In the Circuit Court of Marion County, West Virginia

American Bituminous Power Partners, LP,
Plaintiff,

v.

Case No. CC-24-2018-C-130
Judge Michael Lorensen

Horizon Ventures of West Virginia, Inc.,
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM BENCH TRIAL

This action came on for a bench trial before the Honorable Michael D. Lorensen, Judge, Business Court Division, with trial commencing October 10, 2023 in the Berkeley County Judicial Center, Martinsburg, West Virginia. Roberta F. Green, Esq. and John F. McCuskey, Esq. appeared for Plaintiff, American Bituminous Partners, L.P. Mark A. Kepple, Esq. and Joseph G. Nogay, Esq. appeared for Defendant, Horizon Ventures of West Virginia, Inc. During the trial, the Court heard the testimony of Steve Friend, Herb Thompson, John Karras, and Stanley Sears. Upon consideration of the testimony of the witnesses presented at trial and exhibits introduced into evidence, the entire record of this case, and pertinent legal authority, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the West Virginia Rules of Civil Procedure.

1. This case involves a dispute arising from the parties, Plaintiff American Bituminous Power Partners, L.P. (hereinafter “AMBIT” or “Plaintiff”) and Defendant Horizon Ventures of West Virginia, Inc. (hereinafter “Horizon” or “Defendant”), as Landlord (Horizon) and Tenant (AMBIT) to the “Demised Premises”, a more than 370-acre tract of property in Marion County, West Virginia, upon which the Grant Town Power Plant sits.

2. This matter came before the Court on remand from the West Virginia Supreme Court of Appeals' Order in *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners*, L.P., 246 W. Va. 374, 873 S.E.2d 905 (2022). There, the Supreme Court found that factual questions existed about the interaction between the parties' 1989 Lease Agreement, the 1996 Settlement Agreement, and the Admissions within the 1996 Settlement Agreement which were to be resolved by a factfinder:

> While the 2017 Order appears to have resolved some issues while creating others, reasonable minds could disagree as to the scope of the 2017 Order and whether it did or did not resolve those apparent ambiguities. Despite the complexity of the positions advanced by AMBIT and Horizon, the solution, while perhaps not expedient, is simple. We find that the answer to the ambiguities contained in these various documents is not ours to give, nor is it the business court's to give – the factfinder must supply the answers to these questions. **There is simply too much ambiguity and too many factual disputes in the Lease Agreement, the 1996 Settlement Agreement, and AMBIT's admissions for this case to be appropriate for summary judgment when viewed through the lens of the 2017 Order and the ostensibly conflicting conclusions reached in the summary judgment orders on appeal to this Court.**

Id. at 386, S.E.2d at 917 (emphasis added).

3. The parties first entered into an initial lease agreement in 1987 ("First Lease Agreement") which, *inter alia*, allowed American Bituminous Power Partners, L.P., to rent land from Horizon Ventures of West Virginia, Inc. for the express purpose of building a power plant which would primarily use waste coal situated on the property to produce electricity. All generation is sold to Mon Power via an Electric Energy Power Purchase Agreement (EEPPA). Mon Power then sells that power into the PJM power grid to be distributed throughout thirteen (13) states.

4. In 1989, the parties entered into an Amended and Restated Lease Agreement in 1989 ("Second Lease Agreement" or "1989 Lease") which was admitted into evidence as Plaintiff's Exhibit 20.

5. The Second Lease Agreement set forth the following conditions dealing with rent which are relevant to the current phase of this litigation:

   - If AMBIT uses Local Fuel to generate power, for Operating or Non-Operating Reasons, it must pay Horizon 3% of all gross revenues received for the sale of that power.[1]

   - If AMBIT uses Foreign Fuel for Operating Reasons to generate power, it must pay Horizon 1% of all gross revenues received for the sale of that power.[2]

   - If AMBIT uses Foreign Fuel for Non-Operating Reasons to generate power, it must pay Horizon 3% of all gross revenues received for the sale of that power. [3][4]

6. The Restated Lease Agreement allowed AMBIT to use its "sole judgment" to use Foreign Fuel for Non-Operating Reasons but required AMBIT to use "reasonable judgment" to use Foreign Fuel for Operating Reasons.

