

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710

POCAHONTAS COAL COMPANY, LLC)	CONTEST PROCEEDING
)	
Contestant,)	Docket No.: WEVA 2014-395-R
)	Order No.: 3576153; 12/19/13
)	
v.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	
)	
Respondent.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	CIVIL PENALTY PROCEEDING
)	
Petitioner)	Docket No.: WEVA 2014-1028
)	Docket No.: WEVA 2015-854
)	
v.)	
)	
POCAHONTAS COAL COMPANY, LLC)	Mine ID No.: 46-08878
)	Mine: Affinity Mine
)	
Respondent.)	Commission

**POCAHONTAS COAL COMPANY, LLC’S RESPONSE TO COMMISSION’S JULY 19,
2018 ORDER**

Pocahontas Coal Company, LLC (“Pocahontas”), by and through its undersigned counsel, responds to the Federal Mine Safety and Health Review Commission’s (“Commission”) July 19, 2018, order as follows:

On July 26, 2018, the Secretary of Labor (“Secretary”) filed a Response to the Commission’s July 19, 2018, Order. In his Response the Secretary elected to remove the seal from his July 17, 2018, Response in Support of Pocahontas’ Motion to Withdraw Petition for Discretionary Review and supporting agreement.

Given the Secretary's position, and Pocahontas' desire to move this matter forward, Pocahontas agrees to lift its request to seal its complete July 10, 2018, filing. Pocahontas believes the parties' current positions collectively remove the seal issue from further consideration in this matter.

Accordingly, Pocahontas is providing clean copies of all documents in its July 10, 2018, filing removing the "under seal" designation. Pocahontas respectfully requests the Commission rule on its motion.

Respectfully submitted,

POCAHONTAS COAL COMPANY, LLC
Contestant,

BY COUNSEL

s/ Jason M. Nutzman
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Date: July 26, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing **POCAHONTAS COAL COMPANY, LLC'S RESPONSE TO COMMISSION'S JULY 19, 2018 ORDER** upon the parties on the **26th day of July, 2018**, via FMSHRC e-filing and electronic mail (where indicated) to:

Lisa M. Boyd
Executive Director
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

The Honorable Margaret A. Miller
Administrative Law Judge
Federal Mine Safety and
Health Review Commission
721 19th St., Suite 443
Denver, Colorado 80202-2500

Ed Waldman
Office of the Solicitor
U.S. Department of Labor
201 12th Street – Suite 500
Arlington, Virginia 22202-5450
waldman.edward@dol.gov

s/Jason M. Nutzman

Jason M. Nutzman

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MOTION TO WITHDRAW PETITION FOR DISCRETIONARY REVIEW

Pocahontas Coal Company, LLC (“Pocahontas”), by and through its undersigned counsel, and pursuant to Federal Mine Safety and Health Review Commission (“Commission”) Procedural Rule 10, 29 C.F.R. § 2700.10, and Commission Procedural Rule 11, 29 C.F.R. § 2700.11, hereby moves for an order granting its Motion to Withdraw Petition for Discretionary Review as more fully set forth below.

INTRODUCTION

On October 24, 2013, the Mine Safety and Health Administration (“MSHA”) issued Section 104(e)(1) Written Notice Number 7219153 (“POV Notice”) to Pocahontas’ Affinity Mine alleging a pattern of violations (“POV”) existed at the mining operation. MSHA issued the POV notice pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) (30 U.S.C. § 814(e)(1)). On December 31, 2015, Pocahontas filed with the Commission a Petition for Discretionary Review (“PDR”) pursuant to Commission Procedural Rule 70 (29 C.F.R. § 2700.70). This PDR related to the POV Notice and two decisions issued by Administrative Law Judge on November 3, 2015 and December 24, 2015.

The parties have now negotiated a compromise of this matter and have agreed to resolve the issues raised in Pocahontas’ PDR and the related briefs before the Commission. Accordingly, Pocahontas respectfully moves the Commission for an order granting its Motion to Withdraw Petition for Discretionary Review and states each party will bear its own costs and fees in these proceedings. A copy of the Settlement Agreement is filed separately to this motion as Exhibit 1. Counsel for Pocahontas has informed counsel for the Secretary of its intent to file this motion.

