

**IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
At Charleston**

MONONGAHELA POWER COMPANY;
ALLEGHENY POWER; and,
ALLEGHENY ENERGY SERVICE
CORPORATION,

Petitioners,

No. 11-0015

v.

THE HONORABLE FRED L. FOX, II
Circuit Court Judge of the Sixteenth Judicial Circuit,

Respondent.

**PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE,
WRIT OF MANDAMUS**

**(In the Circuit Court of Marion County, West Virginia
Consolidated at Civil Action No. 09-C-3**

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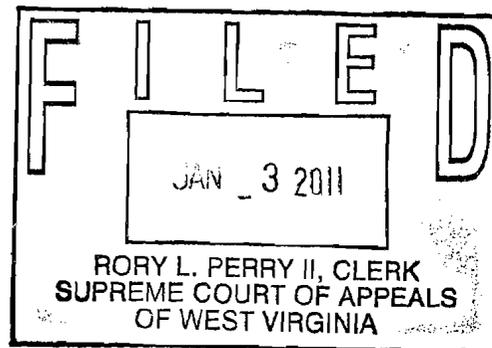


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QUESTIONS PRESENTED

The question answered by the lower court in this case is not only one of first impression in West Virginia and dispositive of the instant matter, it dramatically impacts the largest industry in West Virginia: coal:¹

Whether the typical multi-party contract for the sale and supply of coal, under which the plaintiff/seller agreed to sell, supply and deliver coal to the Buyer's premises or

¹ Companies affiliated with Defendants alone burn as much as 13.25 million tons of coal per year, all or substantially all of which is procured under coal supply agreements similar to the instant agreement under which a seller/supplier sells or delivers coal to the buyer's designated location. In light of the fact that West Virginia mines produce over 165 million tons of coal annually and create \$3.5B in gross state product, the Court's ruling that standard coal supply contracts are not covered by the West Virginia UCC will implicate far-reaching policy concerns regarding the validity of coal supply contracts in effect in 25 coal-producing counties in West Virginia. See, West Virginia Office of Miners' Health, Safety and Training, West Virginia Coal Mining Facts. See, www.wvminesafety.org/wvcoalfacts.

other destination ordained by the Buyer, is a “contract for the sale of goods” within the meaning of West Virginia Uniform Commercial Code §46-2-107(1), such that the cause of action for breach is subject to the four year period of limitation contained in §46-2-725(1).

This narrow question of law is certainly controlling in this case, as the Court aptly observed in its November 9, 2009 Opinion/Order.² Plainly, if the West Virginia UCC applies, so too, does the four year period of limitations contained in §2-725, W.Va. Code 46-2-725(1).³ The plaintiffs’ case would obviously be long time barred.

Defendants assert that the Circuit Court committed clear error in its determination of the above-cited question by improperly focusing its analysis on the character of the Sellers instead of on the character of the actual contract, as identified by the plain language therein. The fact that one party committed to selling coal under the contract identifies itself as both a “broker” and a Seller does not remove the Coal Sales Agreement from the purview of the West Virginia UCC.

STATEMENT OF THE CASE

A. Factual History

This is a breach of contract action arising from the alleged improper termination of a written contract for the sale and delivery of coal. Indeed, the written agreement is titled as a “Coal Sales Agreement.”⁴ Two sister companies are collectively identified in the written

² As the Court euphemistically characterized it, a conclusion that the West Virginia UCC, and the four year period of limitations contained therein, is applicable to this contract for the sale of coal “...would be disastrous for the plaintiff.” Conclusions of Law ¶9 at 6. A copy of this Order is included in the Appendix as **App. 1 - App. 8**.

³ W.Va. Code §46-2-725(1) states that “[A]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.”

⁴ A copy of the Coal Sales Agreement is included in the Appendix as **App. 9 - App. 20** and was originally filed as Exhibit B to Defendants’ Motion to Dismiss, or in the alternative, Motion for Summary Judgment.

agreement as “Seller,” to-wit, Shell Equipment and Shell Sales.⁵ Three affiliated companies are collectively identified in the writing as “Buyer” -- Allegheny Energy Supply Company, LLC, Monongahela Power Company, and the Potomac Edison Company.⁶ Shell Sales, a non-party to this lawsuit, additionally and specifically identifies itself in the Coal Sales Agreement as “Producer.”

The contract for the sale of coal expressly contemplates that the “Seller” (expressly defined to include Plaintiff) will extract coal from a specific source, the “Baldwin Mine,” located in Harrison County, and supply it F.O.B. the “Buyer’s” plant. Shell Equipment, in addition to being defined as “Seller,” is also explicitly identified as “Broker.” However, no distinction is otherwise made in the terms of the contract between the respective rights and responsibilities of Shell Equipment and Shell Sales based on their respective status as “Seller” and/or “Producer” or “Broker,” beyond that the “Producer” owns the Baldwin Mine from which the coal is to be extracted. In substance, the written agreement is entirely a contract for the sale and supply of coal to be mined from a specifically identified source, and delivered to a specific location by the “Seller.” The contract, by its express terms, is not a contract for services. No “Broker” or other service-related duties are articulated in its terms.

The “Seller” was unable to extract and provide coal from the Baldwin Mine as required under the terms of the contract. The “Seller” proffered coal from a different source, and the “Buyer” declined, and instead, terminated the contract in 2000 according to its terms. Almost

⁵ It should be noted that Shell Sales, one of two buyer-parties to the contract, has been selectively omitted as a Plaintiff in this matter and has been replaced with Shell Energy – a non-party to the contract.

⁶ Plaintiffs failed to include Potomac Edison Company as a defendant but added Allegheny Energy Service Corporation (listed in the agreement as the buyer’s agent and a non-party to the contract) and non-entity Allegheny Power (a registered dba).

ten years later, Shell Equipment and Shell Energy (a non-party to the contract) filed the instant civil action against Monongahela Power Company, Allegheny Power (a non-entity) and Allegheny Energy Service Corporation (a non-party to the contract), alleging that even though the “Seller” was not able to extract coal from the Baldwin Mine as explicitly promised in the contract, the requirement should be disregarded and the “Buyer” should be held in breach for refusing to accept and take delivery of coal from sources other than the Baldwin Mine identified in the Agreement.