7. The Restated Lease Agreement states that if the parties disagree for any reason over whether AMBIT used "reasonable judgment" in selecting Foreign Fuel for Non-Operating Reasons, the Second Lease Agreement sets forth a procedure for resolving the dispute, *i.e.*, the parties will agree upon a consulting engineer retained by the lending banks and agreed upon by the parties, and that the engineer's decision "shall be binding on both Landlord and Tenant."

8. Notwithstanding this language, litigation regarding rent disputes followed the Second Lease Agreement.

9. The parties entered into a Third Amended Lease Agreement for three years, from April 1, 1993 to May 28, 1996, in which AMBIT agreed that from 1993 – 2011, all use of "Foreign Fuel" was, and would be, considered to be used for non-operating reasons, and AMBIT would be responsible for paying the full 3% for using Foreign Fuel for any reason, for the next 18 (eighteen) years.

10. Nevertheless, Horizon sued AMBIT again for payment of rent in 1994 and 1995.

11. During the pendency of that litigation, the parties came to an Agreement to Resolve Litigation ("1996 Agreement") which intended to resolve the parties' disputes as to whether AMBIT was bringing in foreign fuel for "operating" or "non-operating" reasons, to resolve the issue of rent calculations going forward, and to lower the monthly rent payment to AMBIT, which 1996 Agreement included the following Admissions made by AMBIT that Horizon was to detrimentally rely upon:

    The 1996 Agreement contains the following Admissions by AMBIT:

> Tenant acknowledges, as a fact, that since the commencement of operations by the Plant, all Foreign Fuel used in the operation of the Plant has been used for Non-Operating Reasons, and further acknowledges, as a fact, that so long as any Local Fuel is located at the Demised Premises, any Foreign Fuel being used in the operation of the Plant is being used for Non-Operating Reasons. As contemplated by the Lease, Local Fuel includes "waste coal material" (as defined in the Lease) on the Demised Premises, whether or not permitted by permits whose issuance or continuance is subject to actions which are within Tenant's control and whether or not reclaimed and is not dependent on the quality of the waste coal material. Tenant expects and intends that Horizon will detrimentally rely on this factual admission, that such reliance is foreseeable by Tenant and reasonable on the part of Horizon, and that such reliance is evidenced by Horizon's execution and delivery of this Agreement. Tenant further acknowledges and agrees that Tenant has no claim to recover any rents paid to Horizon prior to the date of this Agreement.[5]

12. The Court heard testimony at trial that in exchange for AMBIT's Admission defining all Foreign Fuel as "Non-Operating," Horizon agreed to lower the percentage of Applicable Gross Revenues for the use of Foreign Fuel for Non-Operating Reasons to 2.5%, plus other ancillary costs.

13. The Court received evidence (Pl's Ex. 26, Ex. D) that AMBIT confirmed these facts and Admissions in a letter to National Westminster Bank, PLC, which was acting as an

"agent" for the lenders, dated May 20, 1996, which letter specifically references the Restated Lease Agreement, and which letter states that "AMBIT has determined" that:

> As used herein, all capitalized terms not otherwise defined herein have the meanings ascribed to such terms in the Lease.
>
> In connection with our efforts to resolve the outstanding rent calculation and payment issues with Horizon and as the basis of such a resolution, AMBIT has determined that (i) it is reasonable to conclude that since Startup of the Plant all Foreign Fuel which has been used for the generation of power and steam at the Plant has been used for Non-Operating Reasons and (ii) so long as Local Fuel is located at the Site, it is reasonable to conclude that all Foreign Fuel is being used for Non-Operating Reasons.
>
> You have confirmed to us that the Banks will not challenge payments made in accordance with such a determination by AMBIT.

14. The letter was signed by AMBIT and acknowledged by a representative of the bank eight (8) days before the settlement agreement was signed.

15. The parties agree, and testimony was given at trial, that AMBIT and Horizon proceeded under this plan from the time it was entered into in 1996 until December 31, 2012, without incident.

16. Then, in 2013, AMBIT, refused to pay Horizon any rent, allegedly because it needed to pay off its bank creditors "Senior Debt" as described in the Lease.

17. Horizon then sued AMBIT for the rent in question on June 17, 2013 in Ohio County Civil Action No. 13-C-196.

18. After approximately four (4) years of litigation, the Court in 13-C-196 found, in short, that the banks were entitled to have "Senior Debt" paid ahead of Horizon receiving rent, and that Horizon was prohibited by the 1989 lease from filing a lawsuit for rent.

