

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)
) Chapter 11
)
AKORN, INC., <i>et al.</i> ,) Case No. 20-11177 (KBO)
)
Debtors.) (Jointly Administered)
)
) Re: Docket Nos. 10, 70
)
) Obj. Deadline: 6/8/20, 4:00 p.m.
) Hearing Date: 6/15/20, 2:30 p.m.
)

**OBJECTION OF COMMONWEALTH EDISON COMPANY, PSEG LONG ISLAND
AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY TO THE DEBTORS’
MOTION SEEKING ENTRY OF INTERIM AND FINAL ORDERS
(I) DETERMINING ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE
UTILITY SERVICES, (II) PROHIBITING UTILITY PROVIDERS FROM ALTERING,
REFUSING, OR DISCONTINUING UTILITY SERVICES,
(III) ESTABLISHING PROCEDURES FOR DETERMINING ADEQUATE
ASSURANCE OF PAYMENT, AND (IV) GRANTING RELATED RELIEF**

Commonwealth Edison Company (“ComEd”), PSEG Long Island (“PSEGLI”) and Public Service Electric and Gas Company (“PSE&G”) collectively, the “Utilities”), hereby object to the *Debtors’ Motion Seeking Entry of Interim and Final Orders (I) Determining Adequate Assurance of Payment For Future Utility Services, (II) Prohibiting Utility Providers From Altering, Refusing, or Discontinuing Utility Services, (III) Establishing Procedures For Determining Adequate Assurance of Payment, and (IV) Granting Related Relief* (the “Utility Motion”) (Docket No. 10), and set forth the following:



Introduction

The Debtors' Utility Motion improperly seek to shift the Debtors' obligations under Section 366(c)(3) from modifying the amount of the adequate assurance of payment requested by the Utilities under Section 366(c)(2) to setting the form and amount of the adequate assurance of payment acceptable to the Debtors. This Court should not permit the Debtors to shift their statutory burden.

The Debtors seek to have this Court approve their form of adequate assurance of payment, which is a bank account containing approximately \$285,000 that supposedly reflects an amount equal to one-half of the Debtors' monthly utility charges, based on the Debtors' average utility charges over the twelve-month period ending February 2020 (the "Bank Account"). The Court should reject the Debtors' proposed Bank Account because: (1) Outside of bankruptcy courts that ignore the plain language of Section 366, this "form" of security is not a recognized form of security by any public utility commission, (2) The Utilities bill the Debtors on a monthly basis and provide the Debtors with generous payment terms pursuant to applicable state law, tariffs or regulations, and a two-week account is not sufficient in amount or in form to provide the Utilities with adequate assurance of payment; (3) Section 366(c) of the Bankruptcy Code specifically defines the forms of adequate assurance of payment in Section 366(c)(1), none of which include a segregated bank account; and (4) Even if this Court were to improperly consider the Bank Account as a form of adequate assurance of payment for the Utilities, the Court should reject it as an insufficient form of adequate assurance of payment for the reasons set forth in Section A.1. of this Objection.

The Utilities are seeking the following two-month cash deposits from the Debtors, which are amounts that they are authorized to obtain pursuant to applicable state law: (a) ComEd - \$26,655; (b) PSEGLI - \$130,052; and (c) PSE&G - \$41,354. Based on all the foregoing, this Court should deny the Utility Motion as to the Utilities because the amounts of the Utilities' post-petition deposit requests are reasonable under the circumstances and should not be modified.

Facts

Procedural Facts

1. On May 20, 2020 (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' chapter 11 bankruptcy cases are being jointly administered.

The Utility Motion

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

4. Because the Utilities were not properly or timely served with the Utility Motion and the Debtors never attempted to contact the Utilities regarding their adequate assurance requests prior to the filing of the Utility Motion, the Utilities 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 May 22, 2020, 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" to the Utilities.

