

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

In Re:)	
)	Chapter 11
)	
PATRIOT COAL CORPORATION, et al.)	Case No. 12-51502
)	(Jointly Administered)
Debtors.)	
)	Hon. Kathy Surratt-States
)	

**OBJECTION OF APPALACHIAN POWER COMPANY TO THE DEBTORS' 503(b)(9)
REPORT AND NOTICE OF OBJECTION PROCEDURES [DOCKET NO. 3006]**

Appalachian Power Company ("APCo"), by and through its counsel, hereby submits this Objection to the *Debtors' 503(b)(9) Report and Notice of Objection Procedures* [Doc. No. 3006] (the "503(b)(9) Report"):

Procedural Facts

1. On July 9, 2012 (the "Petition Date"), the Debtors commenced their voluntary cases under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "SDNY Court"). On December 19, 2012, the SDNY Court entered an order transferring venue of the Debtors' chapter 11 cases to this Court [Doc. No. 1789] (the "Transfer Order"). Pursuant to the Transfer Order, all orders previously entered in these chapter 11 cases by the SDNY Court remain in full force and effect in accordance with their terms notwithstanding the transfer of venue.

2. The Debtors' cases are being jointly administered, and the Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

3. On August 2, 2012, the SDNY Court entered an *Order Approving Procedures for the Assertion, Resolution and Treatment of Reclamation Claims and Claims Asserted Pursuant to 11 U.S.C. § 503(b)(9)* [Doc. No. 261] (the "503(b)(9) Claim Procedures Order"), which set forth the procedures for claimants to assert 503(b)(9) claims against the Debtors, as well as reconciliation and objection procedures for the parties to follow with respect to the filed claims.

4. Pursuant to the 503(b)(9) Claim Procedures Order, 503(b)(9) claimants were required to file their 503(b)(9) claims on or before the general claims bar date as determined by order of the SDNY Court. Accordingly, pursuant to that certain *Order Establishing Deadline for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof*, entered by the SDNY Court on September 18, 2012 [Doc. No. 1388], which established the general claims bar date as December 14, 2012, all 503(b)(9) claims were required to be filed on or before December 14, 2012 (the "503(b)(9) Claim Bar Date").

5. The 503(b)(9) Claim Procedures Order provided that each claimant asserting a 503(b)(9) claim must prepare a proof of claim setting forth the following:

- (i) the particular goods on which the 503(b)(9) claim is based;
- (ii) the quantity or dollar value of the goods;
- (iii) the date the 503(b)(9) goods were delivered to the Debtors;

- (iv) the invoice numbers and/or purchase order numbers applicable to the 503(b)(9) goods; and
- (v) the basis for the 503(b)(9) demand.

503(b)(9) Claim Procedures Order, § 10.A.a., at p. 9. The 503(b)(9) Claim Procedures Order further provided that the proof of 503(b)(9) claim, accompanied by applicable invoices, bills of lading or other documentation establishing proof of delivery and proof of the date of delivery of the 503(b)(9) goods, must be mailed to the Debtors' claims agent, with a copy served on the Debtors and Debtors' counsel, so as to be received on or before the 503(b)(9) Claim Bar Date. 503(b)(9) Claim Procedures Order, § 10.A.b., at pp. 9-10.

6. The 503(b)(9) Claim Procedures Order also provided for the Debtors, as soon as practicable after receipt of a 503(b)(9) claim, to review the filed 503(b)(9) claim and evaluate the legal sufficiency of the 503(b)(9) claim, the invoice amount of the 503(b)(9) goods, and any setoffs, deductions, credits and other defenses and claims that the Debtors may have against the party asserting the 503(b)(9) claim. After this reconciliation process and no later than 75 days after the 503(b)(9) Claim Bar Date, the Debtors were to file a report setting forth, among other things: (i) the names of the 503(b)(9) claimants; (ii) the bases upon which the Debtors believe that the 503(b)(9) claims are not legally valid, if any; (iii) the Debtors' proposed allowed amount, if any, for each of the 503(b)(9) claims identified in the report; and (iv) any defenses that the Debtors choose to reserve. 503(b)(9) Claim Procedures Order, § 12-16, at pp. 10-12.