19. The Court in 13-C-196 then dismissed Horizon's claim for rent without prejudice. That Court also found that "the percentage of rent payment shall be determined pursuant to

the terms of the Lease Agreement subject to any waiver of a portion of percentage of rent as determined by the formula laid out in paragraph five of the 1996 Agreement." *See* Aug. 22, 2017 Order, *Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P.*, Civ. A. 13-C-196 (Ohio Co. 2013).

20. Subsequently, AMBIT filed the Complaint in the instant civil action. AMBIT asserts in its Complaint that, it used Foreign Fuel for Operating Reasons including from December 2003 to present, and therefore it should have been paying 1 percent of the revenues received in power production, rather than 2-1/2 percent at least since 2003 (the date of AMBIT claims usable local fuel was exhausted). The Court heard testimony that AMBIT also ceased paying even the 1% rent that was undisputed, on the premise that even undisputed amounts owed should be withheld until all litigation between the parties was concluded. Horizon filed a Counterclaim in this civil action.

21. At the trial in this civil action, AMBIT presented evidence regarding its choice to use foreign fuel, presenting evidence and arguing supporting it used its reasonable judgment in selecting its fuel source. However, Horizon presented evidence and testimony that the 1996 Agreement determined that any use of foreign fuel was for a non-operating reason.

22. The Court considers the Admissions contained in the 1996 Agreement:

> Tenant acknowledges, as a fact, that since the commencement operations by the Plant, all Foreign Fuel used in the operation of the Plant has been used for Non-Operating Reasons, and further acknowledges, as a fact, that so long as any Local Fuel is located at the Demised Premises, any Foreign Fuel being used in the operation of the Plant is being used for Non Operating Reasons. As contemplated by the Lease, Local Fuel includes 'waste fuel material' (as defined by the Lease) on the Demised Premises, whether or not permitted by permits whose issuance or continuance is subject to actions which are within Tenant's control and whether or not reclaimed, and is not dependent on the quality of the waste coal material. Tenant expects and intends that Horizon will detrimentally rely on this factual admission, that such reliance is foreseeable by Tenant and reasonable on the part

> of Horizon, and that such reliance is evidenced by Horizon's execution and delivery of this Agreement. Tenant further acknowledges and agrees that Tenant has no claim to recover any rents paid to Horizon prior to the date of this Agreement.

Pl's Ex. 18 at ¶ 2.

23. The Court heard testimony from Stanley Sears and John Karras, signatories to the 1996 Agreement, that the parties entered into the 1996 Agreement to resolve pending litigation, to eliminate future disputes over the reason Foreign Fuel was used, to protect Horizon from AMBIT allowing the permit on the coal itself to expire, and to eliminate future disputes over the quality of the waste coal in question, and, critically, that the parties intended the 1996 Admissions to be prospective.

24. Mr. Sears (Horizon President) and Mr. Karras (Horizon Treasurer) were the only witnesses to testify at trial regarding the intent of the parties in making the 1996 Agreement, and they both testified that they were present and involved in the negotiations leading up to, and resulting in, the 1996 Agreement. Both signed the document. *See, e.g.*, Trial Tr. Pt. 1, 218:2 – 218:10; Trial Tr. Pt. 2, 25:17 – 25:21.

25. Mr. Sears testified that the Admissions in the 1996 Agreement were to "set the factual predicate for determining rent moving forward". Trial Tr. Pt. 2, 227:24-228:1-4.

26. Moreover, the Court considers that Mr. Sears testified that the purpose of the 1996 Agreement was to eliminate all of the issues related to fuel going forward, in exchange for Horizon dismissing its lawsuit and accepting a substantial reduction in Horizon's rent. Trial Tr. Pt. 1, 220:23 – 221:12; Trial Tr. Pt. 2, 42:18 – 43:9.

27. The Court notes that Sears and Karras both also testified that when the 1996 Agreement was negotiated, AMBIT asked to negotiate it because it was having trouble paying its creditors and wanted Horizon's help to do so in order to ensure the continued financial viability of the power plant. Trial Tr. Pt. 2, 24:7 – 24:12; Trial Tr. Pt. 1, 220:23 –

221:12; 223:24 – 224:4.

