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Co-Counsel to Kentucky Utilities Company

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK	
-	Chapter 11
In re:	Case No. 12-12900 (SCC)
PATRIOT COAL CORPORATION, et al.,	Jointly Administered
DebtorsX	

ADDITIONAL ASSURANCE REQUEST OF KENTUCKY <u>UTILITIES COMPANY</u>

I. INTRODUCTION

Pursuant to 11 U.S.C. § 366(c) and the Court's July 30, 2012 Amended Order (i) Prohibiting Utilities From Altering, Refusing Or Discontinuing Service, (ii) Deeming Utility Companies Adequately Assured Of Future Performance And (iii) Establishing Procedures For Determining Requests For Additional Adequate Assurance (D.I. 216) (the "Amended Utility Order"), Kentucky Utilities Company ("KU"), a utility provider to certain of the Debtors, is requesting that it be provided with additional adequate assurance in the form of a 6.6 week cash

deposit in the total amount of \$1,019.588.93 (the "Additional Adequate Assurance Deposit") to ensure that it receives payment for the electricity supplied the Debtors by it post-petition (the "Request"). KU states the following in support of its Request.

II. FACTS AND PROCEDURAL HISTORY

A. The Parties

- 1. KU is a regulated electric utility based in Lexington, Kentucky. KU provides electricity to Dodge Hill Mining Company, LLC ("Dodge Hill"), Heritage Coal Company, LLC ("Heritage") and Highland Mining Company, LLC ("Highland" and, collectively, the "KU Account Debtors") at five separate locations within the Commonwealth of Kentucky.
 - 2. The KU Account Debtors are producers and marketers of coal.

B. The Bankruptcy Filing, the Amended Utility Order and KU's Demands for Adequate Assurance

- 3. On July 9, 2012 (the "Petition Date"), the Debtors commenced their cases under chapter 11 of the Bankruptcy Code, which are now pending before this Court. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.
 - 4. The Debtors' cases are being jointly administered.
- 5. On July 13, 2012, the Debtors filed the Debtors' Motion For An Order (i) Prohibiting Utilities From Altering, Refusing Or Discontinuing Service, (ii) Deeming Utility Companies Adequately Assured Of Future Performance And (iii) Establishing Procedures For Determining Requests For Additional Adequate Assurance (D.I. 64) (the "Utility Motion") with

The term "Debtors" means those entities that are listed on Schedule 1 to the Debtors' Motion For An Order (i) Prohibiting Utilities From Altering, Refusing Or Discontinuing Service, (ii) Deeming Utility Companies Adequately Assured Of Future Performance And (iii) Establishing Procedures For Determining Requests For Additional Adequate Assurance (D.I. 64).

the Court seeking to implement certain procedures for the provision of adequate assurance of payment to its utility suppliers, among other things.

- 6. On July 26, 2012, the Court entered an order granting the Utility Motion (D.I. 189) (the "Initial Utility Order"). Shortly thereafter, on July 30, 2012, the Court entered the Amended Utility Order which "replace[d] in its entirety" the Initial Utility Order. *See* Amended Utility Order at page 3.
- 7. Among other things, the Amended Utility Order provides that the Debtors shall provide a two week Adequate Assurance Deposit to each Utility that requests such a deposit on or before the date that is 21 days from the entry of the Amended Utility Order -- August 20, 2012 (the "Adequate Assurance Deposit Request Deadline"). It also provides that a Utility may file a request with the Court seeking additional adequate assurance from the Debtors by the Adequate Assurance Request Deadline.
- 8. By letter dated August 16, 2012, KU is requesting that the KU Account Debtors provide it with a two week Adequate Assurance Deposit (the "Adequate Assurance Request"). In addition, KU is also requesting that it be provided with the Additional Adequate Assurance Deposit, in the form of a 6.6 week cash deposit, calculated as a historical average over the past twelve months, as set forth below.

		Adequate Assurance
Debtor	Account Number	Deposit Requested
Dodge Hill	300003949793	\$186,118.88
Heritage	300001635535	\$688.78
	300002508301	\$294,201.27
	300002928558	\$87,136.17
	300005042589	\$14,177.13
Highland	300005536994	\$437,266.70
TOTAL:		\$1,019,588.93

All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Debtors' Utility Motion.