7. The 503(b)(9) claimants would then have 20 calendar days from filing and service of the Debtors' 503(b)(9) report to file any objections to the report. 503(b)(9) Claim Procedures Order, § 18, at pp. 12-13.

Facts Regarding APCo

8. APCo is a public utility operating in and pursuant to the laws of the State of West Virginia.

9. Prior to the Petition Date APCo provided the Debtors with electric commodity, and related services concerning the provision of electric commodity, at various locations within the State of West Virginia. APCo provided the electric commodity and service to the Debtor Eastern Associated Coal in the ordinary course of its business pursuant to the terms and conditions of that certain contract between APCo and Eastern Associated Coal, dated March 14, 2011 (the "EAC Contract"). APCo also provided electric commodity and service in the ordinary course of its business to several other Debtors pursuant to APCo's state law tariffs (the "Tariffs"),¹ which can be found at the following link:

https://www.appalachianpower.com/global/utilities/lib/docs/ratesandtariffs/WestVirginia/2012_Tariff_Sheets.pdf.

APCo's 503(b)(9) Claims

10. In accordance with the terms of the 503(b)(9) Claim Procedures Order, on December 7, 2012, APCo filed the following ten 503(b)(9) claims against ten separate Debtors (collectively, the "APCo 503(b)(9) Claims"):

- a. Claim No. 1207 against Apogee Coal Company, LLC - \$38,860.20;
- b. Claim No. 1208 against Catenary Coal Company, LLC - \$54,931.76;

¹ The Tariffs comprise APCo's contract with its customers, including each of the Debtors. APCo's separate contract with Eastern Associated Coal incorporated the terms of APCo's tariffs and specified the schedule under which Eastern Associated Coal had elected to receive electric goods and services, as the Debtor was eligible to receive service under more than one of APCo's Tariff schedules.

- c. Claim No. 1209 against Eastern Associated Coal, LLC - \$271,708.93;
- d. Claim No. 1210 against Jupiter Holdings, LLC - \$9,940.34;
- e. Claim No. 1211 against Kanawha Eagle Coal, LLC - \$46,664.38;
- f. Claim No. 1212 against Panther LLC - \$207,517.32;
- g. Claim No. 1213 against Winifrede Dock Ltd. Liab. Co. - \$843.68;
- h. Claim No. 1214 against Hobet Mining LLC - \$41,131.19;
- i. Claim No. 1215 against Pine Ridge Coal Company, LLC - \$3,842.41; and
- j. Claim No. 1216 against Patriot Coal Corporation - \$48,438.71.

Each of the APCo 503(b)(9) Claims arose from APCo's sale to the Debtors of electric commodity (exclusive of charges for transportation, taxes and other charges related to the provision of the commodity) from 5:00 p.m. on June 19, 2012 through 5:00 p.m. on July 9, 2012.

11. Together with each of the APCo 503(b)(9) Claims, APCo filed an attachment explaining the factual and legal bases for the claims, and a spreadsheet detailing the dollar amount of each claim, the dates and specific quantities of electric commodity (measured in kWh's) provided to each Debtor, the Debtor addresses and account numbers (redacted) to which the electric commodity was provided,² and additional information regarding the Tariff schedules and terms governing each account.

The Debtors' 503(b)(9) Report

12. On February 27, 2013, the Debtors filed their 503(b)(9) Report, in which they proposed to disallow each of the APCo 503(b)(9) Claims in their entirety based solely on the

² APCo billed the Debtors under consolidated account number xxxx6213, which included billings for 24 separate accounts with 10 separate Debtors, all as identified in the spreadsheet attached to the APCo 503(b)(9) Claims.