5. On May 22, 2020, the Court entered the *Interim Order (I) Determining Adequate*

Assurance of Payment For Future Utility Services, (II) Prohibiting Utility Providers From Altering, Refusing, or Discontinuing Utility Services, (III) Establishing Procedures For Determining Adequate Assurance of Payment, and (IV) Granting Related Relief (the “Interim Utility Order”)(Docket No. 70). The Interim Utility Order set (i) an objection deadline of June 8, 2020 and (ii) the final hearing on the Utility Motion to take place on June 15, 2020 at 2:30 p.m.

6. Through the Utility Motion, the Debtors seek to avoid the applicable legal standards under Sections 366(c)(2) and (3) by seeking Court approval for their own form of adequate assurance of payment, which is the Bank Account containing approximately \$285,000 that supposedly reflects an amount equal to one-half of the Debtors’ monthly utility charges, based on the Debtors’ average utility charges over the twelve-month period ending February 2020. Utility Motion at ¶ 11.

7. The proposed Bank Account is not acceptable to the Utilities and should not be considered relevant by this Court because Sections 366(c)(2) and (3) do not allow the Debtors to establish the form or amount of adequate assurance of payment. Under Sections 366(c)(2) and (3), this Court and the Debtors are limited to modifying, if at all, the amount of the security sought by the Utilities under Section 366(c)(2).

8. The Debtors seek Court approval that the remaining monies contained in the Bank Account shall be returned to the Debtors by no later than five (5) business days following the earlier of the date upon which (i) a Chapter 11 plan becomes effective, or (ii) the Debtors provide notice to a utility provider that services provided to the Debtors by such utility providers will no longer be need or will be reduced. Utility Motion at ¶ 13.k. As the Utilities bill the Debtors in arrears, and the Utilities would likely provide post-petition utility goods/services to the Debtors

the effective date of a plan, any monies contained in the Bank Account on behalf of the Utilities should not be returned to the Debtors until the Debtors confirm that they have paid in full their post-petition utility expenses owed to the Utilities.

9. The Utility Motion does not address why the Bank Account would be underfunded with only two-weeks of utility charges when the Debtors know that the Utilities are required by applicable state laws, regulations or tariffs to bill the Debtors monthly. Moreover, presumably the Debtors want the Utilities to continue to bill them monthly and provide them with the same generous payment terms that they received prepetition. Accordingly, if the Bank Account is relevant, which the Utilities dispute, the Debtors need to explain: (A) why they are only proposing to deposit two-week amounts into the Bank Account for the Utilities; and (B) how such an insufficient amount could even begin to constitute adequate assurance of payment for the Utilities' monthly bills.

10. Furthermore, the Utility Motion does not address why this Court should consider modifying, if at all, the amounts of the Utilities' adequate assurance requests pursuant to Section 366(c)(2). Rather, without providing any specifics, the Utility Motion merely states that the Bank Account, "in conjunction with the Debtors' ability to pay for future Utility Services in accordance with prepetition practice," constitutes sufficient adequate assurance of payment. Utility Motion at ¶ 12.

The Debtors' Financing Motion

11. On May 21, 2020, the Debtors filed the *Debtors' Motion Seeking Entry of Interim and Final Orders (I) Authorizing the Debtors To (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims,*

(III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief (the “Financing Motion”)(Docket No. 14).

12. Through the Financing Motion, the Debtors seek approval of a \$30 million DIP Facility. Financing Motion at ¶ 2.

13. The material terms of the DIP Loans have the following milestones: (i) no later than 30 days following the Petition Date – entry of Bidding Procedures Order; (ii) no later than 48 days following the Petition Date – entry of order approving Chapter 11 Plan Disclosure Statement; (iii) no later than 75 days following the Petition Date – deadline for Sale Transaction bids; (iv) no later than 82 days following the Petition Date – auction, if applicable; (v) no later than 89 days following the Petition Date – entry of order approving Sale Transaction; (vi) no later than 91 days following the Petition Date – entry of order confirming Chapter 11 Plan; and (vii) no later than 101 days following the Petition Date – effective date of the Chapter 11 Plan shall have occurred. Financing Motion at pages 17-18.