28. For Horizon, that "cut" was lowering its rent when foreign fuel is used to 2.5% of gross revenues, and paying that .5% to KCUB, an AMBIT creditor, on behalf of AMBIT. *Id.*

29. Karras testified that the Admissions were necessary because the intent of the parties going forward was to simplify the payment process so that Horizon was not required to "look over the shoulder" of AMBIT to see what they were burning, and to eliminate the fighting about local and foreign fuel. Trial Tr. 219:23 – 219:5, 221:14 – 221:2.

30. Sears, similarly, testified that the Admissions in the 1996 Agreement were designed to "cover[] every possibility on fuel selection and payments, and satisfied [Horizon] as to how it would be paid, and why, going into the future." Trial Tr. Pt. 2. 38:20 – 38:23.

31. Sears stated that another purpose of the Admissions was to prohibit AMBIT from allowing the permit on the coal itself to expire ("whether or not permitted by permits whose issuance or continuances is subject to actions which are within the tenant's control"), and from claiming the coal was not the right quality. Trial Tr. Pt. 2, 40:24 – 41:14.

32. Karras also stated that the provision in the Admissions regarding the quality of the waste coal material was to prevent future disputes over the quality and viability of the coal. Trial Tr. Pt. 1, 222:3 – 222:11.

33. Karras testified that Horizon detrimentally relied upon the Agreement for 16 years, while Horizon took less money than AMBIT would have owed for Foreign Fuel usage. Trial Tr. Pt. 1, 223:24 – 224:4.

34. Both Sears and Karras testified that, while they do not believe the Admissions were intended to supersede the lease, the intent of the 1996 Agreement was to set forth a factual predicate that takes away AMBIT's ability to claim it had to use Foreign Fuel for Operating Reasons and to determine rent moving forward, as well as to simplify the

payment process. Trial Tr. Pt. 2, 177:4 – 177:11. Trial Tr. Pt. 2, 227:24-228:1-4.

35. By contrast, AMBIT offered no witness to testify to the intent of the parties in making the 1996 Agreement. Steven Friend, Plant Manager of the Grant Town Power Plant, testified that he had no knowledge of the 1996 Agreement either presently or at the time it was entered into. Trial Tr. Pt. 1, 95:5 – 96:3.

36. Herb Thompson, a prior Fuel Manager, Plant Manager, and Executive Director of the Grant Town Power Plant, agreed that the 1996 Agreement contains an admission by AMBIT that "all foreign fuel used in the operation of the plant has been used for non-operating reasons." Trial Tr. Pt. 1, 179:9 – 179:24.

37. Thompson agreed that AMBIT also sent a letter to the lending banks stating that "it is reasonable to conclude that since the startup of the plant, all foreign fuel which has been used for the generation of power and steam at the plant has been used for non-operating reasons. That's AMBIT saying what their reasonable judgment was" Trial Tr. Pt. 1, 183:11 – 184:9.[6]

38. Thompson confirmed his prior deposition testimony that if the 1996 Agreement is still in place, AMBIT would have to honor it. Trial Tr. Pt. 1, 187:9 – 187:12.

39. Thompson confirmed that AMBIT paid the amounts set forth in the 1996 Agreement for 16 years, from 1996 to 2012. Trial Tr. 187:21 – 187:23. Thompson confirmed that he never told AMBIT management not to pay the amounts set forth in that Agreement at any time from 1996 to 2012. Trial Tr. 188:4 – 188:18.

40. Richard Halloran, AMBIT's Owner's Representative, testified that he disagreed with the settlement at the time it was entered into by the parties but offered no testimony regarding the intent of the parties or to rebut Mr. Sears's or Mr. Karras's testimony regarding the 1996 Agreement.[7] Trial Tr. Pt. 2, 207:1 – 207:17.

41. Because no AMBIT witness testified to the intent of the 1996 Agreement and because

Horizon offered the testimony of two (2) persons, Stanley Sears and John Karras, who were signatories to the 1996 Agreement as to its intent, this Court accepts Horizon's witnesses' unrebutted testimony regarding the intent of the parties as it pertains to the 1996 Agreement and the its effect upon the Lease Agreement, as fact.

