

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION**

<p>IN THE MATTER OF:</p> <p>North Carolina Power Holdings, LLC</p> <p style="text-align: center;">Debtor</p>	<p style="text-align: center;">Case No. 08-01789-8-ATS Chapter 11</p>
<p>IN THE MATTER OF:</p> <p>Lumberton Power, LLC d/b/a Lumberton Cogen, LLC</p> <p style="text-align: center;">Debtor</p>	<p style="text-align: center;">Case No. 08-01790-8-ATS Chapter 11</p>
<p>IN THE MATTER OF:</p> <p>Elizabethtown Power, LLC d/b/a Elizabethtown Cogen, LLC</p> <p style="text-align: center;">Debtor</p>	<p style="text-align: center;">Case No. 08-01791-8-ATS Chapter 11</p>
<p>Motion for Order Appointing Chapter 11 Trustee</p>	

Now comes Vulcan Power Group, LLC and Vulcan Management, Inc., for themselves and on behalf of TDF & Coal and Engeneration, petitioning creditors in the involuntary proceedings filed against the above captioned Debtors, and move the Court pursuant to §§ 105 and 1104 of the Bankruptcy Code and Rules 2007.1 and 9014 of the Federal Rules of Bankruptcy Procedure as follows:

1 On March 17, 2008 (the “Petition Date”), Vulcan Power Group, LLC, Vulcan Management, Inc., TDF & Coal, and Engeneration (the “Petitioning Creditors”) filed involuntary petitions seeking relief under Chapter 11 of the Bankruptcy Code against North Carolina Power Holdings, LLC (“NC Power”), Lumberton Power, LLC d/b/a/ Lumberton Cogen, LLC (“Lumberton Power”), and Elizabethtown Power, LLC d/b/a Elizabethtown Cogen, LLC (“Elizabethtown Power” and collectively the “Debtors”).

2 The summons and copies of the involuntary petitions were served on the registered agents for each of the Debtors, respectively, on March 17, 2008, and the deadline for filing an answer or other responsive pleading is April 9, 2008. As of the date of this Motion no responsive

pleadings have been filed and an order for relief has not been entered in any of the pending involuntary proceedings.

3 This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, and this matter is a core proceeding under 28 U.S.C. §157(b)(2). Venue is proper pursuant to 28 U.S.C. §§1408 and 1409.

4 The Debtors are each Delaware limited liability companies, duly authorized to conduct business in the State of North Carolina. Each Debtor maintains a registered office and registered agent for service of process in Wake County, North Carolina.

5 Vulcan Power Group, LLC, is a creditor of and owns all the membership interests in NC Power.

6 Vulcan Management, Inc., TDF & Coal and Engeneration are creditors of the Debtors.

7 NC Power owns all the membership interests in Lumberton Power and Elizabethtown Power.

8 Lumberton Power owns and operates a power generating facility at SR 2022, Lumberton, N.C.

9 Elizabethtown Power owns and operates a power generating facility at 3100 West Broad St., Elizabethtown, N.C.

Background

10 On or about June 7, 2006, the Debtors entered into a Credit Agreement with Del Mar Onshore Partners, LP (“Del Mar”), as Administrative Agent for the Lenders (as defined therein), under which NC Power as the Borrower and Lumberton Power and Elizabethtown Power as Guarantors arranged for a loan in the initial principal amount of \$13,000,000, with a contract rate of interest equal to the greater of LIBOR plus 9.00% or 13.25%, a default rate of interest equal to the stated contract rate plus 3%, and a prepayment penalty of 3% in year 1, 2% in year 2, and 1% thereafter.

11 On or about May 25, 2007, the Debtors and Del Mar entered into a First Amendment to the Credit Agreement, pursuant to which the Lenders advanced additional principal of \$2,000,000; a warrant agreement was provided to the Lenders for 3% of the equity interests in NC Power for nominal cost; and, an additional “exit fee” of \$600,000 was imposed.