The contract entitled “Coal Sales Agreement” is dated March 3, 2000. The contract was signed on behalf of both Shell Equipment and Shell Sales by one Frank Staud, as President of both companies. The Coal Sales Agreement followed a bid issued on November 9, 1999 by “Seller.” An interim purchase order was created by “Buyer” and sent to “Seller” on December 31, 1999, referencing and accepting “Seller’s” bid.⁷ The purchase order included the following:

“Subject to the consummation of a two-year sales agreement, a change order will be written to assign this purchase order to said two-year sales agreement. At that time, Allegheny Energy’s General Terms and Conditions, as stated on the reverse side of the purchase order, and the provisions of specification 6443-HAR-991 (rev.), attached hereto, shall be superseded by the terms and conditions of consummated two-year sales agreement.”

The terms of the Coal Sales Agreement require the “Seller” to sell and supply a minimum monthly quantity of 8,000 tons of coal per month for use at the Harrison Power Station, located in Haywood, West Virginia, for a period beginning January 1, 2000 and ending on December 31, 2001. Highly pertinent to the question of whether the coal is to be “severed by the buyer” within the meaning of Article 2 of the UCC, W.Va. Code 46-2-107(1), the contract explicitly provides that the coal is to be delivered “at Buyer’s power station and/or Buyer’s Agent’s direction....”

⁷ Allegheny Energy Service Corporation is identified in the purchase order as the “Buyer’s Agent.”

¶2.1. The contract permits Buyer to designate “a destination other than Harrison for delivery of coal hereunder...” Id. ¶2.2. Other provisions in the contract make clear that all coal is to be delivered, weighed, sampled, and accepted or rejected at destination. See, generally, ¶3.0/4.0. The contract provides that the source of the coal was to be Shell Sales Company’s Baldwin Mine, located in Gilmore County, West Virginia. ¶1.0. The contract further recites that Seller “represents that it now owns, leases or controls mining and/or processing operations with sufficient reserves of coal to enable Seller to supply the total quantity of coal specified herein for the terms of the Agreement.” ¶10.0. The contract specifically states that “[S]eller shall not change the coal origin without Buyer’s Agent’s prior written consent.” Id.⁸

Obviously, the contract contains not a word about the “Buyer” extracting or mining the coal, because as stated, this is a contract for the sale of coal to be severed, extracted, mined and delivered by the “Seller.”

Problems soon developed in the ability of “Seller” to obtain and supply coal from the Baldwin Mine. This prompted “Seller” to propose to procure coal from alternative sources in order to meet its requirements under the terms of the contract.⁹ On March 13, 2000, Claude Frantz (an employee of Allegheny Energy) sent a written communication to Frank Staud (President of both Shell Equipment and Shell Sales), stating, in relevant part:

⁸ Shortly after the contract’s execution, on March 11, 2000, Change Order No. 1 was issued to Seller, which assigned a purchase order number to the contract (“S-99-4093”). The Change Order specifically stated that the contract supersedes the terms and conditions of the Original Purchase Order.

⁹ This is apparently the point at which one of the “Shells,” which was plainly supposed to be a “Seller” under the contract was the “Producer” i.e. the owner of the Baldwin Mine to drop out of the picture, and the other “Shell” to serve as a “Broker” and procure substitute coal from a difference source. Unfortunately, that is not what the contract contemplates, and the “Buyer” rejected the proposal.

“After our meeting on March 8, 2000, I have given considerable thought to your proposal to purchase coal from other sources to eliminate shortfall tonnage of Purchase Order No. S-99-40393 Coal Sales Agreement.

I hereby inform you that proposals to ship shortfall tonnage from sources other than Baldwin Mine in Gilmer County, West Virginia are unacceptable and will be rejected.”

The letter goes on to inform Staud that Seller should “consider the coal sales agreement referenced in Purchase Order No. S-99-40393 in jeopardy of termination if deliveries from Baldwin Mine do not materialize by July 1, 2000.”

Because Seller failed to supply Buyer with coal from the Baldwin Mine by July 1, 2000, Buyer sent a “Termination Notice” on July 14, 2000, citing “poor performance.” In addition, Change Order No. 2 was sent to Seller on July 20, 2000, confirming the earlier termination of the contract for poor performance.

B. Procedural History

Nearly nine years later, on or about January 5, 2009, Shell Equipment Co., Inc. (a defined “Seller” under the contract) and Shell Energy Co., Inc., the “plaintiffs,” filed a two-count Complaint in the Circuit Court of Marion County, West Virginia.¹⁰ As previously discussed, Shell Sales, one of the two parties identified as Seller in the contract and the party specifically identified as the producer and owner of the Baldwin mine, is not a party to the instant lawsuit. In Count I, plaintiffs assert a claim for breach of contract “...for the purchase and acquisition by defendants of marketable and merchantable coal.” Complaint ¶7.¹¹ The Complaint makes

¹⁰ Shell Energy Co. is not a party to the contract. However, in the Complaint, plaintiffs allege that “Shell Energy’s involvement was to serve as the prospective source of the coal to be sold.” (Complaint ¶ 6). A copy of the Complaint is included in the Appendix as **App. 21 - App. 27**.

¹¹ Count II, which asserted a separate claim for “detrimental reliance” has been dismissed by the Court.

unmistakable that plaintiffs seek to recover damages for economic injury allegedly suffered as disappointed Sellers of coal.¹²

Defendants filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment, arguing, *inter alia*, that plaintiffs' breach of contract claims are time barred by the four-year statute of limitations governing contracts for the sale of goods, as set forth in Article 2 of the West Virginia Uniform Commercial Code ("UCC") W.Va. Code 46-2-725.¹³

In order to avoid operation of the four-year Uniform Commercial Code statute of limitations governing contracts for the sale of goods, the plaintiffs argued, and the Circuit Court accepted, that a contract for the sale of coal, even though clearly to be severed and delivered by the "Sellers," may be removed from the otherwise appropriate embrace of Article 2 of the UCC because the "Seller" plaintiff is actually a "Broker" who did not engage in the physical severance of the coal (even though it is clearly identified in the terms of the contract as "Seller"). Plaintiff advanced that artful argument on the artifice that the other "Seller," the one presumably actually responsible for the physical act of severing the coal, happens not to be named as a plaintiff. Further, in a response to Defendants' subsequent Motion for Reconsideration, plaintiffs supported that cleverly calculated contrivance with an affidavit that sought to separate the two "Sellers,"

¹² Plaintiffs describe the contract which they allege defendants breached in Paragraph 9 of their Complaint, as follows: "Plaintiff Shell EQMT responded to a "RFB," submitted a bid, and was awarded the order, which was provided to Shell EQMT in written form. Shell EQMT accepted the order, thus forming a contract arrangement." Presumably, plaintiffs are referring to the December 31, 1999 Purchase Order No. S-99-40393, which was, by operation of Change Order No 1, superseded by the terms and conditions of the Coal Sales Agreement prior to Defendants' alleged breach.