A copy of the Adequate Assurance Request, which attaches copies of the KU Account Debtors' payment histories (the "Payment Histories") for the past twelve months, is attached at Exhibit 1 and is incorporated by reference as if set forth in full here.

- 9. As shown by the Payment Histories, it is not uncommon for the KU Account Debtors to make late payments
- 10. Prior to the Petition Date, KU held a \$7,800 deposit from the KU Account Debtors for the Dodge Hill account. Pursuant to 11 U.S.C. § 366(c)(4), this deposit is being applied to reduce the approximately \$88,000 owing KU on this account pre-petition. Prior to the Petition Date, KU also held a \$70,000 surety bond issued by Travelers Casualty and Surety Company of America ("Travelers") for the Highland account. KU is in the process of presenting this bond to Travelers for payment with the funds to be applied to reduce the approximately \$328,000 owing KU on that account as of the Petition Date.
- 11. Contemporaneously with this Request, KU is also requesting a two week Adequate Assurance Deposit from the KU Account Debtors. KU states that, upon information and belief, is not currently holding any pre-petition deposits, prepayments or other security from the KU Account Debtors except as set forth above. KU further states that it is not holding any deposits, prepayments or security from the KU Account Debtors for debts incurred by them postpetition.
- 12. Pursuant to the Amended Utilities Order, KU is hereby filing its formal request for the Additional Adequate Assurance Deposit.

III. THE KU ACCOUNT DEBTORS MUST GIVE KU THE ADDITIONAL ADEQUATE ASSURANCE DEPOSIT BECAUSE KU IS NOT ADEQUATELY PROTECTED WITHOUT IT

KU is not adequately protected by only a two week deposit from the KU Account Debtors. It is not uncommon for the KU Account Debtors to be late on their payments to KU and, given the Public Service Commission's regulations, KU must wait approximately two months before it can terminate their accounts due to non-payment. Accordingly, KU is requesting that it be provided an additional 6.6 week cash deposit which, together with the two week Adequate Assurance Deposit, represents two months of billings.³

Section 366 of the Bankruptcy Code was enacted to balance a debtor's need for utility services from a provider that holds a monopoly on such services, with the need of the utility to ensure for itself, and its rate payers, that it receives payment for providing these essential services. *See Hanratty v. Philadelphia Electric Co. (In re Hanratty)*, 907 F.2d 1418, 1424 (3d Cir. 1990). The deposit or other security "should bear a reasonable relationship to expected or anticipated utility consumption by a debtor." *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986). In making such a determination, it is appropriate for the Court to consider "the length of time necessary for the utility to effect termination once one billing cycle is missed." *Begley v. Philadelphia Electric Co. (In re Begley)*, 760 F.2d 46, 49 (3d Cir. 1985). Further, a pre-petition deposit cannot serve as adequate assurance of payment for goods provided post-petition. *In re Utica Floor Maintenance, Inc.*, 25 BR 1010 (N.D. NY 1982) (finding that Chapter 11 debtor's prepetition security deposit cannot serve as adequate assurance of payment under 11 U.S.C.S. § 366 for debtor's post-petition electric utility service).

This presumes that there are 4.3 weeks per calendar month.

Here, the KU Debtors are billed approximately once per month and KU is prohibited from disconnecting for nonpayment any sooner than 27 days after the mailing date of the original unpaid bill. Because the minimum period of time during which the KU Account Debtors could receive electricity from KU before termination for non-payment of bills is approximately two months, the two week Adequate Assurance Deposit is not sufficient to protect KU against the risk of non-payment post-petition. *See In re Stagecoach*, 1 B.R. 732, 735-36 (Bankr. M.D. Fla. 1979) (holding that a two month deposit is appropriate where the debtor could receive sixty (60) days of service before termination of services because of the utilities' billing cycle); *see also In re Robmac, Inc.*, 8 B.R. 1, 3-4 (Bankr. N.D. Ga. 1979).

The amount of the Additional Adequate Assurance Deposit sought by KU is consistent with KU Account Debtors' anticipated electric consumption. Indeed, it does not exceed the amount of the deposits that it is permitted to request of its customers under applicable Kentucky Public Service Commission tariffs. Therefore, the requested Additional Adequate Assurance Deposit is reasonable and, because the pre-petition deposit and surety bond can secure only pre-petition obligations, the KU Account Debtors may not seek to use them to reduce the amount of the Additional Adequate Assurance Deposit.