Debtors' assertion that the amounts that are the subject of the claims allegedly were for services, not for goods as is required by Section 503(b)(9) of the Bankruptcy Code.

DISCUSSION

I. ELECTRIC COMMODITY CONSTITUTES A GOOD UNDER SECTION 503(b)(9) OF THE BANKRUPTCY CODE.

Section 503(b)(9) of the Bankruptcy Code provides, in pertinent part:

(b) After notice and a hearing, there shall be allowed administrative expenses . . . including –

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

The term “goods” is not defined in the Bankruptcy Code. However, courts that have considered the issue of what constitutes a “good” under Section 503(b)(9) have overwhelmingly applied Article 2 of the Uniform Commercial Code (“UCC”) and the definition of goods found in UCC § 2-105. *See, e.g., GFI Wisconsin, Inc. v. Reedsburg Utility Commission*, 440 B.R. 791, 797-98 (W.D. Wisc. 2010) (holding that it is reasonable to apply the definition of goods provided by the UCC because courts often apply UCC definitions when interpreting Bankruptcy Code provisions); *In re Erving Industries, Inc.*, 432 B.R. 354, 364 (Bank. D. Mass 2010) (concluding that the appropriate meaning of *goods* under § 503(b)(9) corresponds with the meaning given to that term in § 2-105(1) of the UCC); *In re MBS Management Services, Inc.*, 430 B.R. 750, 753 (Bankr. E.D. La. 2010) (citing *In re Erving Industries* for the proposition that electricity is a “commodity” under the Bankruptcy Code); *In re Pacific Gas & Electric Co.*, 271 B.R. 626, 640 (N.D. Cal. 2002) (holding that electricity is a “good” under the UCC); *Cincinnati Gas & Electric Co. v. Goebel*, 502 N.E.2d 713, 715 (1986) (holding that electricity that has passed through

utility-owned conduits, through meters and into homes of consumers is a “good” as defined in the UCC); *Helvey v. Wabash County REMC*, 278 N.E.2d 608, 610 (1972) (analogizing electricity to natural gas and finding that electricity satisfies movability and identifiability requirements of the UCC as it moves into a meter); *Ransome v. Wisc. Elec. Power Co.*, 275 N.W.2d 641, 648 (Wisc. 1979) (“The distribution [of electricity] might well be a service, but the electricity itself, in the contemplation of the ordinary user, is a consumable product.”); *Enron Power Mktg., Inc. v. Nev. Power Co. (In re Enron Corp.)*, 2004 WL 2290486, *2 (S.D.N.Y. 2004) (holding that Utah courts would consider electricity to be a good under Article 2 of the UCC).

A common theme running through the holdings of many of the foregoing cases is that “transformation from a service to a product occurs when raw power crosses from the utility’s distribution system to the customer’s meter.” *In re Pacific Gas and Electric Co.*, 271 B.R. at 638; *see also Mancuso v. Southern California Edison Co.*, 232 Cal. App. 3d 88, 100, 283 Cal. Rptr. 300 (Cal. Ct. App. 1991) (“Electricity which has passed through the consumer’s meter has been sold and delivered. It is in the stream of commerce. It has been marketed. Such a transaction constitutes the sale of a product....”).

The UCC defines “goods” as “all things . . . which are movable at the time of identification to a contract for sale.” UCC § 2-105. A number of courts have recently concluded that electricity is a “good” within the meaning of § 503(b)(9) of the Bankruptcy Code. *See, e.g., GFI Wisconsin, Inc.*, 440 B.R. at 799; *In re Erving Industries, Inc.*, 432 B.R. at 370; *In re Southern Montana Electric Generation and Transmission Cooperative, Inc.*, 2013 WL 85162, *10-*13 (Bankr. D. Mont.) (agreeing with reasoning set forth in *GFI Wisconsin, Inc.* that electricity is a good for purposes of Section 503(b)(9)). In support of its ruling upholding the

bankruptcy court's determination that electricity is a "good" within the meaning of § 503(b)(9),

the district court in *GFI Wisconsin, Inc.* stated:

