

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK COUNTY

APPALACHIAN POWER COMPANY

Index No. [redacted]

Plaintiff(s),

Summons

-against-

ACNR Coal Sales, Inc.,

Date Index No. Purchased: September 30, 2022

Defendant(s).

To the above named Defendant(s)

ACNR Coal Sales, Inc., an Ohio Corporation,
CT Corporation, Statutory Agent
4400 Easton Commons Way, Suite 125
Columbus, Ohio 43219

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is Contract at issue provides for NY as exclusive venue
which is parties regularly transact business in NY.

Dated: New York, NY

September 30, 2022

Giskan Solotaroff and Anderson

by Amy Robinson

Amy Robinson

Attorneys for Plaintiff

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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)	
APPALACHIAN POWER COMPANY,)	<u>COMPLAINT</u>
)	
Plaintiff,)	
)	Index No. _____/2022
v.)	
)	
ACNR Coal Sales, Inc.,)	
)	
Defendant.)	
)	
)	
)	

Plaintiff Appalachian Power Company (“APCO”), through its attorneys Oren Giskan and the firm of Giskan Solotaroff & Anderson LLP, alleges and states as follows for its complaint against Defendant ACNR Coal Sales, Inc. (“ACNR Coal Sales”):

The Parties

1. Plaintiff APCO is a Virginia corporation, with its principal place of business in Columbus, Ohio. APCO is a subsidiary of American Electric Power Company, Inc. (“AEP”), a New York corporation with its principal place of business in Columbus, Ohio.

2. Defendant ACNR Coal Sales is an Ohio corporation with its principal place of business in Saint Clairsville, Ohio.

Jurisdiction and Venue

3. This dispute involves a coal supply contract between APCO and ACNR Coal Sales. This Court has jurisdiction over defendant ACNR Coal Sales, and venue is proper in this Court, because the contract here at issue states in relevant part:

Each Party hereby submits to the exclusive jurisdiction of state or federal courts located in New York City, New York and all appellate courts therefrom and waives any objection which it may have at any time to the laying of venue of any proceedings brought in such court, waives any claim that such proceedings have been brought in an inconvenient forum, and further waives the right to object, with respect to such proceedings, that such court does not have jurisdiction over such Party.

In addition, APCO and ACNR Coal Sales regularly transact business in New York City, New York.

Background Facts

4. Plaintiff APCO is an electric public utility, a wholly owned subsidiary of American Electric Power Company, Inc. (“AEP”), a diversified energy company with regulated electric utilities in 11 states serving approximately 5.5 million customers.

5. Specifically, APCO serves approximately 1 million electric customers in portions of Virginia, West Virginia and Tennessee. APCO has several coal-fired generation facilities, which it uses, along with gas and other generation facilities, to produce electricity to meet its customers’ needs.

6. APCO needs a regular supply of coal in order to keep its coal-fired power plants running and producing electricity.

7. APCO, therefore, regularly contracts with suppliers to provide coal for its coal-fired power plants.

8. ACNR Coal Sales is one of APCO's primary suppliers of coal. ACNR Coal Sales is a subsidiary of American Consolidated Natural Resources ("ACNR"), which was formed in 2020 as a successor to Murray Energy and promotes itself as the largest underground coal mining company in America. According to ACNR's website:

American Consolidated Natural Resources and its Subsidiary Companies employ and manage nearly 5,000 employees and currently manages 9 active coal mines, consisting of 9 underground longwall mining systems and 25 continuous mining units in 5 regions... [ACNR] will manage the productions of over 49 millions of tons of coal per year. [ACNR] manages and controls over 4 billion tons of coal reserves...this production and reserve base allows [ACNR] to provide electric utility customers with low cost, reliable, and high quality coal supplies.

APCO and ACNR Coal Sales Enter into a Coal Purchase and Sale Agreement

9. On January 11, 2012, APCO and ACNR Coal Sales' predecessor, Consolidation Coal Company, entered into a contract for the purchase and sale of coal, identified as "Coal Purchase and Sale Agreement No. 02-10-12-900" (hereinafter "the Agreement").¹

10. Over the years, APCO and ACNR Coal Sales modified the Agreement several times. The parties last amended the Agreement in 2021, via Amendment 2021-1, dated March 31, 2021, and executed by APCO and ACNR Coal Sales on April 21, 2021 (hereinafter, the "2021 Amendment"). Copies of the Agreement and the 2021 Amendment are too voluminous to attach to the complaint, contain sensitive commercial information, and are in the possession of the Defendant.