¹³ A copy of Defendants' Motion to Dismiss (**App. 28 - App. 65**), supporting Memorandum (**App. 66 - App. 108**), Reply Memorandum (**App. 109 - App. 115**) and Plaintiff's Response (**App. 116 - App. 127**) are included in the Appendix respectively.

knowing full well that the two companies are owned and operated by the same individual -- not surprisingly, the affiant.¹⁴

What is surprising is that the connivance worked -- they avoided the clear statute of limitations obstacle. Instead of appropriately analyzing the contract as a whole in order to determine whether the contract was a contract for the sale of goods under the UCC, the Circuit Court held that the contract was not a contract for the sale of goods under Article 2, reasoning that the coal was not to be severed by the "Seller" even though it clearly would have been because it was not to be severed by the "Buyer." In support of its conclusion, the Circuit Court mistakenly focused on the test for distinguishing contracts for the sale of realty and inadvertently converted this contract for the sale of coal into one for the sale of realty. In substance, the Court permitted the "Seller" to recast itself as a "Broker" under the contract, disregarding the obvious fact that the contract by its terms is clearly a contract for the sale of goods which is covered by Article 2 of the UCC. This is an error of law.

Judge Fox denied Defendants' Motion to Dismiss in a November 9, 2009 Opinion/Order which states that the contract for the sale of coal at issue is not governed by the W.Va. UCC, and subsequently not subject to the W.Va. UCC's four-year statute of limitations, "because the [Sellers] were not the entities severing the coal from the realty...rather, they act as brokers" (Order ¶ 9). The Court reasoned that because one of the selling parties identified itself as a "seller/broker" and was allegedly not engaged in the severing of the coal from the realty, the entire contract was removed from the control of the W.Va. UCC. Defendants thereafter filed a

¹⁴ The machinations engaged by the plaintiffs in order to avoid the bar of the statute of limitations is reminiscent of what used to be called the "Shell Game."

Motion for Reconsideration and to Certify Question for immediate appeal, which the Circuit Court subsequently denied without comment on June 28, 2010.¹⁵

SUMMARY OF THE ARGUMENT

In order to properly analyze whether the Coal Sales Agreement is a contract for the sale of goods as defined by the West Virginia UCC, this Court must focus its analysis on two fundamental questions: (1) whether the Coal Sales Agreement is undisputedly a contract for the sale of extracted minerals, as opposed to a contract for rights in land; and (2) whether the Coal Sales Agreement is a contract for the sale of goods as opposed to a contract for brokering services.

A reading of the plain language of both the contract and the West Virginia UCC leads to the conclusion that the Coal Sales Agreement is unmistakably a multi-party contract for the sale of goods within the meaning of Article 2 of the W.Va. UCC. In any event, if, as the plaintiffs assert, the sellers in the contract provided both broker services and goods in the form of coal to be severed, then the Circuit Court should have analyzed this “mixed” contract under the “predominant purpose test,” which it failed to do.

Application of the proper statute of limitations is case dispositive. As the Court pointed out in its November 9, 2009 Order, application of the UCC’s statute of limitations is fatal to the plaintiff’s claims. Consequently, whether the Parties will engage, at great expense, in extensive discovery and ultimately trial of this matter turns strictly on an error of law. Prohibition of the

¹⁵ A copy of Defendants’ Motion for Reconsideration (**App. 128 - App. 130**), supporting Memorandum (**App. 131 - App. 188**), Plaintiffs’ Response (**App. 189 - App. 214**) and Judge Fox’s Order denying Defendants’ Motion (**App. 215 - App. 216**) are included in the Appendix respectively.

Circuit Court's Order or a Writ of Mandamus compelling the Circuit Court to certify this pure question of law is appropriate and necessary.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral Argument is necessary because none of the criteria set forth in West Virginia Rule of Appellate Procedure 18(a) have been met. Pursuant to Rule 20(a), oral argument is appropriate because (1) this case involves issues of first impression and (2) this case involves issues of fundamental public importance.

ARGUMENT

A. The Coal Sales Agreement Is A Contract For The Sale Of Extracted Minerals, And Not A Contract For The Right To Remove Minerals From The Land.

The error committed by the Circuit Court was, in part, a function of its focus on the "severed by the seller" language found in the UCC language, which error was further compounded by its disregard of the terms of the contract. This UCC language is intended to differentiate between contracts for the sale of an interest in realty – which no party in this lawsuit even suggests is the nature of this contract -- and a contract for extracted coal – which is clearly the only thing being sold under this contract. The only issue that should have been addressed below is whether Plaintiff's claimed additional status as a "broker" somehow transforms this contract into one for the sale of services as opposed to one for the sale of coal. The "severed by the seller" UCC language relied on by the lower court has no place in that analysis. However, this Court now needs to address that issue in order to correct the record and provide the needed certainty to the parties as well as the industry.

W.Va. Code 46-2-107(1) provides:

“A contract for the sale of minerals or the like including oil and gas or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.”

This language is clearly intended to differentiate between contracts for the sale of extracted coal (which are governed by the UCC) from contracts for the sale of minerals that are still in the ground (which are governed by realty law, including certain recording obligations). An Official Comment to the United States Commercial Code 2-107 (as adopted by West Virginia) underscores the intent of the drafters: [i]f the buyer is to sever, such transactions are considered contracts affecting land and all problems of the Statute of Frauds and of the recording of land rights apply to them. UCC §2-107 Official Comment 1 (1972).