12 On or about July 26, 2007, the Debtors and Del Mar entered into a Second Amendment to the Credit Agreement, pursuant to which the Lenders advanced additional principal of

\$4,900,000; the existing warrant was replaced with a new warrant for 10% of the equity interests in NC Power for nominal cost; the Lenders charged a “waiver fee” of \$131,244.82, default interest of \$97,500, and an “amendment fee” of \$300,000; and, imposed a new “default fee” in the event of any subsequent default equal to 10% of outstanding principal (i.e., \$1,900,000).

13 On or about October 12, 2007, the Debtors and Del Mar entered into a Forbearance Agreement, pursuant to which an additional warrant was provided to the Lenders for 5% of the equity interests in NC Power at nominal cost (but one-half of which, or 2.5%, could be redeemed for an amount to be calculated as provided therein but in any event not less than \$500,000), and imposed a new fee of \$500,000 which was added to principal as of October 12, 2007.

14 The default fee of \$1,900,000 was added to the principal balance on November 1, 2007

15 As a result of the foregoing, the Lenders made actual cash advances in the aggregate amount of \$19,900,000 (\$13,000,000 on June 7, 2006, \$2,000,000 on May 25, 2007, and \$4,900,000 on July 26, 2007). However, the Lenders also charged and either received or added to the outstanding principal balance the following fees, charges and penalties (in addition to the fees charged at the initial loan closing):

- a. Fees were added to principal of \$300,000 for the amendment on 7/26/07, \$500,000 for the forbearance on 10/12/07, and \$1,900,000 for the default on 11/1/07.
- b. Prepayment penalties of 1% were increased by the addition of an exit fee of \$600,000 on 5/25/07.
- c. Warrants of 10% were granted to the Lenders on 7/26/07 and another 5% on 10/12/07, all for nominal consideration and having an approximate value \$3,000,000.
- d. Fees of \$131,245 were paid for the “waiver” on 7/26/07.

16 By letter dated February 28, 2008 (the “Notice of Acceleration”), and after advancing gross loan proceeds in the aggregate amount of \$19,900,000, the Lenders have accelerated the outstanding indebtedness and demanded payment of \$23,309,849.40 (principal of \$22,390,000 and interest of \$919,849.40), plus attorneys’ fees and other costs if the payment was not made within five days of the date of the Notice of Acceleration. In addition, the Lenders retain the right to assert additional prepayment/exit fees in the aggregate amount of \$826,000, and retain warrants having a value of approximately \$3,000,000 for which only nominal consideration was

supplied.

17 The Credit Agreement is evidenced and secured by, among other documents and filings, the following:

- a. Deeds of Trust on the real estate and security interests in or upon all the personal property of Lumberton Power and Elizabethtown Power.
- b. Guarantee and Collateral Agreement, pursuant to which the Lenders received a pledge of all the equity interests in NC Power as the Borrower and Lumberton Power and Elizabethtown Power as the Guarantors.

Change in Control

18 Under the terms of the Guarantee and Collateral Agreement, in the event of a default the Lenders may exercise the following remedies, among others:

- a. Exercise all voting rights.
- b. Upon bankruptcy, the Lenders have all rights of the Debtors to vote.
- c. Exercise the certificates or stock powers delivered to the Lenders, along with proxies.
- d. Enforce the provisions of securities control agreements with respect to the equity interests in each of the Debtors.

19 Prior to the Petition Date, the Debtors were owned and controlled by Vulcan Power Group, LLC and managed by Vulcan Management, Inc., although day to day management of each facility was performed by Engeneration (as successor to G.L.C. Consulting Service, Inc.) pursuant to an Operation and Management Agreement with Lumberton Power and Elizabethtown Power, respectively.

20 On or about October 12, 2007, at the insistence of the Lenders, the Operation and Management Agreements with Engeneration were terminated by the Debtors giving rise to termination penalties under the existing agreements, and new management agreements were entered into with Wood Group Power Operation (Freeport) LLC.

