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Shedding Light on Whether Electricity is a "Good:" *In re Southern Montana Electric Generation and Transmission Cooperative, Inc.*

By [Jennifer Wertz](#)

The question of whether electricity qualifies as a "good" under the Bankruptcy Code's administrative priority provisions has sparked varied rulings from bankruptcy courts. The recent case of *In re Southern Montana Electric Generation and Transmission Cooperative, Inc.*, from the United States Bankruptcy Court for the District of Montana, followed some courts in ruling that electricity is a "good." Other courts have ruled differently and have concluded that electricity is not a "good." In *Southern Montana*, the court had to address whether electricity qualified as a "good" to determine whether an electricity provider should be entitled to administrative priority for a portion of its claim pursuant to section 503(b)(9) of the Bankruptcy Code.

Section 503(b)(9) of the Bankruptcy Code is unique in that it grants administrative (higher) priority to claims based on the value of "goods" received by the debtor within 20 days from the commencement of a bankruptcy case. In *Southern Montana*, the debtor, a wholesale electricity supplier, received power from PPL EnergyPlus, LLC ("PPL"), pursuant to the terms of a Power Purchase and Sales Agreement between the Debtor and PPL. PPL asserted that it had a claim for the value of the electricity it had provided the debtor. PPL further argued that the portion of the electricity that it had provided to the debtor in the 20 days before the debtor commenced its bankruptcy case, which it valued at over \$2.4 million, should be entitled to administrative priority under section 503(b)(9). Not surprisingly, PPL's argument was met with resistance from the Chapter 11 trustee, the unsecured creditors' committee, and various noteholders.

The *Southern Montana* court began its analysis by noting that according to the Power Purchase and Sale Agreement between the debtor and PPL, the debtor was purchasing electricity as a wholesale customer, not as an end user. The court observed that the debtor purchased electricity from its providers such as PPL and then supplied the power to its members, who in turn sold the power to their customers. The court quickly distinguished those facts from facts in other cases in which courts, especially the court in *In re Pilgrim's Pride Corp.*, 421 B.R. 231 (Bankr. N.D. Tex. 2009), found that electricity did not qualify as a "good." The *Southern Montana* court then examined another line of cases that had ruled the other way, stating that it found *GFI Wisconsin, Inc. v. Reedsburg Utility Comm'n*, 440 B.R. 791, 799-801 (W.D. Wis. 2010) particularly persuasive. In *GFI Wisconsin*, the district court, on appeal from the bankruptcy court, referenced the Uniform Commercial Code ("UCC") to determine whether electricity should qualify as a "good." It concluded that electricity qualifies as a "good" because it "is both identifiable and moving until it reaches the intended customer," and

that such characteristics, among others, logically meant that electricity is a "good."

Without much of its own discussion, the *Southern Montana* court ruled that under the facts of the case, the reasoning of *GFI Wisconsin* was persuasive. The court thus concluded that the electricity provided by PPL to the debtor during the 20 days prior to the debtor's bankruptcy was a "good" for purposes of section 503(b)(9).

Although this opinion sheds some light on the issue, the meaning of "good" for purposes of section 503(b)(9) is still not completely settled.

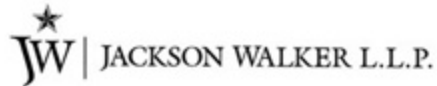
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