



June 8, 2011

By Electronic and First Class Mail
Attorney.General@State.DE.US

The Honorable Beau Biden
Attorney General, State of Delaware
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

Re: Request to Investigate Revocation of Massey Energy Company Corporate Charters

Dear Attorney General Biden:

We write today, on behalf of Free Speech For People and Appalachian Voices, to request investigation by your office into a Delaware corporation that has engaged in repeated and sustained violations of law, contributing to the deaths of people in central Appalachia and to the destruction and devastation of our environment and communities. We request that you investigate and consider bringing proceedings to revoke the charter of the Massey Energy Company corporation and its Delaware corporate subsidiaries (“Massey”). As Massey became a wholly-owned subsidiary corporation of another Delaware corporation, Alpha Natural Resources, Inc. (“Alpha”), on June 1, 2011, we request that you take appropriate steps to ensure Alpha’s cooperation in your inquiry.¹

Free Speech for People is a national campaign to combat unconstitutional doctrines of “corporate rights” that threaten our republican democracy and government of, for and by the American people. Hundreds of thousands of Americans have joined Free Speech for People’s call for a constitutional amendment to restore the United States Constitution and fair elections to the people in response to the US Supreme Court’s recent ruling in *Citizens United v. FEC*. Responsible oversight of state-created

¹ U.S. Securities and Exchange Commission, Alpha Rule 424 prospectus, May 19, 2011 (“On January 28, 2011, Alpha, Mountain Merger Sub and Massey entered into an agreement and plan of merger pursuant to which Mountain Merger Sub will merge with and into Massey, which will be the surviving corporation of the Merger and a wholly owned subsidiary of Alpha.”)

corporations is an essential obligation of citizenship and self-government, and Free Speech for People works for accountability with respect to the privileges and conditions that apply to corporate charters granted by the people and our states.

Appalachian Voices is an award-winning, environmental organization committed to protecting the land, air and water of the central and southern Appalachian region. Since the impacts of coal threaten Appalachia more than any other single source of pollution, Appalachian Voices is committed to reducing coal's impact on the region and to advancing its vision for a cleaner energy future.

Massey Energy Company is the 4th largest coal company in the country, with revenues estimated for 2011 at more than \$4 billion. The corporation keeps its headquarters in Richmond, VA and maintains substantial mine operations in central Appalachia. Although Massey avails itself of Delaware corporate charter laws, the company has virtually no business in Delaware. Following the Massey-Alpha merger, the combined company will be the second largest coal company, with estimated earnings for 2011 at more than \$8 billion. Alpha also avails itself of Delaware corporate charter laws but maintains virtually no business in Delaware.

On April 5, 2010 an explosion in Massey's Upper Big Branch Mine in southern West Virginia killed 29 men working in the mine. We have attached the May 19, 2011 Report of the Governor's Independent Investigation Panel, which has determined that the explosion was preventable, and was caused by Massey's pattern of disregarding safety laws and undermining law enforcement. As discussed further herein, the Report chronicles Massey's repeated violations of law and its "normalization of deviancy."

I. The Corporate Charter in Delaware and Elsewhere Is A Privilege Subject to Revocation in Cases of Repeated Unlawful Conduct

As you know, many of the world's largest corporations, including Massey, have chosen to use corporate charters granted by the people and General Assembly of Delaware. While Delaware has welcomed the widespread use of Delaware corporate charters even for business conducted well beyond Delaware's borders, the people of Delaware and the General Assembly have always insisted that the corporate charter is a privilege, not a right. Delaware, like other states, reserves the right to revoke or forfeit state corporate charters when they are abused or misused, as in cases of repeated unlawful conduct. In Delaware and elsewhere, corporate charters are only granted "subject to dissolution or the revocation or forfeiture of the corporate charter." *See* 8 Del. Code § 284. *See also* 5 Del. Code §§ 732, 1520, 1631 (credit card and bank corporate charters subject to revocation).

