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

In re:

AGERA ENERGY LLC, *et al.*,¹

Debtors.

)
) Chapter 11
)

) Case No. 19-_____ (_____)
)

) (Joint Administration Requested)
)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING AND
APPROVING THE REJECTION OF A CERTAIN UNEXPIRED LEASE OF
NONRESIDENTIAL REAL PROPERTY
NUNC PRO TUNC TO THE PETITION DATE**

Agera Energy LLC and its debtor affiliates, as debtors and debtors in possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases (these “Chapter 11 Cases”), hereby submit this motion (the “Motion”) for entry of an order (the “Order”) pursuant to sections 105(a) and 365 of title 11 of the United States Code (the “Bankruptcy Code”), Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rules 6006-1 and 9013-1(a) of the Local Bankruptcy Rules for the Southern District of New York (the “Local Rules”), substantially in the form attached hereto as **Exhibit A**: authorizing Agera Holdings, LLC to

¹ The Debtors, together with the last four digits of each Debtor’s federal tax identification number, are: Agera Energy LLC (8122); Agera Holdings, LLC (3335); energy.me midwest llc (9484); Aequis Energy, Inc. (7988); Utility Recovery LLC (4351); and Agera Solutions LLC (8749). The location of the Debtors’ corporate headquarters and the service address for all Debtors is 555 Pleasantville Road, S-107, Briarcliff Manor, NY 10510.

reject a certain unexpired Lease (as defined below) with its Landlord (as defined below) as set forth on **Exhibit 1** to the Order *nunc pro tunc* to the Petition Date (as defined below). In support of this Motion, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Southern District of New York (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105(a) and 365 of title 11 of the United States Code (the “Bankruptcy Code”), Bankruptcy Rule 6006, and Rules 6006-1 and 9013-1(a) of the Local Rules.

BACKGROUND

4. On the date hereof (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

5. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

6. No trustee, examiner, creditors’ committee, or other official committee has been appointed in these Chapter 11 Cases.

7. The factual background regarding the Debtors, including a description of the Debtors’ business, capital structure, and the circumstances leading to these Chapter 11 Cases, is set forth in the *Declaration of Todd Sandford Pursuant to Rule 1007-2 of the Local Bankruptcy*

Rules for the Southern District of New York in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings (the "First Day Declaration"),², which is incorporated herein by reference.

THE UNEXPIRED LEASE

8. Agera Holdings, LLC is a party to a certain unexpired lease of real property (the "Lease") with Continental/North Shore II L.P. (the "Landlord"). The Debtors have determined that the Lease provides no further benefit to the Debtors' estates. The Debtors never took possession of the premises, thereby putting the Landlord on notice and giving it an opportunity to mitigate damages by beginning to look for new tenants.

9. The Debtors have determined, in the reasonable exercise of their business judgment, that the Lease no longer serves any business purpose and is burdensome to the Debtors' estates. The Debtors have further determined that the Lease is unlikely to provide value to the Debtors' estates if it were marketed, and any value that the Debtors might obtain would be outweighed by the administrative expenses that the Debtors would incur to realize such value. A description of the Lease is attached as Exhibit 1 to the Proposed Order.

RELIEF REQUESTED

10. By this Motion, the Debtors seek entry of the Order authorizing the Debtors to reject the Lease with the Landlord as set forth on Exhibit 1 to the Order *nunc pro tunc* to the Petition Date.

² Capitalized terms used but not defined herein have the meanings ascribed to such terms in the First Day Declaration.

BASIS FOR REQUESTED RELIEF

A. Rejection of the Lease Constitutes a Sound Exercise of the Debtors' Business Judgment.

11. Bankruptcy Code section 365(a) provides that a debtor in possession, “subject to the Court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” The decision to assume or reject an executory contract or unexpired lease is a matter within a debtor’s “business judgment.” See *In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1993); *In re Old Carco LLC*, 406 B.R. 180, 188 (Bankr. S.D.N.Y. 2009) (“The business judgment standard is employed by courts in determining whether to permit a debtor to assume or reject a contract.”); see also *NLRB v. Bildisco & Bildisco (In re Bildisco)*, 682 F.2d 72, 79 (3d Cir. 1982) (“The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the ‘business judgment’ test.”) (citation omitted), *aff’d*, 465 U.S. 513 (1984). Accordingly, courts generally will not second-guess a debtor’s business judgment concerning the assumption or rejection of an executory contract or unexpired lease.