Article 2 of the Code makes clear the distinction between a contract for the right to extract minerals from land and a contract for extracted minerals. The Code signifies this distinction by utilizing the phrase “severed by the seller.” If one accepts that the distinction set forth in §46-2-107 means that the Code does not govern contracts for the sale of minerals *in situ*, but does govern contracts for the sale of minerals severed by someone other than the buyer, then the analysis of whether a contract is governed by Article 2 is simple.

If, on the other hand, this distinction requires the determination of which party on the Seller side of the contract actually extracts the minerals from the land, a legal misconstruction results. In this case, the Parties entered into a contract for the sale of minerals to be extracted by the “Sellers” – a contract clearly governed by Article 2 of the Code. No Party asserts that the contract provides the Buyers with the right to enter the land and extract the minerals. Nonetheless, the Sellers now argue that, by their own unilateral action in failing to include all parties to the contract in the instant litigation, they can transform the contract from a contract for

the sale of goods into a contract for something other than the sale of goods, thereby removing the entire contract from its original governance by the W.Va. UCC.¹⁶

In this case, two sister-companies sharing a single President (Shell Sales and Shell Equipment) collectively identified themselves as “Seller” in the Coal Sales Agreement. Shell Sales further identified itself as the “Producer,” and Shell Equipment further identified itself as the “Broker.” It is undisputed among the parties that Shell Sales severs the coal from the land and that the fact that Shell Sales may have hired someone else to physically sever the coal does not alter the definition of the coal as a “good” under W.Va. Code 46-2-107(1).¹⁷

However, Defendants submit that “severed by the seller” does not embrace the literal meaning afforded it by the Circuit Court – that all parties identified as Seller in the contract must sever the coal in order for the contract to fall under the provisions of the UCC. In fact, the purpose of the “severance” portion of the W.Va. Code 46-2-107(1) is to differentiate between sales of goods and contracts affecting interests in land.

The significance of the issue presented in this case far outdistances the particular rights and liabilities of the parties in this particular matter. The coal supply contract involved in this

¹⁶ Significantly, one co-seller may not purposefully exclude another co-seller from a lawsuit asserting a breach of contract claim in an effort to change the nature and character of the underlying contract from a contract for goods to a contract for rights in land or for services. This attempt to escape the UCC’s governance of the contract for the sale of goods under W.Va. §46-2-107(1) cannot succeed. As discussed *infra* and in detail, the appropriate and well-accepted test for whether the UCC applies to an allegedly “mixed” contract providing both goods and services is the predominant purpose test. The Circuit Court failed to apply this test and instead held that one “non-severing” seller-party to a contract for goods under the UCC can sue independently *outside* the provisions of the UCC by failing to include the “severing” seller-party as a plaintiff in the litigation. This approach utterly disregards the notion that it is the contract and not the party that is subject to the statutory controls of the UCC.

¹⁷ See Plaintiff’s Response and Incorporated Memorandum of Law to Defendants’ Motion for Reconsideration and to Certify Question for Immediate Appeal, §II(C) and (E)(“Under the coal sales agreement, Shell Sales Co., Inc. as producer, was the party to sever the coal...a third party contract separate and apart from the hypothetical contract cannot alter that duty.”)

case is very typical, unquestionably quite similar to countless other contracts for the sale of coal extant in West Virginia, and elsewhere. One might speculate about just how common such contracts are in this state, but it is a matter of common knowledge that millions of tons coal are sold, supplied and delivered to buyers within and without West Virginia each year. The fact that in this particular situation one of the two “Sellers” under the contract does not actually mine the coal is of no effect. Defendants submit that this is true of many coal supply contracts.

There is, therefore, an overarching and fundamental importance to a proper determination of whether the rights and liabilities of countless other contracting parties are to be determined under the provisions of the most prevalent body of commercial law in American jurisprudence. And, it is not just selecting the correct statute of limitations that is at stake. The provisions of Article 2 of the West Virginia UCC which governs sales of goods transactions, impact dramatically virtually every sort of issue that may arise in a dispute over a commercial transaction. The provisions of the UCC alter other law as it relates not only to a wide variety of liability issues, but also remedies that are available for breach. Thus, the significance of correctly determining whether the West Virginia UCC governs disputes arising out of contracts for the sale and supply of coal (like the contract at issue), cannot be overstated.

There is also far reaching jurisprudential significance to the question of whether West Virginia law will keep step with other jurisdictions on this issue. Little reflection is necessary to recognize the confusion that could be portended if, in West Virginia alone, typical coal supply contracts are not subject to the UCC, while in other states the same contract is subject to the UCC. It is widely recognized by courts and commentators alike that perhaps the most important benefit of the UCC having been adopted in every American jurisdiction is that it promotes certainty, uniformity and predictability between and among the states in the law of commercial

transactions. If this state has the same statutory law as other states, but declines to apply that law to the same sorts of contracts, those salutary objectives are thoroughly undermined. Thus, it is not only important that each state enact the same uniform commercial code, but that each state apply the code to the same transactions.

Given the importance of the question whether the West Virginia UCC applies to coal supply contracts, and the typicality of this type of contract, one would expect that our Supreme Court of Appeals would have definitively addressed the issue. However, thorough research conducted not only by counsel for the litigants in this case, but evidently by the Circuit Court as well, fails to reveal a controlling case.¹⁸ There are sure to be relevant authorities in other jurisdictions, but the issue is certainly one of first impression in West Virginia.¹⁹

B. The Coals Sales Agreement Is A Contract For The Sale Of Goods And Not A Contract For Brokering Services.

Since this contract is not one for the sale of an interest in land, the only true issue is whether this contract is one for the provision of services – clearly it is not. In order to determine whether the Coal Sales Agreement is a contract for the sale of goods or a contract for services,

¹⁸ The Court's November 9, 2009 Opinion/Order cites Reece v. Yeager Ford Sales, Inc., 184 S.E.2d 729 (W.Va. 1971), but that case is not at all apposite. Reece does not address the question of what types of sales contracts are properly within the embrace of the UCC. Moreover, the situation in Reece is so thoroughly distinguishable on the facts from the instant case, as to be of no assistance. See, the further discussion of Reece, *infra*.