I agree with those courts concluding that electricity is movable, tangible and consumable, that it has physical properties, that it is bought and sold in the marketplace and thus, that it qualifies as a good for purposes of the UCC and the Bankruptcy Code. As noted by the bankruptcy court below [in *Pacific Gas & Electric*, 271 B.R. 626, 640 (N.D. Cal. 2002)(holding that electricity is a "good" under the UCC)], electricity begins flowing through power lines when a circuit is formed and continues moving at least until it is metered. The metering satisfies the identification requirement of the UCC and the movement is sufficient to satisfy the movability requirement, even if it reaches the speed of light.

GFI Wisconsin, Inc., 440 B.R. at 800-01. The court in *In re Erving Industries, Inc.* stated the following in support of its ruling that electricity is a good within the meaning of § 503(b)(9) and the UCC:

At the time the electricity is identified to the contract, it is literally moving, *and* it remains movable for some period of time thereafter. The electricity continues to move through the customer's electrical wiring until it is ultimately put to use. This process may occur at speeds so imperceptible that consumption appears to occur simultaneous with identification, but logic compels the conclusion that the electricity is moving (and remains in motion) until it reaches the product sought to be electrified. Because the Court concludes that electricity is movable at the time it is identified to the contract, electricity constitutes a good within the meaning of the UCC and § 503(b)(9).

In re Erving Industries, Inc., 432 B.R. at 370.

In *In re Pilgrim's Pride Corp.*, 421 B.R. 231, 239 (Bankr. N.D. Tex. 2009), a case decided prior to the *GFI Wisconsin, Inc.* and *In re Erving Industries, Inc.* decisions discussed above, the court applied the UCC definition of "goods" and held that electricity is not a good under § 503(b)(9) because the provision of electricity was supposedly more similar to the transmission of television, radio telephone and internet signals that would not be considered

goods under the UCC. The courts in the both the *GFI Wisconsin, Inc.* and *In re Erving Industries, Inc.* cases disagreed with the court in *Pilgrim's Pride*, noting that electricity can be moved and is different from telecommunication signals because it is not merely the medium of delivering something else – it is the “thing” the customer seeks to purchase. *GFI Wisconsin, Inc.*, 440 B.R. at 801; *In re Erving Industries, Inc.*, 432 B.R. at 368. Specifically, the court in *In re Erving Industries, Inc.* stated:

But this Court discerns a marked difference between electricity and television, radio, telephone, and internet signals (“telecommunications signals”). Although their manifestations may appear similar, they are differentiated by both their physical attributes and the purposes for which they are purchased. Telecommunications signals are properly considered services because they are mechanisms by which other non-goods – intellectual property, ideas, sounds, music, images, and words – are sent from one location to another. Electricity, in contrast, is not merely a medium of delivery, but is *the thing* the customer seeks to purchase.

Id.

In *In re Samaritan Alliance, LLC*, 2008 WL 2420107, *3 (Bankr. E.D. Ky. June 20, 2008), another case decided prior to the well-reasoned *GFI Wisconsin, Inc.* and *In re Erving Industries, Inc.* decisions, the court -- without any analysis whatsoever -- simply ruled that the sale of electricity is more appropriately characterized as a service rather than selling goods. For all of the reasons set forth above, the holding in *Samaritan Alliance* should also be rejected by this Court.

