

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	
)	Chapter 11
)	
BUILDING MATERIALS HOLDING)	Case No. 09-12074 (KJC)
CORPORATION, <i>et al.</i> ,)	
)	
Debtors.)	Jointly Administered
)	
)	Re: Docket Nos. 11, 61
)	Objection Deadline: 7/9/09, 4:00 p.m.
)	Hearing Date: 7/16/09, 4:30 p.m.

OBJECTION OF CERTAIN UTILITY COMPANIES
TO THE DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS
(A) PROHIBITING UTILITY PROVIDERS FROM ALTERING,
REFUSING OR DISCONTINUING SERVICE; (B) APPROVING THE DEBTORS'
PROPOSED ADEQUATE ASSURANCE; AND (C) ESTABLISHING PROCEDURES FOR
RESOLVING REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE

Southern California Edison Company ("SCE"), Salt River
Project ("SRP"), and Arizona Public Service ("APS")
(collectively, the "Utilities"), by counsel, hereby object to the
*Debtors' Motion For Interim and Final Orders (A) Prohibiting
Utility Providers From Altering, Refusing or Discontinuing
Service; (B) Approving the Debtors' Proposed Adequate Assurance;
and (C) Establishing Procedures For Resolving Requests For
Additional Adequate Assurance (the "Utility Motion"),* and set
forth the following:

Introduction

Section 366(c)(2), as amended, requires a Chapter 11 debtor
to provide utilities with adequate assurance of payment that is

satisfactory to the utility within 30 days of the Petition Date. If a debtor believes the amount of the utility's request pursuant to Section 366(c)(2) needs to be modified, the debtor can file a motion pursuant to Section 366(c)(3) seeking to modify the amount of the utility's request. Despite the foregoing, the Debtors filed the Utility Motion at the outset of this case that sought, without evidence or supporting documentation, to establish that the Debtors' offer to deposit an amount equal to the Debtors' aggregate costs for two weeks of utility services into a segregated account (the "Escrow Account") constitutes adequate assurance of payment. The Debtors' propose that the Escrow Account would not be for the benefit of any utility provider that already holds a letter of credit or a security deposit. With respect to the Escrow Account, the Debtors failed to: (i) identify who would hold the Escrow Account, (ii) how the Utilities would access the Escrow Account, or (iii) what would happen to the monies contained in the Escrow Account in the event of a default by the Debtors concerning their use of post-petition financing.

As case law is clear that adequate assurance of payment is to be determined on a case-by-case basis, it is remarkable how a two-week deposit or two-week escrow account are becoming the debtor's proposed form and amount of adequate assurance in virtually every bankruptcy case filed in this District.

Moreover, as a customer of the Utilities, the Debtors are aware that the Utilities bill on a monthly basis in arrears and provide the Debtors with generous trade terms, unlike the Debtors' other vendors. Instead of trying to establish their own form and amount of adequate assurance of payment, Section 366(c)(3) very clearly requires that the Debtors, at a minimum, set forth an evidentiary and legal basis as to why this Court should consider modifying the amount of adequate assurance of payment that is satisfactory to the Utilities under Section 366(c)(2).

As discussed herein, this Court should deny the Utility Motion as not being properly before the Court because the Utility Motion: (1) was not heard after notice and a hearing; and (2) does not seek to modify the amount of the Utilities' deposit requests.

Facts

Procedural Facts

1. On June 16, 2009 (the "Petition Date"), the Debtors commenced their cases under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") that are now pending with 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.

2. The Debtors' cases are being jointly administered.

The Utility Motion

3. On the Petition Date, the Debtors filed the Utility Motion.

4. No notice of the Utility Motion was given to the Debtors' utilities prior to the Court entering the *Interim Order (A) Prohibiting Utility Providers From Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance; and (C) Establishing Procedures For Resolving Requests For Additional Adequate Assurance* (the "Interim Utility Order") on June 17, 2009.

5. Because the Utilities were never served with the Utility Motion, they had no opportunity to respond to the Utility Motion or otherwise be heard at the *ex parte* hearing on the Utility Motion that took place on June 17, 2009, despite the fact that Section 366(c)(3) (presuming this was the statutory basis for the relief sought by the Debtors) requires that there be "notice and a hearing" and the Utilities were known entities that provided continuous prepetition utility goods and services to the Debtors.