¹⁹ Although, as stated, there are no West Virginia cases that deal with coal supply contracts under the provisions of the Uniform Commercial Code, there are certainly cases in other jurisdictions which make that conclusion implicit. See, e.g. Adani Exports Ltd. v. AMCI Export Corp., 2007 WL4298525 (W.D.Pa. 2007) (copy appended hereto for convenience); Peabody Natural Resources Co. v. Commissioner of Internal Revenue, 126 T.C. 261, (United States Tax Court, 2006) (copy appended hereto for convenience); Diversified Energy, Inc. v. Tennessee Valley Authority, 339 F.3d 437 (6th Cir. 2003). In entirely different contexts, the courts in these cases all assume without elaboration that typical coal supply contracts like the one involved in this case are generally subject to Article 2 of the Uniform Commercial Code. See also, In re: Pilgrim's Pride Corp., 2009 WL2959717 (Bkrcty.N.D.Tx. 2009) ("Minerals, generally, are goods unless they remain part of the real estate of their origin").

the appropriate analysis must focus on the character of the contract and not the identification of the parties. The lower court failed to conduct the appropriate analysis and ignored the language of the contract in the process.

Although Shell Equipment identifies itself as a “broker,” this is not a brokerage contract. Under this contract, Shell Equipment was not contracted to provide brokerage services. Rather, under this contract, Shell Equipment contracted and committed to sell goods. By the explicit terms of the contract, Shell Equipment, along with Shell Sales, *is* the Seller. Regardless of what title Shell Equipment assigned itself, it committed to sell coal under the contract. A barber who sells a car is still selling goods, regardless of whether he is a barber or a car salesman.

Shell Equipment’s Complaint asserts a breach of a contract for the sale of coal, not a contract requiring Shell Equipment merely to “arrange for shipment of the coal that was offered for sale,” as Shell Equipment asserts in its opposition to the Motion to Dismiss. (Plaintiffs’ Response. p.5). In fact, contrary to the self-serving characterization of itself as merely a broker, plaintiffs acknowledge in their Response that “the Plaintiffs brought a claim based on a breach of the coal sales agreement,” (emphasis added) and they allege that the breach occurred when defendants refused to honor a bid “for the purchase and acquisition by the defendants of marketable and merchantable coal to be shipped to Monongahela Power Company’s Harrison Station.” (Response pp. 2, 5). **The contract identifies no specific brokerage or “service” duties attributed to any specific party whatsoever, including Shell Equipment.** Instead, Shell Equipment is identified collectively with Shell Sales as the “Seller” of the coal in a coal sales agreement.²⁰

²⁰ Frank J. Staud, President of both Shell Sales and Shell Energy (the non-party sister-company to both Shell Sales and Shell Equipment), swears in an affidavit attached to Plaintiffs’ Response

Neither plaintiff nor the Court has set forth any legal authority to support the notion that the rights associated with the status of one seller-party in a multi-seller contract can be asserted as to the entire contract, where the remaining seller-party does not enjoy such a status. This is particularly true in the instant case where Shell Equipment has filed its lawsuit independently, without joining the other co-Seller-party to the contract (Shell Sales) as plaintiff. The fact that the President of Shell Sales, Frank Staud, is also the President of the Plaintiff Shell Energy -- a

to Defendants' Motion to Dismiss and for Summary Judgment that "upon information and recollection, Shell Sales Company, Inc. was never involved in conducting mining operations for the severance of coal from realty in the State of West Virginia," and "[T]hat if Shell Sales Company, Inc. had ever been designated as a producer of coal, it would have been contracted out to other sources involved with severing coal in West Virginia." (Staud Affidavit ¶¶ 6-7, emphasis added).

As a threshold matter, Mr. Staud is well aware that Shell Sales Company, Inc. has been "designated as a producer" of coal, since that is precisely how Shell Sales was designated in the contract at issue in the instant case, under which Mr. Staud's other company sues. In fact, it was Mr. Staud who executed the Coal Sales Agreement on behalf of Shell Sales on March 3, 2000 in his capacity as President. As discussed above, Shell Sales represented in the express terms of the contract, **in direct contradiction to Mr. Staud's affidavit**, that it "owns, leases or controls mining and/or processing operations with sufficient reserves of coal to enable Seller to supply the total of coal specified..." (Coal Sales Agreement ¶10.0). Adding yet another contradiction, in Shell Equipment's Response to Defendants Motion for Reconsideration, Shell Equipment now acknowledges that Shell Sales was the party to sever the coal. Regardless of Mr. Staud's contradictory assertion that Shell Sales was never involved in the severance of coal, Shell Sales affirmatively asserted in the contract that it owned and controlled the mining and/or processing operations to supply the coal identified in the Coal Sales Agreement. Despite Mr. Staud's affidavit, the contract language, which controls the agreement between the parties, conclusively establishes that Shell Sales was the party who would sever the coal from its mine.

As a well settled legal proposition, the plaintiff should not now be permitted through extrinsic evidence to contradict the clear, express terms of the contract that they seek to enforce. Not only does that transgress the parol evidence rule, *see Iafolla v. Douglas Pocahontas Coal Corp.*, 250 S.E.2d 128 (W.Va. 1979) ("...extrinsic evidence cannot be used to alter or interpret language in a written contract which is otherwise plain and unambiguous." Syl.Pt.3); *Wellman v. Tomblin*, 84 S.E.2d 617 (W.Va. 1954), but the plaintiffs should be estopped to even advance that argument.

Under such circumstances, whether the contract falls within the purview of the UCC in accordance with W.Va. Code 46-2-107(1) must be gleaned from the text of the contract, without regard to self-serving affidavits. Moreover, the applicability of the UCC *cannot* be ascertained by examining extrinsic evidence regarding the status of only one of several parties to the contract and ignoring the status and conduct of the remaining parties.

non-party to the contract -- raises more questions than answers as to plaintiffs' decision to leave the co-Seller identified as the "producer" in the Coal Sales Agreement out of the instant litigation.

If, as plaintiffs assert and the Court agrees, the contract between Shell Equipment and defendants for the purchase and delivery of extracted coal is not a contract for the sale of goods under the UCC because *one seller-party* to the contract does not sever the coal from the land by its own physical labor, then it stands to reason that the Court must also consider the status of the *other seller-party* and conclude that where at least one party severs the coal, the contract is covered by the UCC. Instead, this Court's ruling effectively instructs that in a multi-seller contract where one party identified as Seller owns and mines the coal to be sold, *every* Seller in the contract must physically sever the coal in order for the contract to be governed by the West Virginia UCC. This is a conclusion completely unsupported by either logic or law.