ARGUMENT

Pocahontas seeks to withdraw its PDR based entirely on the terms of the Settlement Agreement between the parties. Commission Procedural Rule 11 provides that “[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission.” See 29 C.F.R. § 2700.11; see also Fed. R. App. P. 42(b) (noting in part that “[a]n

appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court").¹

Commission precedent sets forth the right of a party to request permission to withdraw its petition for discretionary review. See Speed Mining, Inc., 27 FMSHRC 286 (Mar. 2005) (granting motion to withdraw petition for discretionary review filed pursuant to Commission Rules 10 and 11); Newmont Gold Company, 21 FMSHRC 564 (June 1999) (granting motion to withdraw as it neither disturbed the holdings of the judge nor the penalties assessed); Thunder Basin Coal Company, 1996 WL 354599 (June 1996) (granting unopposed motion to withdraw petition for discretionary review); RNS Services, Inc., 18 FMSHRC 115 (Feb. 1996) (granting unopposed motion to withdraw petition for discretionary review); Jim Walter Resources, Inc., 9 FMSHRC 390 (Mar. 1987) (granting unopposed motion to withdraw petition for discretionary review and to dismiss proceeding); Russell Collins and Virgil Kelley, 5 FMSHRC 1671 (Oct. 1983) (granting motion to withdraw petition for discretionary review).

The Commission has also recognized that a proceeding “no longer present[s] a justiciable controversy” and “[a] case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome.” See Brent Roberts, 20 FMSHRC 1245, 1247-48 (Nov. 1998); see also Youghioghney & Ohio Coal Company, 7 FMSHRC 200 (Feb. 1985) (finding adequate reason to grant motion to dismiss proceeding filed by Secretary after petition for discretionary review filed by operator when “there is no longer a true adversarial contest suitable for judicial resolution”).

¹ Commission Rule 1(b) provides that Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure shall apply “so far as practicable” in absence of applicable Commission rules. See 29 C.F.R. § 2700.1(b).

CONCLUSION

For the reasons set forth above Pocahontas requests that the Commission issue an order granting its Motion to Withdraw Petition for Discretionary Review.

Respectfully submitted,

POCAHONTAS COAL COMPANY, LLC
Contestant,

BY COUNSEL

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Date: July 10, 2018

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Respondent.)	Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing **MOTION TO WITHDRAW PETITION FOR DISCRETIONARY REVIEW** upon the parties on the **10th day of July, 2018**, via FMSHRC e-filing and electronic mail (where indicated) to:

Lisa M. Boyd
Executive Director
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

The Honorable Margaret A. Miller
Administrative Law Judge
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721 19th St., Suite 443
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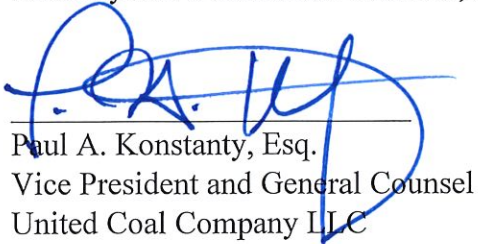
s/Jason M. Nutzman
Jason M. Nutzman

AGREEMENT

1. This Agreement is being entered into between Pocahontas Coal Company LLC (“Pocahontas”) and the Mine Safety and Health Administration (“MSHA”) on June 29, 2018 (collectively “Parties”).
2. The Parties have agreed to end the matter currently pending before the Federal Mine Safety and Health Review Commission (“Commission”) in *Pocahontas Coal Company, LLC v. U.S. Secretary of Labor, Mine Safety and Health Administration (MSHA), WEVA 2014-395-R, et. al.* (“the Proceeding”).
3. By entering into this Agreement Pocahontas hereby agrees to file with the Commission a Motion to Withdraw Appeal in the Proceeding.
4. In exchange for Pocahontas filing a Motion to Withdraw Appeal in the Proceeding, and the Commission’s issuance of a full, clear, and unambiguous dismissal of the Proceeding, MSHA agrees to immediately terminate Notice of Pattern of Violations Number 7219153 issued at the Affinity Mine on October 24, 2013, and provide prompt written acknowledgment of the same to Pocahontas.
5. The Commission’s refusal to fully dismiss the Proceeding renders this Agreement null and void and the parties shall be returned to their original positions in the Proceeding, prior to entering this Agreement, to include waiting on consummation of Pocahontas’ appeal before the Commission, any remand or direction by the Commission, or any additional appeals to the United States Court of Appeals and beyond.
6. The Parties will bear their own attorney’s fees and litigation expenses for the Proceeding.
7. The Parties agree to keep the contents of this Agreement confidential until such time as the Commission issues a full, clear, and unambiguous dismissal of the Proceeding.

8. The parties agree to execute this Agreement in Counterparts.

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Jason M. Nutzman, Esq.
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Ali A. Beydoun
Counsel, Appellate Litigation

Edward Waldman
Attorney

Attorneys for the Secretary of Labor,
Mine Safety and Health
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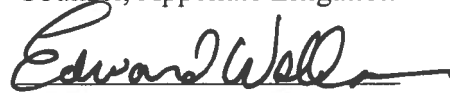
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