[CONTINUED ON NEXT PAGE]

IV. CONCLUSION

Based on the foregoing, KU requests that the KU Account Debtors remit the Additional Adequate Assurance Deposit to it per the instructions in the Adequate Assurance Request. KU also requests that it be awarded such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

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EMILY L. PAGORSKI

emily.pagorski@skofirm.com

August 16, 2012

BY FEDERAL EXPRESS

Patriot Coal Corporation 12312 Olive Boulevard, Suite 400 St. Louis, Missouri 63141 Attn: Robert L. Meade, Vice President and Treasurer

BY FEDERAL EXPRESS

Davis Polk & Wardwell, LLP 450 Lexington Avenue New York, New York 10017 Attn: Michelle M. McGreal, Esq.

BY FEDERAL EXPRESS

Kramer Levin Naftalis & Frankel 1177 Avenue of the Americas New York, New York 10036 Attn: Adam C. Rogoff Gregory G. Plotko

Re: Request for Adequate Assurance Deposit And Additional Adequate Assurance (In re Patriot Coal Corp., et al., S.D. N.Y. Bankr., 12-12900)

Ladies and Gentlemen,

We represent Kentucky Utilities Company ("KU") with respect to the Chapter 11 bankruptcy proceedings that have been filed by Patriot Coal Corporation and its subsidiaries (collectively, the "Debtors"). KU provides electricity to three of the Debtors – Dodge Hill Mining Company, LLC ("Dodge Hill"); Heritage Coal Company, LLC ("Heritage") and Highland Mining Company, LLC ("Highland" and collectively, the "KU Account Debtors") – through 6 utility accounts.

Pursuant to the Bankruptcy Court's July 30, 2012 Amended Order (i) Prohibiting Utilities From Altering, Refusing Or Discontinuing Service, (ii) Deeming Utility Companies Adequately Assured Of Future Performance And (iii) Establishing Procedures For Determining Requests For Additional Adequate Assurance (the "Utilities Order"), KU requests that the KU Account Debtors provide it with an adequate assurance deposit in the total amount of \$308,966.34, which amount was calculated as a historical average over the past 12 months, and an additional

Robert L. Meade Michelle M. McGreal, Esq. Adam C. Rogoff, Esq. Gregory G. Plotko, Esq. August 16, 2012 Page 2

adequate assurance deposit in the total amount of \$1,019,588.93, calculated in the same manner, as set forth below.¹

Debtor	Account Number	2 Week Adequate Assurance Deposit	6.6 Week Additional Adequate Assurance Deposit
Dodge Hill	300003949793	\$56,399.66	\$186,118.88
Heritage	300001635535	\$208.72	\$688.78
_	300002508301	\$89,151.90	\$294,201.27
	300002928558	\$26,404.90	\$87,136.17
	300005042589	\$4,296.10	\$14,177.13
Highland	300005536994	\$132,966.34	\$437,266.70
TOTAL:		\$308,966.34	\$1,019,588.93

We note that prior to the July 9, 2012 petition date (the "Petition Date") KU held a \$7,800 deposit from the KU Account Debtors for the Dodge Hill account but that it did not hold any other deposits. Pursuant to section 366(c)(4) of the Bankruptcy Code, KU is setting off this security deposit against the approximately \$88,000 owing it on this account pre-petition. Given that a pre-petition deposit cannot serve as adequate assurance for goods provided post-petition, the KU Account Debtors must remit the full \$56,399.66 requested by KU to it as the two week deposit for this account above.

Prior to the Petition Date, KU also held a \$70,000 surety bond issued by Travelers Casualty and Surety Company of America ("Travelers") for the Highland account. KU is in the process of presenting this bond to Travelers for payment with the funds to be applied to reduce the approximately \$328,000 owing KU on the account as of the Petition Date. Because the bond is payable by a third party and secured Highland's pre-petition obligations to KU, the KU Account Debtors also may not deduct the amount of bond from the requested two week deposit for this account.