The clear and unambiguous terms of the Coal Sales Agreement lead ineluctably to the conclusion that this is a "contract for the sale of goods" within the scope of Section 2-207(1). The contract requires coal to be extracted *by the "Seller"* from the Seller's designated mine, and delivered to "Buyer's" power station or such other destination as designated by "Buyer." The contract states that Seller and Producer Shell Sales owns the Baldwin Mine from which the coal was to be produced. Despite plaintiffs' assertions, the contract also explicitly states that Seller "owns, leases or controls mining and/or processing operations with sufficient reserves of coal to enable Seller to supply to total quantity of coal specified herein for the term of this Agreement." (Coal Sales Agreement ¶10.0). This language clearly and conclusively establishes that the coal at issue in this contract is owned by and severed by the Seller in accordance with W.Va. Code § 46-2-107(1).

Shell Equipment essentially argues that whether a contract is governed by the UCC can be determined by examining the conduct and status of *only the suing seller-party* in isolation and then analyzing the contract in the context of only that party. This is simply an untenable and unsupportable proposition in contract law. The inclusion of a seller-party in the contract, where that seller-party also identifies itself as broker and allegedly undertakes performance of “service-related” duties other than actual physical severance of the coal from the land, does not remove the entire contract from the governance of the UCC. That “Seller” contractually committed to providing the only good that is the focus of the contract – coal. The inquiry stops there and the UCC governs.

Finally, despite Shell Equipment’s assertion that it is a “broker” of coal and is not involved in any coal mining operation or severance of the coal, the *contract* is a contract for the sale of coal in its extracted form. Specifically, the preamble to the terms of the Agreement states:

“For and in consideration of the mutual covenants and agreements herein contained, **Buyer agrees to buy and Seller agrees to sell coal** of the quality and in the quantities hereinafter stated upon the terms and conditions herein set forth.”

1. Shell Equipment Asserts Claims In The Complaint As A Seller Of Coal For Breach Of A Contract To Sell And Supply Coal, Not For Breach Of Contract To Broker Coal.

In the Complaint, Shell Equipment asserts claims based on its status as a “seller” and not a “broker.” The Court’s November 9, 2009 Opinion and Order also states that “[B]ecause the plaintiffs were brokers, the aforementioned four-year limitation period does not apply...” At the outset, nothing in Section 2-207(1), or any other provision of the UCC provides that brokers are somehow excepted from the provisions of the UCC when they enter into “contracts for the sale of goods.” In effect, it is the character of the contract rather than the nature or status of the

contracting party (either buyer or seller) that determines whether the transaction is covered by the Code. In other words, when a broker contracts to buy or sell goods, the contract is clearly subject to the Code. There would be significance to the status of Shell Equipment as a broker, only if the contract were one for the sale and supply of brokering services -- which is clearly not the case here. By its clear and unambiguous language, the Coal Sales Agreement is a contract to purchase coal -- not a contract for brokering services. Shell Equipment acknowledges this when, in its Complaint, Shell Equipment alleges that defendants breached the Coal Sales Agreement by refusing to permit Shell Equipment to “ship” coal to defendants. (Complaint ¶12). In fact, in paragraph 14 of the Complaint, Shell Equipment *specifically identifies itself* as a producer and sales entit[y]:

Various and sundry arbitrary reasons were given to the plaintiff Shell EQMT for the failure to honor its accepted bid, all of which “reasons” were merely a pretext to allow the defendants to tighten their control upon the market by entering into large tonnage contracts with favored production to the detriment of **smaller producers and sales entities such as plaintiffs. These smaller companies such as Shell EQMT** were qualified to bid up said coal purchase contracts as let by the defendants.

Shell Equipment goes on to discuss how, in the past, Shell Equipment “acquired equipment, expended costs and obtained property for the development and sale of coal from its Jones Run location...” (Complaint ¶6). For Shell Equipment to now identify itself simply as a “broker” in order to avoid application of the West Virginia UCC to the contract, is disingenuous at best.

Shell Equipment specifically identifies itself in the Coal Sales Agreement as “Seller” and has sued defendants in its capacity as the “prospective source of coal to be sold” for breach of a coal *sales* agreement. (Complaint ¶6). Plaintiffs acknowledge that defendants entered into contracts with plaintiffs “for the purchase and acquisition by the Defendants of marketable and merchantable coal.” (Complaint ¶¶6-7). Plaintiffs further acknowledge that plaintiffs “agreed to

be the required source for [this] coal production.” The contract at issue is a Coal Sales Agreement, not a coal brokerage agreement. To construe this contract as something other than a contract for the sale of goods, as it obviously was intended to be, is to torture unintended consequences out of an otherwise clear and unambiguous contract for the sale of extracted coal.

2. The Court Has Not Identified Any Legal Basis For The Finding In Its Opinion That Because Shell Equipment Identified Itself As A “Broker,” The Coal Sales Agreement Is Not Controlled By The West Virginia UCC.

As previously discussed, the Circuit Court states in its Opinion that “[B]ecause the plaintiffs were brokers, the aforementioned four-year limitation period does not apply.” With respect to Shell Equipment’s claimed status as “broker,” the Circuit Court points in its Opinion to Reece v Yeager Ford Sales, Inc., 155 W. Va. 461, 184 S.E. 2d 729 (1971) as “an interesting case that sheds some light on how West Virginia interprets such an issue.” Reece held that the buyer of an automobile from an independent automobile dealer, who purchased the automobile from a manufacturer for re-sale to the buyer, was not entitled to rescission of the sale against the manufacturer of the automobile on a UCC breach of warranty claim on the basis that the manufacturer was not a party to the contract and thus not a seller within the meaning of the UCC.

Reece is entirely distinguishable from the instant facts. As a threshold matter, the Reece case does not deal with brokers at all, but instead deals with independent automobile dealers who actually purchase cars from the manufacturer for resale. Id. at *730. Reece does not analyze a “broker” relationship where the dealer is “involved in the acquisition of purchase orders for sales” from buyers -- the services Shell Equipment alleges it provides. (Complaint ¶2).