The Delaware Constitution (Article IX, §1) requires that the General Assembly "shall, by general law, provide for the revocation or forfeiture of the charters or franchises." The General Assembly has followed this mandate of the people by enacting

Title 8, Section 284 of the General Corporations Law entitled “Revocation or Forfeiture of Charter; Proceedings.” That section provides:

(a) The Court of Chancery shall have jurisdiction to revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises. The Attorney General shall, upon the Attorney General's own motion or upon the relation of a proper party, proceed for this purpose by complaint in the county in which the registered office of the corporation is located.

(b) The Court of Chancery shall have power, by appointment of receivers or otherwise, to administer and wind up the affairs of any corporation whose charter shall be revoked or forfeited by any court under any section of this title or otherwise, and to make such orders and decrees with respect thereto as shall be just and equitable respecting its affairs and assets and the rights of its stockholders and creditors.

In *Young v. the National Association for the Advancement of White People*, 35 Del.Ch. 10, 109 A.2d 29 (1954) the Chancery Court stated, “there is no question but that this Court will forfeit a corporate charter where the abuse of its privileges and franchises is clear.” 109 A.2d at 31. The Court added that such revocation of a corporate charter is appropriate in cases of “a sustained course of fraud, immorality or violations of statutory law . . .” *Id.* In a subsequent action brought by the Attorney General to revoke a corporate charter, the Chancery Court affirmed again that “continued serious criminal violations by corporate agents in the course of the discharge of their duties could very well constitute the misuse of a charter.” *Craven v. Fifth Ward Republican Club*, 37 Del.Ch. 524, 528, 146 A.2d 400, 402 (1958) (granting preliminary injunction).

II. “The Normalization of Deviance” - - The Report of the Governor’s Independent Investigation Panel, May 19, 2011.

On April 5, 2010 an explosion in Massey’s Upper Big Branch Mine in southern West Virginia killed 29 men working in the mine. The Governor of West Virginia appointed an independent investigation panel to determine the cause of the explosion, and to impartially find facts that would help prevent similar disasters in the future. Numerous Massey executives refused to cooperate with the investigation. A Massey official was indicted in March 2011, charged with lying to the Federal Bureau of Investigation.²

The Report of the Governor’s Independent Investigation Panel (the “Report”) concerning the explosion and deaths describes in more than 100 pages how Massey repeatedly placed profits ahead of worker safety and compliance with the law, and has a

² <http://blogs.findlaw.com/blotter/2011/03/security-chief-from-massey-mines-explosion-charged-with-lying-to-fbi-and-obstructing-the-investigati.html>

long history of criminal and civil violations of law. Describing a shocking corporate culture of illegality, “enemies lists”, “codes of silence, ” and a “too big to be regulated” attitude, the Report states, “Massey exhibited a corporate mentality that placed the drive to produce above worker safety.”³

The Report concludes that the fatal explosion at the Massey mine was caused by Massey’s systemic failure to comply with basic, existing standards, such as maintaining adequate ventilation systems, complying with standards for applying rock dust and water spraying. Massey did not record many safety hazards, and when recorded, did not correct them.

The Report identifies a longstanding “culture” at Massey that is “causing incalculable damage to mountains, streams, and air in the coalfields; creating health risks for coalfield residents by polluting streams, injecting slurry into the ground and failing to control coal waste dams and dust emissions from processing plants; using vast amounts of money to influence the political system; and battling government regulation regarding safety in the coalmines and environmental safeguards for communities.”⁴

As alarming as the corporate violations that caused the death of scores of men, the independent panel identified failures of the government agencies that should have been enforcing the law to protect the lives of the people working in Massey’s mines. As the report says, “merely having laws on the books has never been enough to ensure worker safety. The ability of the government to rigorously enforce those laws is a hard-earned right paid for with the blood of coalminers.”⁵

The West Virginia Independent Investigation Panel linked the failure of government’s law enforcement directly to the corruption of government caused by the campaign spending and political influence of Massey and its CEO. The Report describes how, after a West Virginia Court concluded that Massey had intentionally and wrongfully acted in disregard of the rights of another business and destroyed the business, the CEO, Don Blankenship, spent \$3 million to fund a vicious judicial election campaign accusing the incumbent judge of being “soft on sex offenders.” That judge lost the election to “a virtually unknown lawyer” who was a “personal friend” of Blankenship and was “more sympathetic to Massey’s interests.”⁶

The Report provides “a graphic illustration of the intertwining of coal and government that works to the detriment of those dedicated to creating an atmosphere in which miners are assured safe working conditions.”⁷

³ Report at 99-100.