KU further demands that the KU Account Debtors provide it with additional adequate assurance for each of the accounts in the form of an additional 6.6 week cash deposit which, together with the 2 week adequate assurance deposit, represents two months of billings.² The additional adequate assurance is necessary to ensure that KU receives payment for the goods that it supplies to the KU Account Debtors post-petition. KU estimates that the period of time during which the KU Account Debtors could receive electricity from KU before KU could discontinue service for non-payment of its bills is approximately two months. This is because the KU

KU notes that it will also file a formal request for the additional adequate assurance deposit with the Court per the Utilities Order.

This calculation is based on a 4.3 week calendar month.

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Account Debtors are billed approximately once per month, and because KU is prohibited from disconnecting for nonpayment any sooner than 27 days after the mailing date of the original unpaid bill. This is a result of Kentucky Public Service Commission regulations to which KU must adhere. As such, the requested deposits are appropriate and reasonable, especially where the amounts of the total deposits sought do not exceed those that KU is permitted to request of its customers under the applicable Public Service Commission tariffs.

Pursuant to the Utilities Order, the KU Account Debtors' payment history for the most recent 12 months for each of these accounts is attached at Exhibit A. As you will see, it is not uncommon for the KU Account Debtors to be late on their payments to KU. This further evidences that KU is not adequately assured of payment with only a two week deposit such that the additional adequate assurance requested for these accounts is necessary.

KU asks that all of the deposits requested herein be remitted to Kentucky Utilities Company, ATTN: Cindy Kruger, One Quality Street, Lexington, KY 40507. Of course, should you have any questions please do not hesitate to contact us. Thank you.

Sincerely,

Emily L. Pagorski

Emily L. Ragonal

Enclosures

cc: Tracy L. Klestadt, Esq. (by electronic mail) Lea Pauley Goff, Esq. (by electronic mail)