6. Through the Utility Motion, the Debtors seek to avoid the procedural and substantive requirements of Section 366. Instead of responding to adequate assurance demands of their utility companies, the Debtors elected to file the Utility Motion and seek Court approval for their own form of adequate assurance in the form of an escrow account supposedly containing an amount

equal to two weeks of utility charges (the "Escrow Account"). Utility Motion at ¶ 15; Interim Utility Order at p. 2. The Debtors propose that utilities that already hold a letter of credit or a security deposit will not have access to the Escrow Account. However, Section 366(c)(4) provides that utilities can recoup prepetition security against prepetition debt without notice or order of the Court.

7. The Debtors' estimate that they spend an average of approximately \$557,000 each month on utility costs. Utility Motion at ¶ 13.

Facts Concerning the Utilities

8. Each of the Utilities provided the Debtors with prepetition utility goods and/or services and has continued to provide the Debtors with utility goods and/or services since the Petition Date.

9. Under the Utilities' billing cycles, the Debtors receive approximately one month of utility goods and/or services before the Utility issues a bill for such charges. Once a bill is issued, the Debtors have approximately 15 to 30 days to pay the applicable bill. If the Debtors fail to timely pay the bill, a past due notice is issued and a late fee is subsequently imposed on the account. If the Debtors fail to pay the bill after the issuance of the past due notice, the Utilities issue a notice that informs the Debtors that they must cure the arrearage

within a certain period of time or their service will be disconnected. Accordingly, under the Utilities' billing cycles, the Debtors could receive at least 2 months of unpaid charges before the utility could cease the supply of goods and/or services for the post-petition payment default.

10. In order to avoid the need to bring witnesses and have lengthy testimony regarding the Utilities regulated billing cycles, the Utilities request this Court, pursuant to Rule 201 of the Federal Rules of Evidence, to take judicial notice of the Utilities' billing cycles. Pursuant to the foregoing request and based on the voluminous size of the applicable documents, the Utilities are providing the following web site links to the tariffs and/or state laws, regulations and/or ordinances, and/or cooperative service rules:

SCE -
<http://www.sce.com/AboutSCE/Regulatory/tariffbooks/rules.htm>

SDG&E -
<http://www.sdge.com/regulatory/currentEffectiveTariffs.shtml>

SRP - Rules and Regulations:
<http://www.srpnet.com/about/pdfx/rulesandregsrev2004.pdf>

Price Plans:
https://www.srpnet.com/prices/pdfx/2008_ratebook_Nov08_final.pdf

11. Subject to a reservation of the Utilities' rights to supplement their post-petition deposit requests if additional

accounts belonging to the Debtors are subsequently identified, the Utilities' estimated prepetition debt owed by the Debtors to the Utilities, and post-petition deposit requests are currently as follows:

<u>Utility</u>	<u>No. of Accts.</u>	<u>Est. Pre-Pet. Debt</u>	<u>Dep. Request</u>
SCE	4	not available	\$12,080(2-month)
APS	2	\$3,277.18	\$6,019 (2.5-month)
SRP	8	\$11,504.52	\$54,290 (2-month)

12. APS held a prepetition deposit, plus interest, totaling \$4,016.41 that it recouped against the Debtors' prepetition debt pursuant to Section 366(c)(4). The remaining \$739.23 of the prepetition deposit may be applied to APS's post-petition deposit request.

13. SRP maintained a \$46,991 surety bond on its 6 accounts with SelectBuild Arizona, LLC. The prepetition debt on the SelectBuild Arizona, LLC accounts totaled \$10,687.52. In addition, SRP maintained a \$400 cash deposit on its two BMC West Corporation accounts, with is less than the \$817 prepetition debt on those accounts.

Discussion

A. THE UTILITY MOTION SHOULD BE DENIED AS TO THE UTILITIES.

Sections 366(b) and (c) of the Bankruptcy Code, in pertinent part, provide:

(b) Such utility may alter, refuse, or discontinue

service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date.