14. On May 22, 2020, the Court entered the *Interim Order (I) Authorizing the Debtors (A) To Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection To Prepetition Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* (the “Interim Financing Order”)(Docket No. 65).

15. The Interim Financing Order approved a carve-out for the payment of fees of the Debtors’ professionals incurred prior to the delivery of a Carve Out Trigger Notice, plus an additional \$3 million incurred subsequent to the delivery of a Trigger Notice. (the “Carve-Out”). Interim Financing Order at pages 25-26.

16. Attached as Exhibit “A” to the Interim Financing Order is a 13-week budget

through the week ending August 16, 2020 (the “Budget”). It is unclear whether the Debtors have budgeted sufficient sums for the timely payment of their post-petition utility expenses.

The Debtors’ Critical Vendor Motion

17. On May 21, 2020, the Debtors filed the *Debtors’ Motion Seeking Entry of Interim and Final Orders (I) Authorizing Debtors To Pay Prepetition Claims of Certain Critical Vendors, Foreign Vendors, Import/Export Claimants, 503(b)(9) Claimants, and Lien Claimants, (II) Granting Administrative Expense Priority To All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief* (the “Critical Vendor Motion”) (Docket No. 12). Through the Critical Vendor Motion, the Debtors sought authority to pay the prepetition claims of certain supposed critical vendors and foreign vendors in an aggregate amount of up to \$8 million on an interim basis and \$14 million on a final basis. Critical Vendor Motion at ¶ 1. Although the Debtors’ state that utility services are essential for the Debtors ongoing operations and the overall success of their Chapter 11 cases (Utility Motion at ¶ 8), the Debtors do not consider their utility providers to be Critical Vendors for purposes of the Critical Vendor Motion.

18. On May 22, 2020, the Court entered the *Interim Order (I) Authorizing Debtors To Pay Prepetition Claims of Certain Critical Vendors, Foreign Vendors, Import/Export Claimants, 503(b)(9) Claimants, and Lien Claimants, (II) Granting Administrative Expense Priority To All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief* (the “Interim Critical Vendor Order”) (Docket No. 67). The Interim Critical Vendor Order authorized the Debtors to pay up to \$8 million of critical vendor and foreign vendor claims on an interim basis. Interim Critical Vendor Order at ¶ 3.

The Sale Motion

19. On the Petition Date, the Debtors filed the *Debtors' Motion Seeking Entry of An Order (A) Authorizing and Approving Bidding Procedures, (B) Scheduling An Auction and a Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Establishing Notice and Procedures For the Assumption and Assignment of Certain Executory Contracts and Leases, and (E) Granting Related Relief* (the "Sale Motion")(Docket No. 18).

20. The Ad Hoc Group and the Debtors reached an agreement that culminated in the Ad Hoc Group submitting a stalking horse credit bid to serve as the floor for further marketing of the Debtors' assets. Sale Motion at ¶ 15.

21. Pursuant to the Bidding Procedures, the Debtors will solicit any higher or otherwise better proposals according to the following proposed schedule, subject to Court availability: (i) August 3, 2020 – bid deadline; (ii) August 10, 2020 – auction; (iii) August 15, 2020 – contract objection and sale objection deadline; and (iv) August 20, 2020 – sale hearing. Sale Motion at ¶ 17.