¹ Not long after APCO and Consolidation Coal Company entered into the Agreement, McElroy Coal Company ("McElroy") was added as a seller, and ultimately became the sole seller under the Agreement. McElroy was an affiliate of Murray Energy Holdings, which entered bankruptcy in 2019. At the conclusion of the Murray Energy Holdings bankruptcy proceedings in 2020, ACNR emerged as the owner of Murray Energy Holdings' assets, and ACNR Coal Sales replaced McElroy as the counter-party to APCO under the Agreement. The 2021 Amendment acknowledges that ACNR Coal Sales is a party to the Agreement as "assignee from Consolidation Coal Company and McElroy Coal Company (the "Seller")." This Complaint refers to ACNR Coal Sales and McElroy as "ACNR Coal Sales."

11. Both the Agreement and the 2021 Amendment specify the quantities of coal that ACNR Coal Sales is obligated to supply to APCO for each covered year, and set a price – or a mechanism for computing the price – to be paid for each ton of coal ACNR Coal Sales contracted to deliver.

12. At issue here are the quantities of coal that ACNR Coal Sales committed to supply in 2021 and 2022 pursuant to the 2021 Amendment that was signed in April 2021.² According to Table 2.1.1 in the 2021 Amendment, ACNR Coal Sales promised to supply APCO with 2,100,000 tons of coal in Contract Year 2021. Consistent with the parties' past practice for making up shortfalls, the 2021 Contract Year quantity includes 917,761 tons that ACNR Coal Sales had committed to deliver in 2020; the parties agreed, however, that those 917,761 tons would be delivered in 2021. Those 917,761 tons from 2020 were to be the first tons of coal to be delivered in Contract Year 2021, and were to be priced at the applicable 2020 contract price.

13. For 2022, the 2021 Amendment obligates ACNR Coal Sales to deliver 1,917,761 tons of coal to APCO in Contract Year 2022, with 1,000,000 tons for 2022 at 2022 prices and 917,761 tons representing agreed upon tons to be moved from 2021 to 2022, delivered at the 2021 contract price. The 2021 Amendment also grants APCO the option to increase this 2022 Contract Quantity by 60,000 tons per calendar quarter (240,000 additional tons). APCO elected to take the optional tons for all four quarters of the year.

14. Thus, under the Agreement and the 2021 Amendment, ACNR Coal Sales committed to deliver to APCO 2,100,000 tons of coal in Contract Year 2021, and an additional 1,917,761 tons of coal (plus the 240,000 optional tons) in Contract Year 2022.

² At the time that ACNR Coal Sales signed the 2021 Amendment in April 2021, ACNR Coal Sales was aware that APCO had not taken delivery of any coal from ACNR Coal Sales in January through March of 2021, but nonetheless committed to supply over 3 million tons of coal in the remainder of 2021 and 2022.

ACNR Coal Sales Fails to Supply the Coal it Committed to Provide to APCO

15. Despite the 2021 Amendment's clear requirements, in Contract Year 2021, ACNR Coal Sales supplied APCO with only 1,780,304 tons of coal, a shortfall of 319,696 tons. APCO has pushed ACNR Coal Sales on this shortfall, asking ACNR Coal Sales to deliver the contracted-for coal. In conversations between the Parties' businesspersons, ACNR Coal Sales initially acknowledged the 2021 shortfall and agreed to make up that shortfall. Through August, ACNR Coal Sales has not delivered all the 2021 tons that it is required to supply, let alone the required amount of 2022 tons.

16. In addition, ACNR Coal Sales has failed to keep pace with the coal deliveries it contracted to make in 2022. Through the end of August 2022, ACNR Coal Sales should have delivered two-thirds of the 2021 shortfall tons (319,696 tons) and two-thirds of the Contract Year 2022 coal (roughly 2.158 million tons), or a total of approximately 1.65 million tons. Instead, through August, ACNR Coal Sales had delivered only 625,642 tons – a shortfall of approximately a million tons.

