

QUANTUM PHYSICS AND SPEED OF LIGHT AT THE DELAWARE BANKRUPTCY COURT
TWENTY DAYS OF PREPETITION ELECTRICITY NOT ENTITLED TO
§ 503(b)(9) ADMINISTRATIVE PRIORITY IN BANKRUPTCY

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Bankruptcy Judge Christopher S. Sontchi for the Delaware Bankruptcy Court in *In re NE Opco, Inc.* held that “electricity” provided in the 20 days prior to the Debtors’ bankruptcy filing is not a “good” entitled to an administrative priority under § 503(b)(9) of the Bankruptcy Code.¹

Section 503(b)(9) provides a priority administrative expense, after notice and a hearing, for “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.” To determine what constitutes “goods” for the purposes of § 503(b)(9), the Court looked to the definition set forth in Article 2 of the Uniform Commercial Code: “Goods” means all things ... which are *movable at the time of identification to the contract for sale ...*.”²

There is a split of authority as to whether electricity constitutes “goods” under the U.C.C. and § 503(b)(9).³

Judge Sontchi began his analysis by distinguishing between “goods” and “services.” A service “is performed and consumed simultaneously.” In contrast, a “good” must be “moveable at the time of identification,” which for electricity is when it passes through the meter measuring its delivery. Judge Sontchi concluded that there must be a “meaningful” period between *identification* and *consumption* to find that electricity is a good.

Judge Sontchi rejected the reasoning of the bankruptcy court in *In re Erving Indus., Inc.* that “logic dictates” that “some period of time, however imperceptible, must pass between the measurement of the electricity at the meter and [its] use.”⁴ In doing so, Judge Sontchi highlighted an affidavit introduced in the *GFI Wisconsin, Inc. v. Reedsburg Utility Com’n* case explaining that electricity is consumed *simultaneously* with its measurement and that no movement “take[s] place after measurement by the meter.”⁵

Electricity travels at the speed of light in a vacuum (or a substantial fraction of the speed of light through cables depending on the insulation). At two-thirds the speed of light, for example, electricity will travel one kilometer in 4.978 microseconds (.000004978 seconds). Judge Sontchi concluded that the separation of “1/60th of 1/60th of 1/60th of a second between identification and consumption” is “meaningless.”

Accordingly, under the plain language of § 503(b)(9), “electricity is not moveable at identification and, thus, is not a good because there is no meaningful delay between identification and consumption.”

Although not necessary to his determination, Judge Sontchi opined on other factors considered by other courts that he determined either supported finding that electricity is not a “good” or were irrelevant. Judge Sontchi recognized that, in contrast to electricity, both water and natural gas are included in the definition of “goods” under the U.C.C.⁶ and can be stored in their current form (as opposed to electricity which must be converted to chemical energy to be stored in a battery and is “no longer electricity”). Further, the Court found irrelevant § 546(c)’s reclamation of “goods” provision, § 366’s “utility service” provisions, and the relationship of the electricity provider and the Debtors.

Next, the Court adopted and applied the “apportionment” test in which “the amount attributable to the goods is provided administrative priority status and the amount attributable to services is not.” Accordingly, the utility provider was entitled to administrative priority only for the portion of value attributable to the natural gas and not the amount attributable to the electricity. Therefore, the Court granted the utility provider an administrative expense of \$78.08 and denied the remainder of the \$93,262.55 requested.

In conclusion, one Delaware Bankruptcy Court has weighed in and held that the value of electricity delivered in the 20 days prior to a debtor’s bankruptcy petition is *not* entitled to administrative expense priority under § 503(b)(9). The provision of water and gas during such period, however, would be entitled to such priority. This decision may well energize other courts to work toward a resolution of the split of authority.

¹ See Opinion, *In re NE Opco, Inc.*, No. 13-11483(CSS) (Bankr. D. Del. Nov. 1, 2013) [Dkt. No. 431].

² U.C.C. § 2-105(1).

³ The Court cited cases holding that electricity is a “good” entitled to § 503(b)(9) administrative priority, see *In re Erving Indus., Inc.*, 432 B.R. 354, 369-70 (Bankr. D. Mass. 2010); *GFI Wisconsin, Inc. v. Reedsburg Utility Com’n*, 440 B.R. 791, 800-01 (W.D. Wis. 2010); *In re Great Atl. & Pac. Tea Co.*, 12-CV-7629 CS, 2013 WL 5212141, *7 (S.D.N.Y. Sept. 16, 2013), and cases holding that electricity is *not* a “good” under § 503(b)(9). See *In re PMC Mktg. Corp.*, 09-02048, 2013 WL 4735736, *6 (Bankr. D. P.R. Sept. 4, 2013); *In re Pilgrim’s Pride Corp.*, 421 B.R. 231, 238-40 (Bankr. N.D. Tex. 2009); *In re Samaritan Alliance, LLC*, 07-50735, 2008 WL 2520107, *4 (Bankr. E.D. Ky. June 20, 2008).

⁴ 432 B.R. at 370.

⁵ 440 B.R. at 795-96.

⁶ Section 2-107(1) of the UCC states: “A contract for the sale of minerals or the like (including oil and gas) ... is a contract for the sale of goods” While “gas” is expressly defined as a “good,” water is implicitly included in the definition as a “mineral.” The Black’s Law Dictionary defines “minerals” as “any natural inorganic matter that has a definite chemical composition and specific physical properties that give it value”, which encompasses water.