The court in Reece found that the manufacturer was not a seller under the UCC because there was no contract between the buyer and the manufacturer -- not because the re-seller was a “broker.” In contrast, in this case the Buyers, the manufacturer/owner of the coal and the alleged

“broker” are all in contract with each other. In the Coal Sales Agreement, both the manufacturer/owner of the coal and the claimed “broker” are a party to the contract and both parties identify themselves in the contract as Sellers. Moreover, the buyer in Reece was attempting to recover from the manufacturer in addition to the independent dealer. In the instant case, the broker is attempting to recover from the buyer and argues that the fact that it allegedly provides only services under the contract removes the entire contract between all the parties from UCC control. Reece stands for the proposition that a buyer *not in contract* with the manufacturer of an automobile cannot maintain an action for rescission related to breach of warranty against the manufacturer, as the manufacturer is not a seller under the UCC. **Reece holds nothing with respect to the applicability of the UCC to the contract between the re-seller/dealer and the buyer** and in fact, finds that the *seller* in the transaction was the re-seller/dealer.

On the other hand, the U.S. District Court for the Western District of Pennsylvania recently analyzed a coal supply contract between an importer of coal for resale and a company identified as a global trader of coal. *See, Adani Exports Limited v. AMCI Export Corporation*, No. 05-304, 2007 WL 4298525 (W.D. Pa. Dec. 4, 2007). Although the issue in that case was contract formation, the Court asserted that the contract between entities **selling coal severed by others**, was governed by the provisions of the Uniform Commercial Code. *Id.* at *9. In making its determination, the Court went on to instruct that:

“While decisions from other jurisdictions may prove to be helpful in most contexts, the Pennsylvania Supreme Court has made it clear that such decisions are ‘entitled to even greater deference where consistency and uniformity of application are essential elements of a comprehensive statutory scheme like that contemplated by the Uniform Commercial Code.’”

Defendants have identified no case law or other authority in West Virginia that instructs that a contract which includes a claimed “broker” selling coal severed by others as a seller-party

to a contract for the supply and sale of coal is removed from the governance of the West Virginia UCC.

C. If The Instant Coal Sales Agreement Is A “Mixed” Contract For Goods And Brokering Services, Under The “Predominant Purpose Test” The Contract Is Nonetheless A Contract For The Sale Of Goods Governed By The UCC

Although it is not entirely clear from the Circuit Court’s Opinion/Order, it appears that the Court may have viewed Shell Equipment as contracted to provide a brokering “service” under the Coal Sales Agreement, instead of selling coal.²¹ Inexplicably, Plaintiff argues that the *Coal Sales Agreement* under which it sues does not involve a sale of goods and cites the Court’s November 9, 2009 Opinion/Order for the proposition that because Shell Equipment is a broker and is a party to the contract, the coal sold under the contract cannot therefore be a good.²² This is utterly irreconcilable with the clear language of W.Va. Code § 46-2-105, to read in conjunction with § 46-2-107.

§46-2-105. Definitions: Transferability; "goods"; "future" goods; "lot"; "commercial unit."

(1) "Goods" mean all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops *and other identified things attached to realty as described in the section on goods to be severed from realty.* (section 2-107)(emphasis added).

§46-2-107. Goods to be severed from realty: Recording.

(1) A contract for the sale of *minerals or the like including oil and gas or a structure or its materials to be removed from realty* is a contract for the sale of goods within this article if they are to be severed by the seller but until severance

²¹ That may explain to some extent why the Court found it of consequence that Shell Equipment claims to be a “broker”.

²² See Plaintiff’s Response and Incorporated Memorandum of Law to Defendants’ Motion for Reconsideration and to Certify Question for Immediate Appeal, § 2F.

a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell. (emphasis added).

To argue in light of the above statutory language, that the subject coal is not “goods” in a mixed contract is unsupportable. Including an alleged seller of “services” in the contract does not *de facto* make the coal otherwise clearly covered under the UCC, no longer “goods.” In making this argument, Plaintiffs leap over the well-established “predominant purpose” test, as discussed *infra*..

As discussed above, Shell Equipment is but one of two parties identified as Seller. Regardless of Shell Equipment’s self-identification as “broker,” both parties as “sellers” clearly provide goods in the form of coal.²³ If the Coal Sales Agreement is a “mixed” contract, providing both goods and services, then the proper analysis must focus, not on the status of the individual sellers, but on the Coal Sales Agreement’s “predominant purpose” in order to ascertain whether the West Virginia UCC applies to the Coal Sales Agreement. Abex Corporation/Jetway Div. v. Controlled Systems, Inc., 1993 WL 4836, 6 (4th Cir. 1993) (holding that the West Virginia UCC applies to a mixed contract where the majority of the provisions of the contract establish detailed procedures for buying and selling goods.) *citing* Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456, 460 (4th Cir. 1983). This inquiry emphasizes three criteria: (1) the language of the contract; (2) the nature of the business of the supplier; and (3) the intrinsic worth of the materials involved. *Id.* An analysis of these factors irrefutably establishes that the predominant purpose of the Coal Sales Agreement is the sale of goods:

²³ Shell Sales identifies itself in the Coal Sales Agreement as “producer” and, as discussed *infra*., represents that it owns the mine from which the coal is produced and owns, leases or controls the mining equipment and operations.

(1) The language of the contract deals exclusively with the sale of coal and makes no reference whatsoever to any additional “broker” services provided by Shell Equipment. Specifically, the contract lays out: the period in which coal will be supplied; the location Seller will deliver the coal to; the monthly rate of coal to be supplied; the schedule for the delivery of coal, including the time of day during which the coal will be delivered; at what point title to the coal will pass to Buyer; detailed quality specifications of the coal to be delivered -- including the moisture percentage, ash content and sulfur content; and pricing and payment mechanisms for the coal delivered. There is no reference to any specific services provided by Shell Equipment and more importantly, no reference whatsoever to services which are not intrinsically related to the direct supply and shipment of extracted coal.

(2) Both Sellers are in the business of selling coal. Shell Equipment is charged with no individual responsibilities under the contract and there are no “services” other than those intrinsically related to the sale and delivery of coal, are identified in the contract. The only thing supplied by the Coal Sales Agreement is coal.