21 By letter dated February 28, 2008 (the "Notice of Exercise of Rights"), Del Mar took the following actions:

- a. Exercised rights under the Vulcan Pledge Agreement, to (i) register the pledged securities (the ownership interest of Vulcan Power Group, LLC in NC Power) in its name and (ii) exercise all voting, consent, corporate, partnership or other rights

pertaining to such pledged securities.

- b. As proxy for and with power of attorney from Vulcan Power Group, LLC, executed documentation so as to (i) remove all managers currently serving on the board of managers of NC Power, (ii) nominate, appoint and authorize certain persons to fill the vacancies thereby created, (iii) remove all of the officers currently serving as officers of NC Power, and (iv) nominate, appoint and authorize certain persons to serve as officers of NC Power.
- c. The Lenders then directed or caused its newly appointed managers and officers to (i) remove all managers currently serving on the board of managers of Lumberton Power, (ii) nominate, appoint and authorize certain persons to fill the vacancies thereby created, (iii) remove all of the officers currently serving as officers of Lumberton Power, and (iv) nominate, appoint and authorize certain persons to serve as officers of Lumberton Power.
- d. The Lenders then directed or caused its newly appointed managers and officers to (i) remove all managers currently serving on the board of managers of Elizabethtown Power, (ii) nominate, appoint and authorize certain persons to fill the vacancies thereby created, (iii) remove all of the officers currently serving as officers of Elizabethtown Power, and (iv) nominate, appoint and authorize certain persons to serve as officers of Elizabethtown Power.¹

22 As a result of the foregoing, Del Mar has effectively taken control of all the management decisions of the Debtors, thereby preventing the Debtors from taking any actions which Del Mar or the Lenders may perceive as being against the interests of the Lenders, including but not limited to the commencement of voluntary proceedings under Chapter 11, adversary proceedings to avoid transfers made and obligations incurred pursuant to Section 548 of the Bankruptcy Code, restructuring of the Debtors' collective obligations, sale of the Debtors' assets, or other means of providing fair and equitable treatment for the claims and interests of other parties.

Request for Trustee

23 Del Mar as Administrative Agent for the Lenders, and its designees as current management of the Debtors, cannot be expected to adequately or fairly represent the interests of

¹ The individuals designated by Del Mar to fill all such newly created vacancies are identified as Jim Utt, Jerry Robinson and Scott Arnold.

the Debtors or discharge the fiduciary duties of the Debtors to its creditors as debtors-in-possession, including but not limited to the restructuring of the secured indebtedness held by Del Mar as administrative agent for the Lenders, objecting to the claim of Del Mar to extent necessary or appropriate, or commencement of adversary proceedings to avoid fraudulent transfers made to or obligations incurred for the benefit of Del Mar and the Lenders.

24 Even if the steps taken by Del Mar to seize control of the Debtors were reversed and rescinded and prior management restored, the Debtors cannot effectively discharge their duties so long as the existing provisions vesting control in the Lenders remain in place, as any efforts to proceed in Chapter 11 would be subject to being blocked or overridden by the Lenders.

25 Section 1104 provides that at any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and hearing, the Court shall order the appointment of a trustee:

- a. For cause, including fraud, dishonest, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause;
- b. If such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
- c. If grounds exist to convert or dismiss the case under § 1112, but the court determines that the appointment of a trustee is in the best interests of creditors and the estate.

26 As more particularly set forth above, there is cause to appoint a trustee based upon the inherent conflict of interest between the duties of the Lenders' designees to (i) the Lenders who appointed and direct their activities, and (ii) other creditors of the Debtors to whom a fiduciary duty is owed. Even if former management were restored, the Debtors would be subject to the Lenders' control to such an extent as may frustrate the Chapter 11 process, akin to a management deadlock.

27 The Debtors own and operate substantial assets, the potential for rehabilitation and reorganization is substantial, and any restructuring, refinancing, or liquidation of assets should be managed in the context of a plan or sale pursuant to Section 363 of the Bankruptcy Code, rather than through the Lenders' exercise of its rights to liquidate collateral pursuant to its deeds of trust and security interests.