12. The “business judgment” standard is not a strict standard; it requires only a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor’s estate. See *In re Helm*, 335 B.R. 528, 538 (Bankr. S.D.N.Y. 1996) (“To meet the business judgment test, the debtor in possession must ‘establish that rejection will benefit the estate.’ ”) (citation omitted); *In re Balco Equities, Inc.*, 323 B.R. 85, 99 (Bankr. S.D.N.Y. 2005) (“In determining whether the debtor has employed reasonable business discretion, the court for the most part must only determine that the rejection will likely benefit the estate.”). Under the business judgment standard, “[a] debtor’s decision to reject an executory contract must be summarily affirmed unless it is the product of ‘bad faith, or whim or caprice’ ” *In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001).

13. Further, as with the assumption or rejection of an executory contract or an unexpired lease under Bankruptcy Code section 365, any amendment to an executory contract or unexpired lease that may be deemed outside the ordinary course of business is authorized under section 363 of the Bankruptcy Code when there is a “sound business purpose” that justifies such action. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *see also In re Borders Grp. Inc.*, 453 B.R. 477, 482 (Bankr. S.D.N.Y. 2011)

14. The Debtors, in their sound business judgment, have determined that rejection of the Lease is in the best interests of the Debtors’ estates. The Lease is no longer—indeed never was—necessary for or beneficial to the Debtors’ ongoing businesses, and it creates unnecessary and burdensome expenses for the Debtors’ estates. The Debtors never took possession of the premises subject to the Lease. In addition, the Debtors have determined that no meaningful value would be realized by the Debtors if the Lease was assumed and assigned to third parties. Accordingly, the Lease should be rejected.

B. *Nunc Pro Tunc* Relief is Appropriate.

15. Bankruptcy Code section 365 does not specifically address whether the Court may order rejection to be applied retroactively. *See In re Jamesway Corp.*, 179 B.R. 33, 37 (S.D.N.Y. 1995) (stating that section 365 does not include “restrictions as to the manner in which the court can approve rejection”); *see also In re CCI Wireless, LLC*, 297 B.R. 133, 138 (D. Colo. 2003) (noting that section 365 “does not prohibit the bankruptcy court from allowing the rejection of leases to apply retroactively”). But courts have held that a bankruptcy court may, in its discretion, authorize rejection retroactively to a date prior to entry of the order authorizing such rejection where the balance of equities favors such relief. *See BP Energy Co. v. Bethlehem Steel Corp.*, No. 02 CIV. 6419 (NRB), 2002 WL 31548723, at *3 (S.D.N.Y. Nov. 15, 2002) (“[W]e cannot conclude . . . that a bankruptcy court’s assignment of a retroactive rejection date

falls outside of its authority when the balance of the equities favors this solution.”); *In re Jamesway Corp.*, 179 B.R. at 38 (same); *see also In re At Home Corp.*, 392 F.3d 1064, 1065–66 (9th Cir. 2004) (affirming bankruptcy court’s approval of retroactive rejection) cert. denied sub nom., 546 U.S. 814 (2005); *In re Thinking Machs., Corp.*, 67 F.3d 1021, 1028 (1st Cir. 1995) (“[B]ankruptcy courts may enter retroactive orders of approval, and should do so when the balance of equities preponderates in favor of such remediation”).

16. The balance of equities favors authorizing the Debtors to reject the Lease *nunc pro tunc* to the Petition Date. Any postponement of the effective date of rejection of the Lease may potentially cause the Debtors to incur unnecessary administrative expenses that provide no tangible benefit to the Debtors’ estates. Additionally, the Debtors never took possession of the premises, thereby putting the Landlord on notice and giving it an opportunity to mitigate damages by beginning to look for new tenants.

RESERVATION OF RIGHTS

17. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors’ or any other party’s rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under Bankruptcy Code section 365 other than those leases and contracts that are subject to this Motion. If this Court grants the relief sought herein, any payment made pursuant to this Court’s order is not intended and should not be construed as an admission of the validity of any claim or a waiver of the Debtors’ or any other party’s rights to dispute such claim subsequently.

MOTION PRACTICE

18. This motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated and a discussion of their application to this motion. Accordingly, the Debtors submit that this motion satisfies Local Rule 9013-1(a).