Moreover, the holdings in *Pilgrim's Pride* and *Samaritan Alliance* should be rejected by this Court because they are contrary to well established law of the Supreme Court of West Virginia, whose law applies to the sales underlying the APCo 503(b)(9) Claims, as they were sales of electricity from a West Virginia electric utility to consumers of electricity located within

West Virginia. In *Fickeisen v. Wheeling Electrical Co.*, 67 S.E. 788 (W. Va. 1910), the Supreme Court of West Virginia held that electricity is "personal property capable of sale." *Id.* at 789. In support of its holding, the court explained:

When, under the law of sales, the Wheeling Company delivered electricity into the wires of the Bridgeport Company at the bridge end, the title and possession of the Wheeling Company ceased, and the Bridgeport Company took title and possession there.... [W]hen that electricity passed from the bridge end into the streets of Bridgeport, it was, through every foot of its course, the property of the Bridgeport Company. The Wheeling Company lost title; the Bridgeport Company acquired title then and there.... Though this mysterious agent, friendly, yet sometimes deadly to man, be unseen and unseeable, still it had substance so far as to be measured. A certain quantity measured by volts performs, under the law of some states, the deadly function of electrocution of the murderer. It is capable of measurement by the volt. In this case it was delivered in quantity known by one company to the other.

Id. Thus, under controlling law, the electric commodity sales that are the basis of APCo's 503(b)(9) Claims were not sales of services as the Debtors contend. Rather, they were sales of moveable personal property, which constitute "goods" within the meaning of UCC § 2-105 and Section 503(b)(9).

As to the remaining elements of Section 503(b)(9), the electric commodity that APCo sold to the Debtors was: (a) ordered by the Debtors in the ordinary course of Debtors' businesses; (b) sold by APCo to the Debtors in the ordinary course of their businesses; and, (c) received by the Debtors within the twenty-day period prior to the Petition Date (the "Section 503(b)(9) Period"). Accordingly, pursuant to Section 503(b)(9) of the Bankruptcy Code, APCo is entitled to an allowed claim for the full value of the electric commodity, i.e. a total of \$723,878.92, delivered by APCo to the Debtors during the Section 503(b)(9) Period.

II. THE AMOUNT OF APCo'S 503(b)(9) CLAIMS REFLECT ONLY THE TOTAL AMOUNT DUE FOR THE ELECTRIC COMMODITY PROVIDED TO THE DEBTORS DURING THE 503(b)(9) PERIOD.

APCo provided the Debtors with both electric commodity and service to transport that electric commodity to the Debtors. The APCo 503(b)(9) Claims include only the charges for electric commodity APCo provided to the Debtors during the 503(b)(9) Period, measured in kWhs, exclusive of transportation charges, taxes and other charges related to APCo's delivery of the electric commodity to the Debtors during that period. Accordingly, the APCo 503(b)(9) Claims should be allowed in the total amount of \$723,878.92, broken down as follows:

- a. Claim No. 1207 against Apogee Coal Company, LLC - \$38,860.20;
- b. Claim No. 1208 against Catenary Coal Company, LLC - \$54,931.76;
- c. Claim No. 1209 against Eastern Associated Coal, LLC - \$271,708.93;
- d. Claim No. 1210 against Jupiter Holdings, LLC - \$9,940.34;
- e. Claim No. 1211 against Kanawha Eagle Coal, LLC - \$46,664.38;
- f. Claim No. 1212 against Panther LLC - \$207,517.32;
- g. Claim No. 1213 against Winifrede Dock Ltd. Liab. Co. - \$843.68;
- h. Claim No. 1214 against Hobet Mining LLC - \$41,131.19;
- i. Claim No. 1215 against Pine Ridge Coal Company, LLC - \$3,842.41; and
- j. Claim No. 1216 against Patriot Coal Corporation - \$48,438.71.

WHEREFORE, APCo respectfully requests that this Court enter an order:

- (1) Denying the objections to the APCo 503(b)(9) Claims set forth in the Debtors' 503(b)(9) Report;

(2) Allowing each of the APCo 503(b)(9) Claims in the full amount for which it was filed; and

(3) Providing such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing was served via electronic filing in the CM/ECF system of the U.S. Bankruptcy Court, Eastern District of Missouri upon all parties to this case requesting service by electronic filing and via facsimile transmission and United States Mail, postage prepaid, on the following parties, on this _18th_ day of March, 2013:

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