42. No AMBIT witness offered any reason why AMBIT paid under the 1996 Agreement for sixteen (16) years and then stopped, be it by claimed individual mistake, unilateral mistake, or otherwise.[8]

43. AMBIT did not present any evidence explaining why, factually, it believes the 1996 Agreement was not prospective.

44. Accordingly, based on the aforementioned facts and upon the evidence presented, the Court finds that:

a. The intent of the parties in entering into the 1996 Agreement was fourfold: (1) to resolve litigation pending at the time, (2) to eliminate future disputes over whether Foreign Fuel was used for Operating or Non-Operating Reasons and simplify the payment process, (3) to protect Horizon from AMBIT allowing the permit on the coal itself to expire, and (4) to eliminate future disputes over the quality of the waste coal in question, in short, to establish a "factual predicate for determining rent moving forward."

b. The evidence presented at the trial clarifies that the Admissions were therefore intended, at all times, to be prospective and to continue until the end of the Power Purchase Agreement.

c. Based upon the evidence presented in this case, the plain language of the Admissions, which states, *inter alia*, "so long as any Local Fuel" is used and "Tenant expects and intends that Horizon will detrimentally rely on this factual admission, that such reliance is foreseeable by Tenant and reasonable on the part of Horizon, and that such reliance is evidenced by Horizon's execution and delivery of this Agreement," are

to be interpreted as prospective. The Court finds that the Agreement contains no requirement that the local fuel be of any particular quality. The Court finds that the absence of these terms and intentional and purposeful.

d. In exchange for this Admission defining all Foreign Fuel as "Non-Operating," Horizon agreed to lower the percentage of Applicable Gross Revenues for the use of Foreign Fuel for Non-Operating Reasons to 2.5%, plus other ancillary costs.

e. AMBIT did not present evidence indicating that any of the aforementioned language in the Admissions should be interpreted in any other way.

45. This Court further finds that AMBIT's proffered theory of interpretation regarding the 1996 Agreement is without merit, as follows:

a. AMBIT offered no testimony as to the intent of the parties regarding the 1996 Agreement. AMBIT's only discernible argument relating to the 1996 Agreement is that, based upon the language, Horizon waived its right to collect 3% of the gross, but AMBIT never waived its right to pay only 1% of the gross. This argument is without merit. Trial Tr. Pt. 2, 119:16 – 121:1.

b. AMBIT relies upon the following language in the 1996 Agreement:

> With respect to each payment of Post-April Percentage Rent which becomes due under the Lease in accordance with this Agreement, tenant shall on or before the due date for such payment of Post-April Percentage Rent provided under the Lease, pay the amount of such Percentage Rent calculated at the designated rate under the Lease, less the amount of such payment which constitutes Waived Percentage Rent. Each such payment shall be subject to the assignment to KCUB contained in Paragraph 7.

c. Specifically, AMBIT owes the "amount of such Percentage Rent calculated at the designated rate under the Lease." The "designated rate" can only be 3%, as AMBIT is foreclosed from claiming that it is 1% by the Admissions.

d. From that 3%, the "Waived Percentage Rent" provision from Paragraph 14 applies to subtract .5% from the 3%, bringing the total rent owed by AMBIT to Horizon to 2.5% of the Gross Revenues as determined by the Amended and Restated Lease Agreement of 1989.

e. From that 2.5%, Horizon is obligated to pay .5% to KCUB, as set forth in Paragraph 7 of the 1996 Agreement.

f. AMBIT's argument also ignores the fact that AMBIT's clear statement in the Admissions that Foreign Fuel is always used for Non-Operating Reasons, precluding AMBIT from arguing that it is used Foreign Fuel for Operating Reasons and is only obligated to pay 1% of the Gross.

g. Moreover, AMBIT presented no evidence that the parties intended to leave the possibility of a 1% payment on the table. Rather, the only contemporaneous evidence regarding the purpose of the 1996 Agreement was presented by Horizon, whose witnesses testified that such a result was *never* the intended purpose of the Agreement.

h. Furthermore, AMBIT offered no justification as to why Horizon, who filed the lawsuit which led to the 1996 Agreement and who had succeeded in prior litigation against AMBIT for similar issues, would agree to reduce their rent cap by .5% *and* agree to pay .5% to one of AMBIT's creditors, without the Admissions contained in the 1996 applying to rent calculations prospectively.[9]

46. Accordingly, the Court declines AMBIT's invitation to deny Horizon the benefit of the agreement it entered into in 1996, with regard to how rent was to be calculated, "Post April" (1996).

47. This Court therefore finds that the Admissions contained in the 1996 Agreement are prospective and binding on the parties, and remain so until the end of the Power

Purchase Agreement.

48. Having determined the Admissions apply prospectively, the remaining issue before the Court is whether the 1996 Admissions remain applicable until the present time.