⁴ Report at 92.

⁵ Report at 76.

⁶ Report at 85.

⁷ Report at 85.

Massey “relish[ed] the opportunity to challenge inspectors’ enforcement actions by disputing findings and arguing about what the law requires.” The Vice-President for safety at Massey openly said, “don’t worry, we’ll litigate it away” about a violation found by an inspector. Still, in 2009 alone, federal inspectors wrote 515 citations and orders for safety violations and 48 “withdrawal orders” for significant and substantial violations.⁸ Massey CEO’s message in the Annual Report for 2009 says, “we are proud of our safety record.” The CEO’s message goes on to label climate change science a “misinformation scandal” and to express “concern” with “environmental extremism” and “ill-considered regulations.”⁹

III. Other Violations of Law By Massey

According to the Report, in one ten-year period, Massey was cited for 62,923 federal violations including more than 25,000 considered “significant and substantial.” Fifty-nine men who worked in Massey’s mines were killed in accidents during that time.¹⁰

In January 2006, a fire at Massey’s Aracoma Alma mine killed two men. Federal investigators determined that the fatal fire was caused by Massey’s “reckless disregard” for safety rules at the Aracoma mine.¹¹ On December 23, 2009, Massey’s subsidiary, the Aracoma Coal Company pleaded guilty to ten criminal violations of mine safety laws, including a felony conviction for a willful violation causing death, and agreed to pay a \$2.5 million criminal fine. According to the Independent Investigation Report, Massey CEO Don Blankenship may have been aware of the violations before the fire occurred.

In January 2008 Massey Energy Company, Inc. paid a \$20 million fine for Clean Water Act violations in West Virginia and Kentucky. The United States Department of Justice and the Environmental Protection Agency described the fine as the largest civil penalty in the history of the EPA.¹²

⁸ Report at 77.

⁹ 2009 Annual Report at 16-17.

¹⁰ Report at 93.

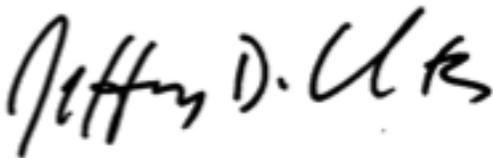
¹¹ Report at 92.

¹² January 17, 2008 announcement, Massey Energy to Pay Largest Civil Penalty Ever for Water Permit Violations, available at <http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/6944ea38b888dd03852573d3005074ba!OpenDocument>

Under the Delaware Constitution and revocation law, the “Court will forfeit a corporate charter where the abuse of its privileges and franchises is clear.” *Young v. the National Association for the Advancement of White People*, 35 Del.Ch. 10, 109 A.2d 29 (1954). We respectfully urge you to investigate whether, as seems clear, Massey Energy Company and its subsidiary corporations have forfeited the privilege of their corporate charters, and to initiate forfeiture proceedings using your authority under Title 8.

Thank you for your consideration. We are available to discuss this referral with you further at your convenience, and we look forward to hearing from you.

Sincerely,



Jeffrey D. Clements
General Counsel
Free Speech For People
9 Damonmill Square, Suite 4B
Concord, Massachusetts 01742
Phone: (978) 287-4901
Fax: (978) 287-4900
jclements@freespeechforpeople.org



Willa Coffey Mays
Executive Director
Appalachian Voices
191 Howard Street
Boone, North Carolina 28607
Phone: (828) 262-1500
Fax: (828) 262-1540
willa@appvoices.org