accrued unpaid rent was specifically subordinated per the explicit terms of the Lease. Similarly, if AMBIT is not currently making the required monthly deposits to make the upcoming October 1, 2014 payment on the bonds (the scheduled aggregate principal amount required to be paid is \$9.7 million, of which it is currently projected that more than 50% of such amount will not be available to reimburse the Bank Group for the required drawing under the letter of credit), the failure to meet that obligation also constitutes Senior Debt as defined in the Lease, and therefore any unpaid rent currently accruing is Subordinated Rent as provided by the Lease's explicit terms.

¹² The Trust Indenture's requirement that AMBIT make the monthly deposits capable of paying the Bank Group and the payments to the Bank Group are "obligations ... of Tenant pursuant to ... the "Credit Agreements" ... between (i) [AMBIT] ... and (ii) any banks or other financial institutions providing a letter of credit or other form of security or credit enhancement for the tax-exempt bonds being used to finance a portion of the [Plant] ... including, without limitation, all principal, premium (if any) and interest on all loans and other extensions of credit made pursuant to the Credit Agreements," which constitute "Senior Debt" under the Lease. *See* Lease § 7A(a), AC App. at 031.

The Circuit Court also failed to consider that any repayment of Subordinated Rent must be repaid at the interest rate set forth for Subordinated Rent under the Lease, and must be repaid on the specific amortization schedule provided for Subordinated Rent under the Lease.

Affirming the Circuit Court's Order would have significant negative consequences for the Plant, all of the involved parties, and all of the associated financial institutions, as it would inevitably trigger a series of Events of Default under the governing agreements. For example, under the Reimbursement Agreement with the Bank Group, an unstayed judgment for more than \$1 million against AMBIT is an Event of Default. *See* Reimbursement Agreement § 10(h), AC App. at 515. Also under the Reimbursement Agreement, an Event of Default occurs if AMBIT fails to immediately reimburse a draw on the letter of credit, *see id.* §§ 3.04, 10(a)(i), AC App. at 452-453, 512, or if Horizon fails to "perform any material covenant or agreement contained in the Lease" adversely affecting the Bank Group, which may already have occurred given Horizon's decision to institute the pending action to collect Subordinated Rent despite its contractual promise otherwise. *See id.* § 10(e), AC App. at 514. When an Event of Default occurs under the Reimbursement Agreement, the Bank Group has the right to terminate the letter of credit, declare all reimbursement obligations due and payable, require the Trustee to declare the principal of and unpaid interest on the bonds to be due and payable and to draw on the letter of credit in full, and to foreclose on the collateral based on the Project Mortgage, subject to MonPower's rights under the Utility Mortgage and the Recognition Agreement. *See id.* § 10, AC App. at 511-520.

Any attempt by Horizon to execute a judgment stemming from this Order could reasonably be expected to substantially jeopardize AMBIT's financial standing while simultaneously limiting AMBIT's abilities to meet its obligations under the Trust Indenture and

endangering the Bank Group's rights under the Reimbursement Agreement and its collateral documents, including the Project Mortgage.¹³ Similarly, MonPower's rights under the EEPA and its collateral documents, including the Utility Mortgage, would be affected. Because any moneys required to be paid by AMBIT that constitute Subordinated Rent are to be paid directly into an account maintained for the benefit of the Bank Group, and when no longer subordinated, are subject to the requirements of repayment of Subordinated Rent in Section 7 of the Lease, an attempt by Horizon to redirect those moneys would threaten AMBIT's continued ability to meet its obligations to operate the Plant. Likewise, such an action by Horizon, who has consistently acknowledged the subordination of rent to Senior Debt, would likely compel the Bank Group to assert and protect its rights.

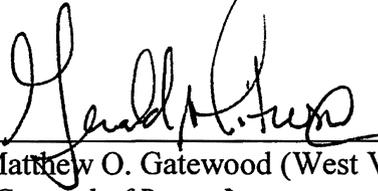
III. CONCLUSION

The Circuit Court's Order should be vacated and the case remanded to the Circuit Court for a full consideration of all of the facts involved.

¹³ The judgment would also constitute an Event of Default under the Project Mortgage and the Utility Mortgage, which provide for Events of Default if AMBIT "shall fail to perform or observe, or cause to be performed or observed, any of the terms, covenants and conditions contained in the Ground Lease on the part of [AMBIT] to be performed or observed thereunder and such failure shall continue beyond any applicable period of grace set forth in the Ground Lease." Project Mortgage § 2.01(f), AC App. at 604; Utility Mortgage § 2.01(g), AC App. at 765-766. Such a judgment would also likely lead to an Event of Default under the EEPA with MonPower.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0446

(Circuit Court of Ohio County, Civil Action No. 13-C-196)

**AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership; PLEASANT VALLEY
ENERGY COMPANY, a California corporation; and
AMERICAN HYDRO POWER PARTNERS, L.P., a
Pennsylvania limited partnership,**

**Defendants Below,
Petitioners,**

v.

**HORIZON VENTURES OF WEST VIRGINIA, INC.,
a West Virginia corporation,**

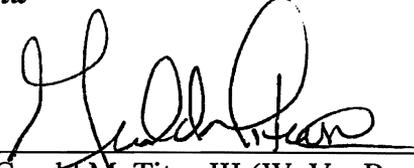
**Plaintiff Below,
Respondent.**

CERTIFICATE OF SERVICE

I, Gerald M. Titus III, hereby certify that service of the foregoing **Brief of *Amicus Curiae* Bank Group Lenders in Support of Petitioners** has been made U.S. Mail, postage prepaid, on this 28th day of July, 2014, addressed as follows:

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