49. The Admissions specify, in relevant part, that:

> [S]o long as any Local Fuel is located at the Demised Premises, any Foreign Fuel being used in the operation of the Plant is being used for Non-Operating Reasons. As contemplated by the Lease, Local Fuel includes "waste coal material" (as defined in the Lease) on the Demised Premises, whether or not permitted by permits whose issuance or continuance is subject to actions which are within Tenant's control and whether or not reclaimed and is not dependent on the quality of the waste coal material.

50. Accordingly, this Court must determine whether any "Local Fuel is located at the Demised Premises."

51. The definition of "waste coal material" in the Lease is as follows:

> WHEREAS, mined waste material resulting from coal mining operations and deposited on the surface of the ground is referred to herein as "waste coal material" (it being understood that the word "coal" when used herein or in the Lease does not include waste coal material).

52. Based on the testimony adduced during the trial of this case and of the evidence presented therein, this Court finds that there is waste coal present at both the Grant Town and Joanna parcels, and that the provision of the Admissions requiring waste coal to be present is satisfied.

53. Specifically, Horizon representatives Sears and Karras both testified that waste coal is present to this day at both the Grant Town and Joanna parcels, and that the provision in the Admissions requiring fuel to be present is therefore satisfied. Trial Tr. Pt. 1, 244:16 – 244:23; Trial Tr. Pt. 2, 177:12 – 177:18.

54. Although AMBIT argued that the Local Fuel must be usable, a requirement negated by the 1996 Agreement, AMBIT representative Friend confirmed that at least three years'

worth of usable Local Fuel remains on the Demised Premises. Trial Tr. Pt. 1, 92:17 – 93:5, 97:15 – 97:20, 104:24 – 104:6.

55. AMBIT representative Thompson also stated that over six million (6,000,000) tons of Local Fuel was located on the Grant Town premises, and 3.5 (3,500,000) million more tons were present on the Joanna parcel. Trial Tr. Pt. 1, 189:5 – 189:10. Thompson also testified that the word "reasonable" as used in the letter that AMBIT sent to its banks, confirming the factual predicate established in the 1996 Agreement, was "reasonable we are talking about was used in the Lease." Trial Tr. Pt. 2, 183:1-5.

56. Thompson further testified, specifically, that waste coal on the Demised Premises owned by Horizon could be burned in the CFB boilers at the Grant Town Power Plant, and that it can, in fact, be blended with other coal. Trial Tr. Pt. 2, 198:5 – 198:13. Thompson also testified that the Miltech reports cited by Thompson were available to him when AMBIT made its determinations that it represented to its lenders as part of the 1996 Agreement. Trial Tr. Pt. 2, 184:10-184:15.

57. The plain language of the Admissions merely requires that Local Fuel be "located" at the Demised Premises, and does not specify any further requirements.

58. AMBIT's argument that the Court should read additional terms into the definition of "Local Fuel," including, but not limited to, the economic viability of the fuel, is therefore rejected. AMBIT's arguments and testimony regarding the economic viability of the fuel are not relevant, as the Admissions merely require local fuel be located at the premises.

59. As such, this Court finds that based on the testimony and evidence set forth in this matter, Local Fuel, as contemplated and agreed upon by the parties in the 1996 Agreement for the purposes of rent calculations, is located at the Demised Premises.

60. Because there is Local Fuel on the Demised Premises, the 1996 Admissions are, and have been, applicable from the time they were entered into in 1996.

61. This Court makes the following Conclusions of Law:

62. Because the evidence was clear that parties entered into the 1996 Agreement intending to resolve pending litigation, to eliminate future disputes over the reason Foreign Fuel was used, to protect Horizon from AMBIT allowing the permit on the coal to expire, and to eliminate future disputes over the quality of the waste coal in question, and, critically, that the parties intended the 1996 Admissions to establish a factual predicate for rent calculations and to be prospective, and the parties are bound by the terms of the 1996 Agreement in the determination of the payment of rents.

63. Because the evidence shows that Local Fuel is, and has been, present at the Demised Premises, and that the 1996 Admissions are still, therefore, effective, the Court finds in favor of Horizon on AMBIT's claims as set forth in AMBIT's Complaint.

64. The Court finds that the 1996 Agreement specifically dispensed with any issue as to the quality of the coal. The economic viability of the coal for use in this power plant is a quality of coal issue and thus, not determinative of any fact admitted by AMBIT in the 1996 Agreement.