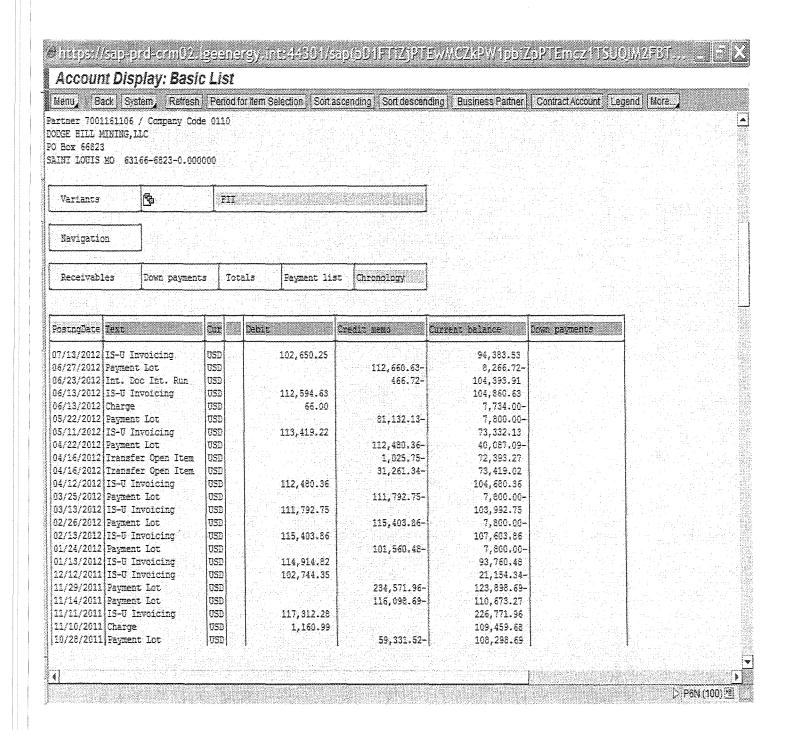
EXHIBIT A

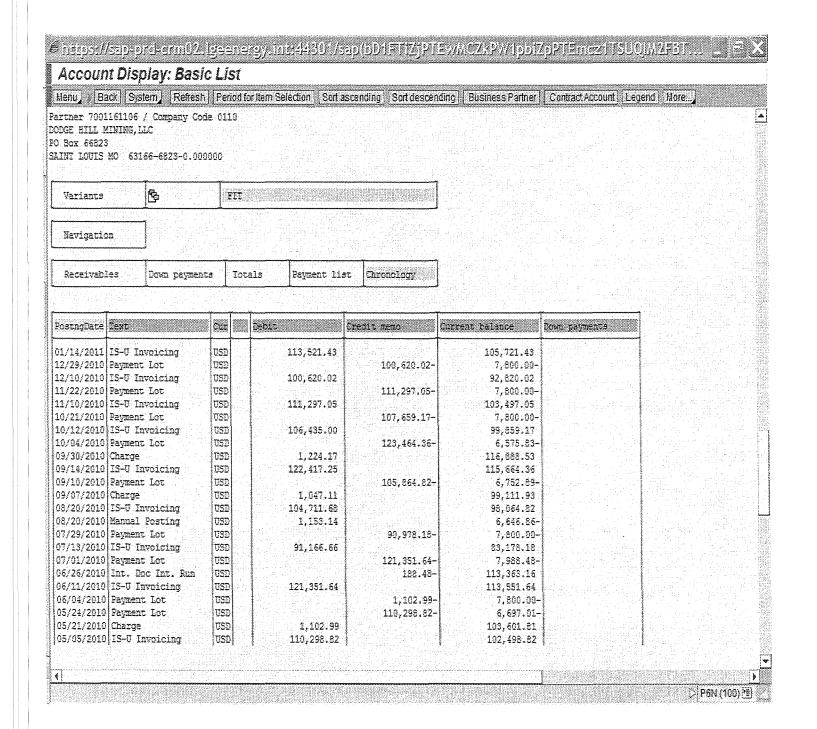
DODGE HILL

ACCOUNT NO. 300003949793

LOCATION: DODGE HILL MINING LLC NA W. 12TH STREET STURGIS, KENTUCKY 42459

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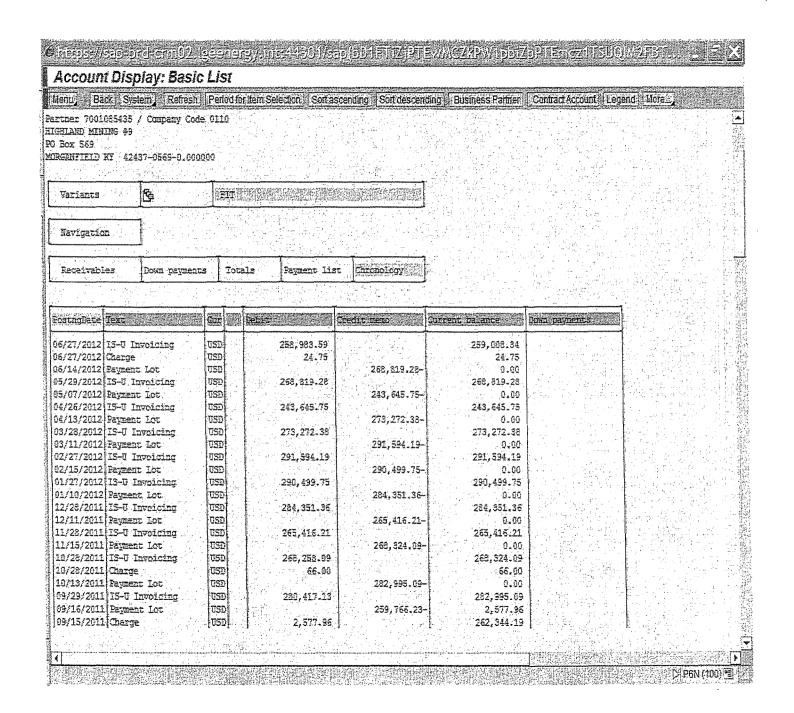