17. As a direct consequence of ACNR Coal Sales' breach, APCO has had to find other ways to meet its customers' electric needs, including having to purchase energy from the market at greatly increased costs to APCO and its customers.

18. Section XXI of the Agreement imposes on both parties the duty to mitigate damages. APCO has complied with that duty by taking reasonable steps to lessen the harm caused to APCO and its customers by ACNR Coal Sales' breach. When ACNR Coal Sales continued to fail to deliver the contracted for coal and refused to make up the coal shortfalls – in contravention of the parties' normal course of dealings, in which the parties always agreed to make up shortfalls – APCO was unable to generate as much electricity from its coal fired plants as intended. To satisfy

its customers' needs, APCO had to purchase replacement energy from the market, at market prices. The result was that it cost APCO far more to supply its customers with power than if APCO had received in 2021 the full 2,100,000 tons of coal from ACNR Coal Sales. APCO has continued to purchase replacement energy at market prices in 2022, as ACNR Coal Sales has continued not to live up to its obligation to deliver the contracted for quantity of coal for the 2022 Contract Year. APCO has incurred substantial damages to cover for the failure of ACNR Coal Sales to supply the full contract quantity of coal for Contract Year 2021 and into Contract Year 2022.

19. ACNR Coal Sales' failure to deliver the quantity of coal it committed to for Contract Years 2021 and 2022 coincided with a sharp increase in the market prices for coal. The increased prices APCO had to pay, and still must pay, for replacement energy from the market have not only impacted APCO, but also have driven up the cost of electricity to its customers.

20. Section XXV of the Agreement states: "[T]he provisions of the UCC as adopted by the State of New York shall govern this Agreement[,] shall be deemed to apply to this Agreement and any Coal supplied hereunder shall be deemed to be 'goods' for purposes of the UCC." Under the applicable UCC provision, NY UCC § 2-713 (2014), APCO may recover as damages both (a) the difference between the market price when APCO learned of the breach and the contract price, and (b) any incidental and consequential damages caused by ACNR Coal Sales' breach.³

21. In replacing the power-generating capabilities represented by the approximately one million tons of coal that ACNR Coal Sales has thus far failed to supply, APCO has incurred substantial incidental and consequential damages, in addition to the prices APCO paid for replacement power.

³ The Agreement limits "incidental, punitive, special or consequential damages" to \$5,000,000 per occurrence and \$20,000,000 in the aggregate under the Agreement (Section XXVIII).

COUNT I – BREACH OF CONTRACT

22. APCO adopts and incorporates the preceding as if fully restated herein.

23. The Agreement, as modified by the 2021 Amendment, is a valid and enforceable contract between APCO and ACNR Coal Sales.

24. ACNR Coal Sales has failed to fulfill its obligations under the Agreement, as modified by the 2021 Amendment. Specifically, ACNR Coal Sales has failed to supply APCO with the full contract quantity of coal specified for Contract Year 2021 and continues to fail to deliver for Contract Year 2022.

25. Prior to ACNR Coal Sales' breach, APCO complied with the terms of the Agreement, as modified by the 2021 Amendment.

26. As a result of ACNR Coal Sales' failure to supply the full contract quantity of coal for Contract Years 2021 and 2022, APCO has been damaged. Specifically, APCO has been forced to purchase replacement energy to be able to keep supplying electricity to APCO's customers in three states.

27. According to the provisions of the UCC, as adopted in New York and made specifically applicable to the parties' contract, APCO is entitled to recover both the full costs of its cover as well as its incidental and consequential damages, in an amount to be established at trial.

WHEREFORE, APCO demands judgment against ACNR Coal Sales in an amount that exceeds the jurisdictional limits of all lower courts in addition to a judgment:

(1) directing ACNR Coal Sales to deliver to APCO all of the tons called for, but not yet supplied, under the Agreement and 2021 Amendment;

(2) awarding APCO monetary damages, in an amount to be determined at trial, for all undelivered coal;

(3) monetary damages compensating APCO for its incidental and consequential damages, in an amount to be determined at trial; and

(4) such other relief as this Court deems just and equitable.

Dated: September 30, 2022

Respectfully submitted,

Appalachian Power Company, Inc.

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