(c)(1)(A) For purposes of this subsection, the term "assurance of payment" means

- (i) a cash deposit;
- (ii) a letter of credit;
- (iii) a certificate of deposit;
- (iv) a surety bond;
- (v) a prepayment of utility consumption; or
- (vi) another form of security that is mutually agreed upon between the utility and the debtor or the trustee.

(B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment,

(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility;

(3)(A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

(B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider

- (i) the absence of security before the date of the filing of the petition;
- (ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or
- (iii) the availability of an administrative expense priority.

(4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility

may recover or set off against a security deposit provided to the utility by the debtor before the date of the filing of the petition without notice or order of the court.

11 U.S.C. §366.

As set forth by the United States Supreme Court, "[i]t is well-established that 'when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct., 1942, 147 L. Ed. 2d 1 (2000)). *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, 597 (6th Cir. 1997) ("Statutes . . . must be read in a 'straightforward' and 'commonsense' manner.").

A plain reading of Section 366(c)(2) makes clear that a debtor is required to provide adequate assurance of payment satisfactory to its utilities on or within thirty (30) days of the filing of the petition. If a debtor believes the amount of the utility's request needs to be modified, then the debtor can file a motion under Section 366(c)(3) requesting the court to modify the amount of the utility's request.

In this case, the Debtors completely ignore the Utilities' adequate assurance requests. Instead, the Debtors filed the Utility Motion to improperly shift the focus of their obligations

under Section 366(c) from modifying the amount of the Utilities' adequate assurance requests to establishing the form and the amount of adequate assurance of payment acceptable to the Debtors.

Accordingly, this Court should not reward the Debtors for their failure to comply with the requirements of Section 366(c) and deny the Utility Motion as to the Utilities. See *In re Viking Offshore (USA), Inc.*, 2008 WL 782449 at *3 (Bankr. S.D. Tex. Mar. 20, 2008) ("The relief requested by Debtors would reverse the burden, by making an advance determination that the proposed assurance was adequate. . . . the court lacks the power to reverse the statutory framework for provision of adequate assurance of payment."); see also *In re Pilgrim's Pride Corporation*, Case No. 08-45664 (DML)(Docket No. 447), United States Bankruptcy Court For the Northern District of Texas, *Memorandum Order* entered on January 5, 2009 (Denying debtors' motion seeking to establish adequate assurance of payment).

1. The Debtors' Proposed Escrow Account Does Not Provide the Utilities With Adequate Assurance of Payment.

The Escrow Account is an improper and otherwise unreliable form of adequate assurance of future payment for the following reasons:

- (i) This Court only has authority under Section 366(c)(3) to modify the amount of the Utilities' deposit requests. Neither the Debtors nor this

Court have the authority to establish the form of adequate assurance of payment, i.e., the creation of an escrow account instead of the cash deposits that the Utilities are requesting from the Debtors.

- (ii) The Debtors have failed to propose any procedures as to when and how utilities could obtain funds from the Escrow Account. The Utilities would presumably have to incur legal fees and costs to file and litigate an application for payment of post-petition administrative expenses, which would be for at least one month's service because the Utilities' bill the Debtors on a monthly basis.
- (iii) The Escrow Account may not continue to exist if the Debtors default on their use of post-petition financing.
- (iv) The Utilities bill monthly in arrears so any request by the Utilities upon the Escrow Account would be, at a minimum, for monthly bills. Accordingly, the Escrow Account that would merely contain the estimated cost of 50% of the Debtors' monthly utility charges would be undercapitalized from the outset. Furthermore, it is not clear if the Debtors correctly estimated their monthly post-petition utility expenses.

Accordingly, the Court should not approve the Escrow Account as adequate assurance to the Debtors' utility providers on a final basis because the Escrow Account is not the form of adequate assurance requested by the Utilities herein and because it is an otherwise unreliable form of adequate assurance.

2. The Utility Motion Should Be Denied As To the Utilities Because the Debtors Have Not Set Forth Any Basis For Modifying the Utilities' Requested Deposits.