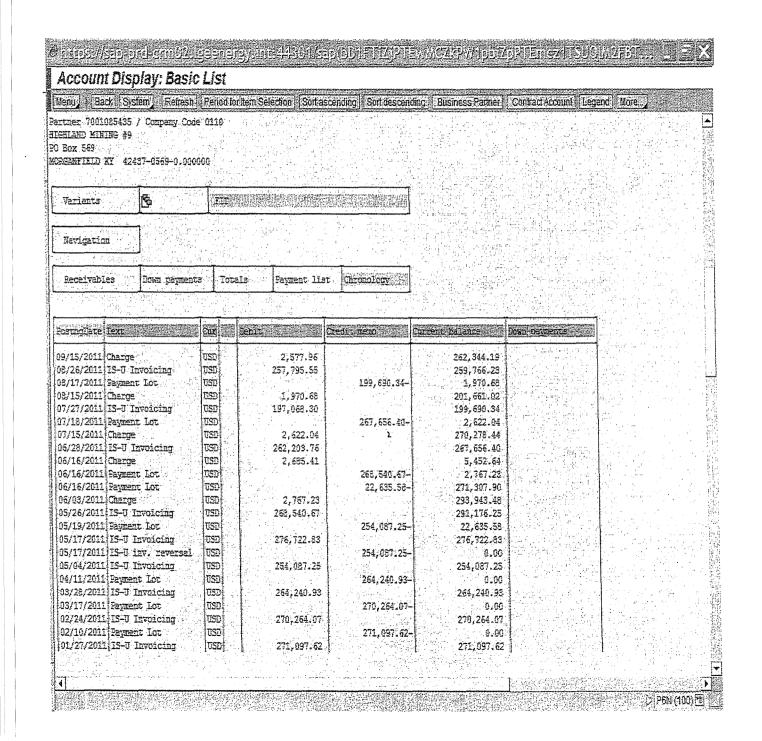


HIGHLAND MINING

ACCOUNT NO. 3000055369944

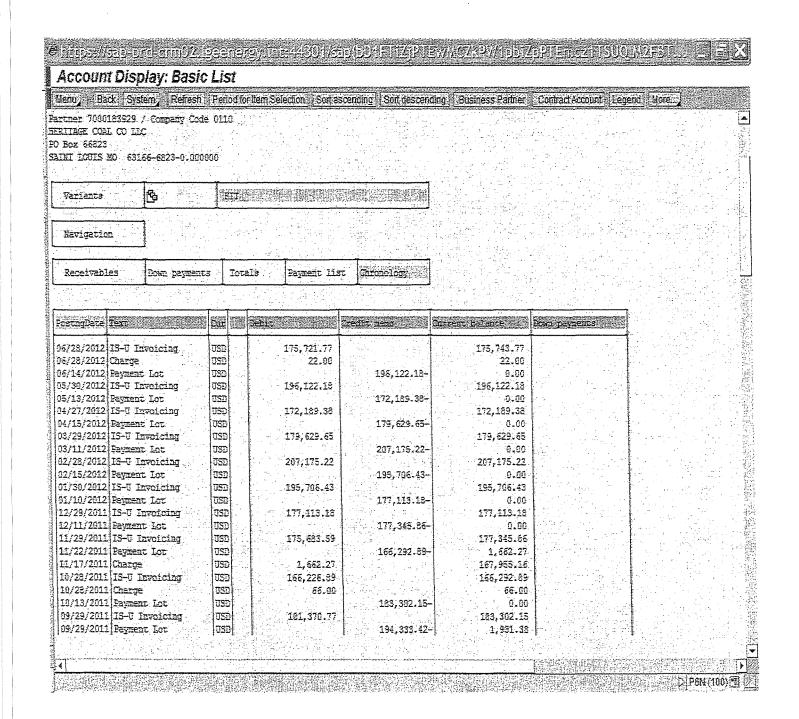
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HIGHLAND MINING #9
US HWY 60
MORGANFIELD, KENTUCKY 42437