(3) No value is assigned to Shell Equipment’s alleged brokering services. However, the contract **specifically identifies** the dollar value of the coal to be delivered under the contract as “89.5 cents per million ‘as-received’ Btu.” No dollar value is assigned or even referred to with respect to any additional broker “services” under the contract. The entire value of the contract is measured by the price of the coal to be sold to Buyer.

Clearly, any reasonable analysis under the predominant purpose test demonstrates the obvious fact that the Coal Sales Agreement is not a contract for services, but is instead a contract for the sale of goods under Article 2 of the West Virginia Uniform Commercial Code.

D. Writ Of Prohibition Or Mandamus Is Appropriate In This Matter.

Prohibition lies as a matter of right in all cases of usurpation and abuse of power by an inferior tribunal or where the tribunal exceeds its legitimate powers. West Virginia Code § 53-1-1 (1994); Glover v. Narick, 184 W. Va. 381, 400 S.E.2d 816 (1990). A Writ of Prohibition will lie where the abuse of power is so flagrant and violative of a party's rights so as to make the remedy of appeal inadequate. State ex. rel. UMWA Internat'l Union v. Maynard, 176 W. Va. 131, 342 S.E.2d 96 (1985).

In determining whether to entertain and issue a Writ of Prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. State ex. rel. Nationwide Mutual Insurance Co. v. Kaufman, 222 W. Va. 37, 41, 658 S.E.2d 728, 731 (2008). Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. Id.

A Writ of Prohibition is an appropriate remedy for Petitioners in this matter because not only are the questions presented by this Petition dispositive of the case, they represent issues of law of first impression in West Virginia.

Alternatively, Petitioners assert that the rulings of the Respondent as referenced herein, specifically the denial of Defendants' Motion to Certify Questions related to pure questions of law, constitute a flagrant abuse of authority and exceed the trial court's legitimate powers such that a Writ of Mandamus is an appropriate remedy for Petitioners in this matter.

Petitioners have a clear right to the relief sought - certification of pure questions of law which substantially control the case. Respondent has a duty to certify pure questions of law that are clearly appropriate for review by this Court. The Court has many times observed that pure issues of law are appropriate for certification where "there is a sufficiently precise and undisputed factual record on which the legal issues can be determined."²⁴ The issues framed by the certified question substantially control the case in that application of the appropriate period of limitation under the West Virginia UCC is dispositive of the case.

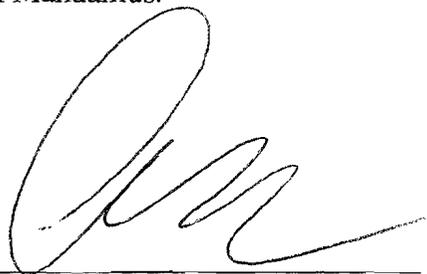
CONCLUSION

Judge Fox's November 9, 2009 Order denying Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment and thereby permitting Plaintiffs to evade operation of the UCC by suing independently from their co-seller, coal-severing sister-company is explicitly contrary to the plain language of W.Va. Code 46-2-107(1) as well as case law confirming that the coal sales contract at issue must be analyzed under the "predominant purpose" test. Therefore, the Order is clearly erroneous as matter of law. As such, Judge Fox's Order constitutes abuse of the trial court's power such that a writ of prohibition or mandamus is an appropriate remedy in this matter.

²⁴ State of West Virginia ex. rel. Department of Health and Human Resources v. Wertman, 557 S.E.2d 773 (W. Va. 2001), citing Syl. Pt. 5; Bass v. Coltelli, 453 S.E.2d 350 (1994). The questions are uniquely appropriate for certification under W.Va. Code §58-5-2, since there is a precise and undisputed factual record on which the legal issue can be determined.

For the foregoing reasons, Petitioners request that this Court grant the instant Petition for Writ of Prohibition, issue a rule to show cause against Respondent, Judge Fox and prohibit Respondent from enforcing the ruling on Plaintiff's Motion to Dismiss, or in the alternative, Motion for Summary Judgment. In the alternative, Petitioners request that this Court issue a Writ of Mandamus directing Judge Fox to certify the pure question of law presented in Defendants' Motion to Certify Question, which was denied on June 28, 2010 and issue a rule to show cause against Judge Fox with respect to the Writ of Mandamus.

Signed:



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VERIFICATION

Commonwealth of Pennsylvania,

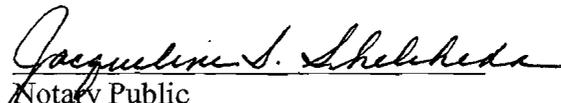
County of Westmoreland, to wit;

I, David W. Gray, after making an oath or affirmation to tell the truth, say that the facts I have stated in this Memorandum Of Law In Support Of Petition For Writ Of Prohibition, Or In The Alternative, Writ Of Mandamus are true of my personal knowledge, and if I have set forth matters upon information given to me by others, I believe that information to be true.

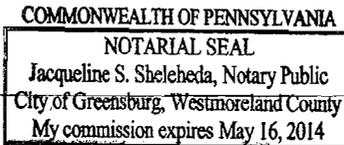

Signature

December 21, 2010
Date

This Verification was sworn to or affirmed before me on this 21st day of December, 2010.


Notary Public

My commission expires: _____



**IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
At Charleston**

MONONGAHELA POWER COMPANY;
ALLEGHENY POWER; and,
ALLEGHENY ENERGY SERVICE
CORPORATION,

Petitioners,

No. _____

v.

THE HONORABLE FRED L. FOX, II
Circuit Court Judge of the Sixteenth Judicial Circuit,

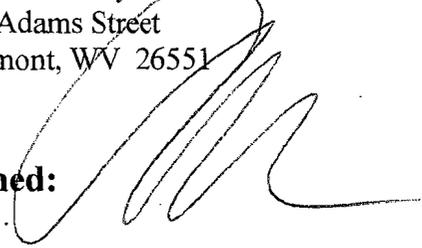
Respondent.

PROOF OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Petition for Writ of Prohibition, Or in the Alternative, Writ of Mandamus upon all parties and counsel listed below via First Class, U.S. Mail on December 30, 2010:

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The Honorable Fred L. Fox, II
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Signed: 

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