In the Utility Motion, the Debtors fail to address why this Court should modify the Utilities' requests for the adequate assurance of payment deposits set forth above. Under Section

366(c)(3), the Debtors have the burden of proof as to whether the Utilities' adequate assurance of payment requests should be modified. See *In re Stagecoach Enterprises, Inc.*, 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979) (holding that the debtor, as the petitioning party at a Section 366 hearing, bears the burden of proof). However, the Debtors do not offer the Court with any evidence or factually supported documentation to explain how or why the amount of the Utilities' adequate assurance requests should be modified. Accordingly, the Court should deny the relief requested by Debtors in the Utility Motion and require the Debtors to comply with the requirements of Section 366(c) with respect to the Utilities. See *In re Lucre, Inc.*, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005) (holding that the right of a debtor or trustee to seek modification of a utility's deposit request "arises only after the adequate assurance payment has been agreed upon by the parties.").

B. THE COURT SHOULD ORDER THE DEBTORS TO PROVIDE THE ADEQUATE ASSURANCE OF PAYMENT REQUESTED BY THE UTILITIES PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE.

Section 366(c) was amended to overturn decisions such as *Virginia Electric and Power Company v. Caldor, Inc.*, 117 F.3d 646 (2d Cir. 1997), that held that an administrative expense, without more, could constitute adequate assurance of payment in certain cases. Section 366(c)(1)(A) specifically defines the forms that assurance of payment may take as:

- (i) a cash deposit;
- (ii) a letter of credit;
- (iii) a certificate of deposit;
- (iv) a surety bond;
- (v) a prepayment of utility consumption; or
- (vi) another form of security that is mutually agreed upon between the utility and the debtor or the trustee.

A determination of adequate assurance is within the court's discretion, and is made on a case-by-case basis, subject to the new requirements of Section 366(c). See *In re Utica Floor Maintenance, Inc.*, 25 B.R. 1010, 1016 (Bankr. N.D.N.Y. 1982); *In re Cunha*, 1 B.R. 330, 332-33 (Bankr. E.D. Va. 1979). 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 *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." *In re Begley*, 760 F.2d 46, 49 (3d Cir. 1985). Based on the Debtors' anticipated utility consumption, the minimum period of time the Debtors could receive service from the Utilities before termination of service for non-

payment of bills is approximately two (2) to three (3) months. Accordingly, the deposits requested by the Utilities are reasonable. See *In re Stagecoach*, 1 B.R. at 735-36 (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 the Matter of Robmac, Inc.*, 8 B.R. 1, 3-4 (Bankr. N.D. Ga. 1979).

As set forth above, the Utilities' adequate assurance requests are based on: (1) the Utilities' billing exposure created by their applicable Tariffs; and (2) amounts that the applicable public service commission, which are neutral third-party entities, permit the Utilities to request from their customers. Although the Utilities recognize that this Court is not bound by the Tariffs, the Tariffs are extremely relevant information of a determination made by an independent entity on the appropriate amount of adequate assurance that should be paid to the Utilities.

In contrast, the Debtors do not provide an objective or evidentiary basis for their proposed adequate assurance in the form of an escrow account supposedly containing two weeks of the Debtors' estimated monthly utility charges. Additionally, the Debtors' proposed two-week Escrow Account does not cover the Utilities' monthly invoices and is woefully inadequate to cover the exposure that the Utilities would face if the Debtors fail to timely pay for one month's

service and receive another month's service before a Utility could terminate service for the post-petition payment default. Additionally, it is unknown whether the Debtors will have sufficient funds to timely pay their post-petition utility charges. The bottom line is that if the Debtors want to continue to receive the Utilities' generous trade terms established by the Tariffs (i.e. bills issued monthly in arrears with due dates 15 to 30 days thereafter), they need to provide the Utilities with more security than a two-week deposit escrow. The Debtors are probably not asking their counsel to provide unsecured post-petition service, and likely are on reduced credit terms with most of their other post-petition vendors, so they should not be allowed to treat the Utilities so differently.

WHEREFORE, the Utilities respectfully request that this Court enter an order:

1. Denying the Utility Motion as to the Utilities;
2. Awarding the Utilities the post-petition adequate assurance of payment pursuant to Section 366 in the amount and form satisfactory to the Utilities; and

3. Providing such other and further relief as the Court
deems just and appropriate.

Dated: July 10, 2009 STEVENS & LEE, P.C.

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