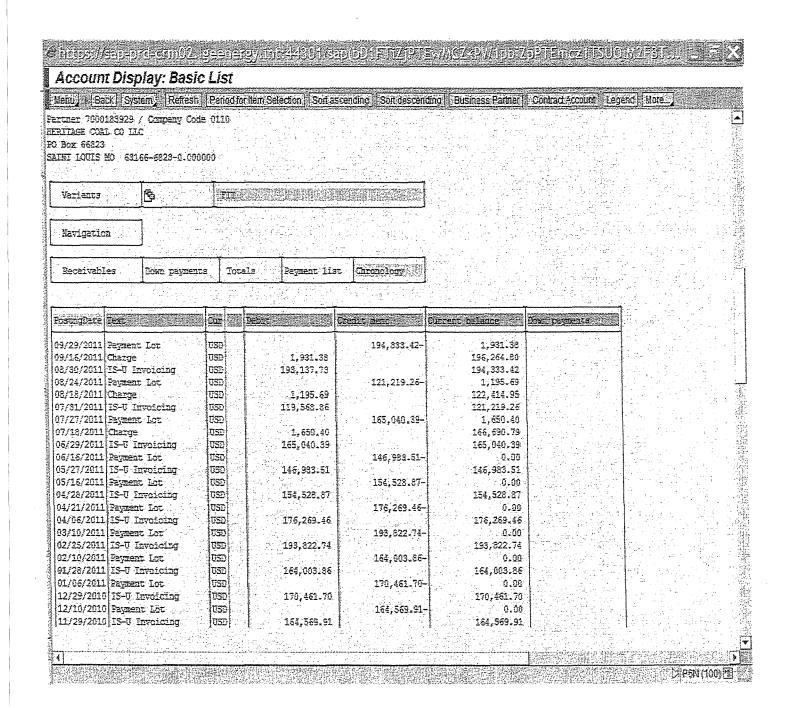




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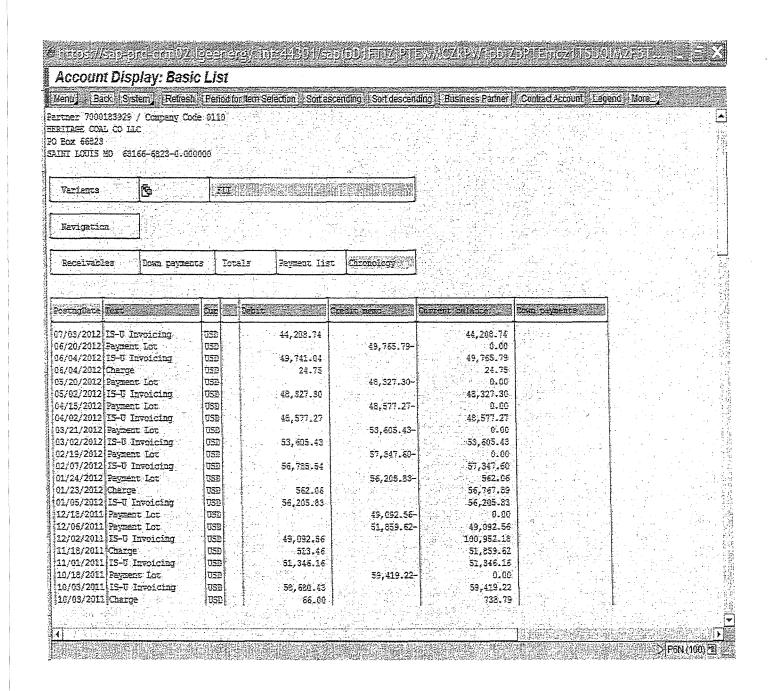
LOCATION:
HERITAGE COAL CO. LLC
530 FRENCH ROAD CAMP 9
MORGANFIELD, KENTUCKY 42437