65. The Court finds that Horizon did not breach the Lease Agreement.

66. The Court finds that AMBIT did breach the Lease Agreement by failing to pay agreed-upon rent since 2013.

67. The Court finds that AMBIT is not entitled to any rent reimbursement from the years 1996 – 2012.

68. Because the evidence shows that Local Fuel is, and has been, present at the Demised Premises, and that the 1996 Admissions are still, therefore, effective, the Court finds for Horizon on Horizon's claims as set forth in Horizon's Counterclaim.

69. The Court finds that AMBIT is required to pay its unpaid balance of rents owed to Horizon from 2013 to the present to Horizon at the rate of 2.5% of AMBIT's gross

revenue.

70. It is hereby ADJUDGED and ORDERED that the Court ORDERS the following relief:

a. AMBIT shall produce and serve upon Horizon all annual financial reports detailing gross revenues earned by AMBIT since January 1, 2013, as well as all transactional reports related to the sale of any product or waste produced by the Grant Town Power Plant since January 1, 2013, within seven (7) days of the entry of this order.

b. AMBIT shall begin immediately paying rent at 2.5% of Gross Revenues in concert with the 1996 Agreement and the 1989 Amended and Restated Lease until all Local Fuel, regardless of quality, is consumed and no longer present on the site.

c. Now that this Court has determined the appropriate way to calculate rent in this Order, the Court next sets date for a hearing on what the calculation of numbers should be. This damages hearing shall be held on December 15, 2023 at 1:00 p.m., in Courtroom 4B, Berkeley County Judicial Center, Martinsburg, West Virginia. Any party or counsel having a conflict with this date or desiring a continuance must file a written motion for a change in the hearing date on or before December 5, 2023, and verify that the moving party has contacted all opposing counsel, state whether counsel or other parties have provided dates and offer at least three alternative dates for the hearing.

d. AMBIT shall continue to pay rent at 2.5% of Gross Revenues in concert with the 1996 Agreement and the 1989 Amended and Restated Lease until all Local Fuel, regardless of quality, is consumed and no longer present on the site.

71. IT IS SO ORDERED.

72. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTER: October 31, 2023

[1] "Local Fuel" is defined as "waste coal material presently located on" the rental property.
[2] "Foreign Fuel" is defined as "waste coal material or other energy sources from locations other than" the rental property.
[3] "Operating Reason" is defined, in short, as one or more of the following five reasons:

i. to achieve and maintain the manufacturer's rated output of any Plants on the Demised Premises.
ii. to operate any Plants on the Demised Premises in a safe manner.
iii. to operate the Initial Cogeneration Plant in compliance with the Electric Energy Purchase Agreement, dated Sept. 15, 1988.
iv. to operate any Plants on the Demised Premises in compliance with any operation or maintenance manual.
v. due to the inability of AMBIT to use Local Fuel as a result of any law, rule, regulation, or order of any court or agency.
vi. due to exhaustion of the usable waste coal material on the Demised Premises.

[4] "Non-Operating Reason" is defined as "usage designed to reduce the cost of limestone usage by a Plant," or "there is no Operating Reason to do so."
[5] The "Demised Premises" consists of the Grant Town Parcel and Joanna Parcel, which AMBIT rents from Horizon.
[6] Thompson attempted, during rebuttal, to claim that this Admission was false, and that AMBIT had *never* selected a foreign fuel for a non-operating reason. Trial Tr. Pt. 2, 185:15 – 185:22.
[7] AMBIT improperly called Halloran as a "rebuttal witness" but attempted to use him to put on evidence which should have been part of its case-in-chief. This Court dismissed the witness after warning AMBIT to limit the examination to rebuttal questions and giving AMBIT an opportunity to ask several additional questions related solely to rebuttal.
[8] The Court notes that the timing of the decision to stop paying the rent correlates with Richard Halloran's acquisition of AMBIT's remaining partner interests. The Court also notes in closing arguments it was alluded to the owners in Irvine, California no longer owning the company at that time.
[9] Sears confirmed that out of the 2.5% agreed to in the 1996 Agreement, Horizon was then required to pay .5% of that money to KCUB, a third party to whom AMBIT, not Horizon, was indebted. Trial Tr. Pt. 2, 36:15 – 36:20.

/s/ Michael Lorensen
Circuit Court Judge
16th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.