NOTICE

19. The Debtors will provide notice of this Motion to: (a) the United States Trustee; (b) the holders of the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) counsel to BP Energy Company; (d) counsel to Exelon Generation Company, LLC; (e) the Landlord; (f) the Internal Revenue Service; (g) the United States Attorney for the Southern District of New York; and (h) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, under the circumstances, no other or further notice is required.

NO PRIOR REQUEST

20. No prior request for the relief sought in this motion has been made to this or any other court.

WHEREFORE, the Debtors seek entry of the Order, substantially in the form attached hereto as **Exhibit A**, authorizing the Debtors to reject the Lease and granting such further relief as the Court deems appropriate.

Dated: October 4, 2019
New York, NY

Respectfully submitted,

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*Proposed Counsel to the Debtors
and Debtors in Possession*

Exhibit A

Proposed Order

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

_____)	
In re:)	Chapter 11
)	
AGERA ENERGY LLC, <i>et al.</i> , ¹)	Case No. 19-_____ (____)
)	
Debtors.)	(Jointly Administered)
)	
_____)	Re: Docket No. ____

**ORDER AUTHORIZING AND APPROVING THE REJECTION OF A
CERTAIN UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY
NUNC PRO TUNC TO THE PETITION DATE**

Upon the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”), for entry of an order authorizing the Debtors to reject a certain Lease with its Landlord pursuant to 11 U.S.C. § 365 *nunc pro tunc* to the Petition Date; and this Court having found that it has jurisdiction to consider the Motion pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012; and this Court having found that the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of these Chapter 11 Cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and this Court having reviewed the Motion and having heard

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² Capitalized terms used but not defined herein have the meanings ascribed to such terms in the Motion.

statements in support of the Motion at a hearing held before this Court (the “Hearing”); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and any objections to the relief requested herein having been withdrawn or overruled on the merits; and after due deliberation thereon and good and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. The Lease listed on **Exhibit 1** is rejected under 11 U.S.C. § 365, effective *nunc pro tunc* to the Petition Date.
2. The Landlord shall not be entitled to an administrative expense claim under Bankruptcy Code sections 503(b)(1), 365(d)(3), or any other provisions of the Bankruptcy Code in connection with the Lease or the rejection thereof.
3. The Debtors and their claims and noticing agent are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.
4. Proofs of Claim arising out of such rejection are due by _____ .m. (Eastern Time) on _____. IF YOU FAIL TO TIMELY SUBMIT A PROOF OF CLAIM IN THE APPROPRIATE FORM ON OR BEFORE THE DEADLINE SET FORTH HEREIN, YOU WILL BE FOREVER BARRED, ESTOPPED, AND ENJOINED FROM (A) ASSERTING SUCH CLAIM AGAINST ANY OF THE DEBTORS AND THEIR CHAPTER 11 ESTATES, (B) VOTING ON ANY CHAPTER 11 PLAN OF REORGANIZATION FILED IN THESE CASES ON ACCOUNT OF SUCH CLAIM, AND (C) PARTICIPATING IN ANY DISTRIBUTION IN THE DEBTORS’ CHAPTER 11 CASES ON ACCOUNT OF SUCH CLAIM.
5. Nothing in this Order or the Motion shall be construed as prejudicing any rights the Debtors may have to dispute or contest (i) whether the Lease is actually an executory contract

or unexpired lease that is subject to assumption or rejection under section 365 of the Bankruptcy Code or (ii) the amount of, or basis for, any claims asserted against the Debtors arising in connection with the rejection of the Lease, or as an admission as to the validity or priority of any claim against the Debtors.

6. Nothing in this Order or the Motion is intended or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors' or any other party's rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under Bankruptcy Code section 365 other than the Lease subject to this Motion.

7. Notwithstanding anything to the contrary, the terms and conditions of this Order are immediately effective and enforceable upon its entry.

8. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: _____, 2019
White Plains, New York

THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

Exhibit 1

Lease

Lease	Property	Notice Address	Lease Expiration
Lease, dated March 11, 2019, between Agera Holdings, LLC and Continental/North Shore II L.P.	375 North Shore Drive, Pittsburgh, PA 15212	Agera Holdings LLC Accounts Payable 375 N. Shore Drive Suite 400 Pittsburgh, PA 15212	March 11, 2024