28 For these reasons, appointment of a Chapter 11 trustee is clearly in the interests of creditors and the estate. The Petitioning Creditors request the appointment of Richard M. Hutson, II, of Durham, N.C. as Chapter 11 Trustee for the Debtors. Mr. Hutson is well qualified, capable to discharge the duties of such office, and without conflict in these proceedings.

Wherefore, the Petitioning Creditors pray the Court for the following relief:

- 1 Schedule this motion for hearing on April 10, 2008. or as soon thereafter as the Court may determine.
- 2 Order appointing Richard M. Hutson, II, or such other qualified person as may be selected by the Court, as Chapter 11 Trustee for each of the Debtors.
- 3 Such other relief as the Court may deem necessary and proper.

RESPECTFULLY submitted on behalf of the Petitioning Creditors. this the 20th day of March, 2008.

/s/ John A. Northen
Counsel for Vulcan Power Group, LLC and
Vulcan Management, Inc., and on behalf of
TDF & Coal and Engeneration

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION**

IN THE MATTER OF: North Carolina Power Holdings, LLC Debtor	Case No. 08-01789-8-ATS Chapter 11
IN THE MATTER OF: Lumberton Power, LLC d/b/a Lumberton Cogen, LLC Debtor	Case No. 08-01790-8-ATS Chapter 11
IN THE MATTER OF: Elizabethtown Power, LLC d/b/a Elizabethtown Cogen, LLC Debtor	Case No. 08-01791-8-ATS Chapter 11
Notice of Motion for Order Appointing Chapter 11 Trustee	

Vulcan Power Group, LLC and Vulcan Management, Inc., for themselves and on behalf of TDF & Coal and Engeneration, petitioning creditors in the involuntary proceedings filed against the above captioned Debtors, have filed a motion requesting that this Court appoint Richard M. Hutson, II, as the Chapter 11 Trustee for each of the Debtors. The petitioning creditors have also requested that the Court hear this Motion to Appoint a Chapter 11 Trustee on April 10, 2008 or as soon thereafter as the Court may determine. Any party wishing to oppose or be heard on this matter is directed to file a written response with the Court and deliver a copy thereof to counsel for the moving parties and the other parties listed on the attached service list no later than April 9, 2008 at 5:00 o'clock p.m.

RESPECTFULLY submitted this the 20th day of March, 2008.

/s/ John A. Northen
Counsel for the moving parties

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Certificate of Service

I hereby certify that I have this day served a copy of the **Motion for Order Appointing Chapter 11 Trustee** and the **Notice of Motion for Order Appointing Chapter 11 Trustee** by (i) regular mail, postage prepaid. (ii) electronic transmission. (iii) overnight delivery and/or (iv) facsimile addressed to the following parties on March 20, 2008:

Marjorie K. Lynch Jeff Cook Bankruptcy Administrator 434 Fayetteville St. Mall, Ste. 620 Raleigh, NC 27601 Email: Marjorie_lynch@nceba.uscourts.gov Email: Jeff_cook@nceba.uscourts.gov Fax: 919-856-4692	Jesse H. Austin, III Paul Hastings Janofsky & Walker LLP 600 Peachtree St. NE, Ste 2400 Atlanta, GA 30308 Email: jessaustin@paulhastings.com Fax: 404-815-2424
North Carolina Power Holdings, LLC Attn: National Registered Agents, Inc. 120 Penmarc Drive, Suite 118 Raleigh, NC 27603	Lumberton Power, LLC dba Lumberton Cogen, LLC Attn: National Registered Agents, Inc. 120 Penmarc Drive, Suite 118 Raleigh, NC 27603
Elizabethtown Power, LLC dba Elizabethtown Cogen, LLC Attn: National Registered Agents, Inc. 120 Penmarc Drive, Suite 118 Raleigh, NC 27603	

Respectfully submitted this the 20th day of March, 2008.

/s/ John A. Northen

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