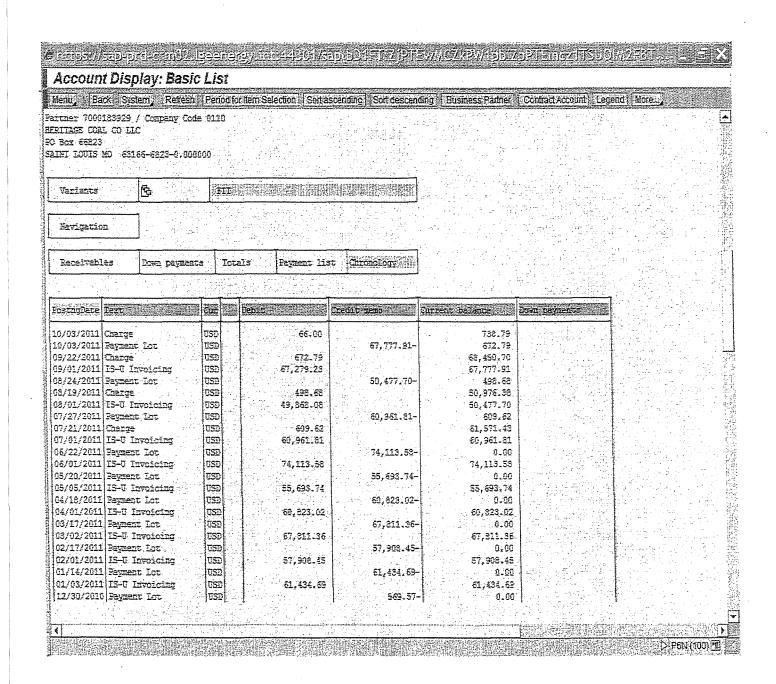




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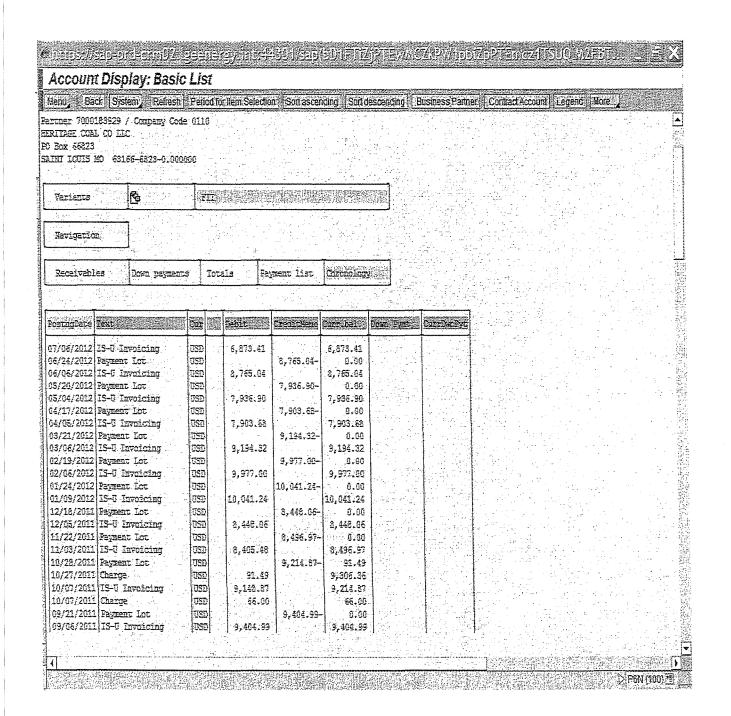
LOCATION:
HERITAGE COAL CO. LLC
267 MOUNT VERNON ROAD
UNIONTOWN, KENTUCKY 42461

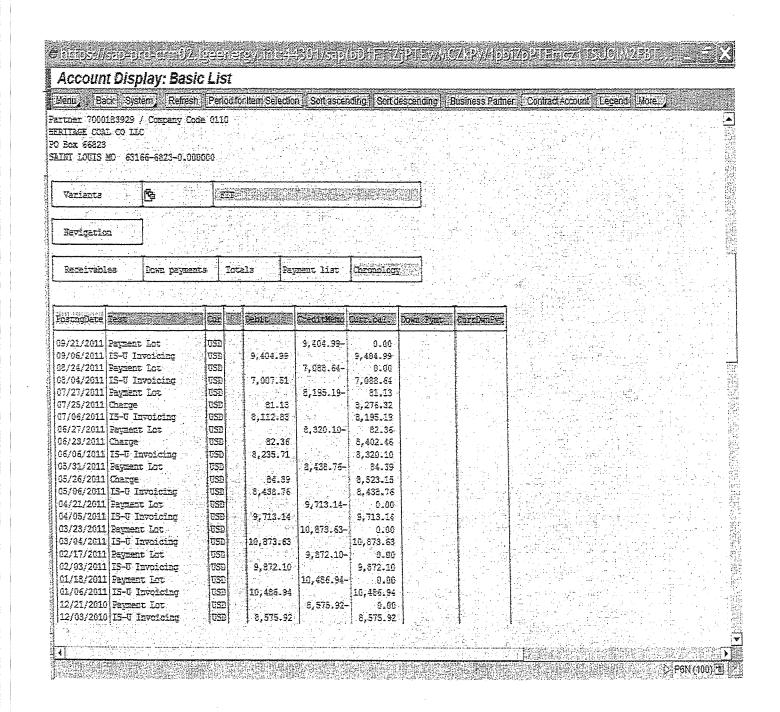




ACCOUNT NO. 300005042589

LOCATION:
HERITAGE COAL CO. LLC
186 BLUEGRASS ROAD S
MORGANFIELD, KENTUCKY 42437-6654





ACCOUNT NO. 300001635535

LOCATION:
HERITAGE COAL CO. LLC
OVERLAND BELTINE
UNIONTOWN, KENTUCKY 42461