Facts Concerning the Utilities

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

23. 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 20 to 30 days to pay the applicable bill. If the Debtors fail to timely pay the bill, a past due notice is issued and, in most instances, a late fee may be

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

24. In order to avoid the need to bring witnesses and have lengthy testimony regarding the Utilities regulated billing cycles, the Utilities request that this Court, pursuant to Rule 201 of the Federal Rules of Evidence, 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' web site links to their tariffs and/or state laws, regulations and/or ordinances are as follows:

ComEd:

Tariffs: <https://www.comed.com/customer-service/rates-pricing/rates-information/Pages/current-rates.aspx>

Regulations:

<http://www.ilga.gov/commission/jcar/admincode/083/08300280sections.html>

PSEGLI: <https://www.psegliny.com/page.cfm/AboutUs/ServiceRates>

PSE&G:

Electric: <https://nj.pseg.com/aboutpseg/regulatorypage/electrictariffs>

Gas: <https://nj.pseg.com/aboutpseg/regulatorypage/gastariffs>

25. Subject to a reservation of the Utilities' right to supplement their post-petition deposit requests if additional accounts belonging to the Debtors are subsequently identified or the Debtors return to the Utilities for commodity supply, the Utilities' post-petition deposit requests are as follows:

<u>Utility</u>	<u>No. of Accts.</u>	<u>Est. Prepet. Debt</u>	<u>Dep. Request</u>
ComEd	17	\$10,968.19	\$26,655 (2-month)
PSEGLI	12	\$85,117.60	\$130,052 (2-month)
PSE&G	10	\$114,756.10	\$41,354 (2-month)

Discussion

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

Sections 366(c)(2) and (3) of the Bankruptcy Code provide:

(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).

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. *In re Lucre*, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005). 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 under Section 366(c)(2).

In this case, the Debtors filed the Utility Motion to improperly shift the focus of their obligations under Section 366(c)(3) from modifying the amount of the adequate assurance of payment requested under Section 366(c)(2) to setting the form and amount of the 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.

1. The Debtors' Proposed Bank Account Is Not Relevant And Even If It Is Considered, It Is Unsatisfactory Because It Does Not Provide the Utilities With Adequate Assurance of Payment.

This Court should not even consider the Bank Account as a form of adequate assurance of payment because: (1) It is not relevant because Section 366(c)(3) provides that a debtor can only modify "the amount of an assurance of payment under paragraph (2)"; and (2) The Bank Account is not a form of adequate assurance of payment recognized by Section 366(c)(1)(A). Moreover, even if the Court were to consider the Bank Account, the Bank Account is an improper and otherwise unreliable form of adequate assurance of future payment for the following reasons:

1. Unlike the statutory approved forms of adequate assurance of payment, the Bank Account is not something held by the Utilities. Accordingly, the Utilities have no control over how long the Bank Account will remain in place.

2. It is underfunded from the outset because the Utilities issue monthly bills and by the time a default notice is issued the Debtors will have received approximately 60 days of commodity or service.
3. The Debtors fail to state whether draws from the Bank Account would be limited to two-week amounts and what amounts, if any, are in the Bank Account for each Utility to draw upon.
4. The Debtors are not required to replenish the Bank Account following pay-outs.
5. The Debtors should not reduce the amount of Bank Account on account of the termination of utility services to a Debtor account until the Debtors confirm that all post-petition charges on a closed account are paid in full.

Accordingly, the Court should not approve the Bank Account as adequate assurance as to the Utilities because the Bank Account is: (a) not the **form** of adequate assurance requested by the Utilities; (b) not a form recognized by Section 366(c)(1)(A); and (c) 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' Request Deposits.

In the Utility Motion, the Debtors fail to address why this Court should modify the amounts of the Utilities' requests for adequate assurance of payment. Under Section 366(c)(3), the Debtors have the burden of proof as to whether the amounts of 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 provide the Court with any evidence or factually supported documentation to explain why the amounts 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.

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 follows:

- (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.

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).

The Utilities bill the Debtors on a monthly basis for the charges already incurred by the Debtors in the prior month. The Utilities then provide the Debtors with approximately 10 to 30 days to pay a bill before a late fee may be charged, and also provide written notice before utility service can be terminated for non-payment pursuant to applicable state laws and/or tariffs. Based on the foregoing state-mandated billing cycles, the minimum period of time the Debtors could receive service from the Utilities before termination of service for non-payment of post-petition bills is approximately two (2) months. Moreover, even if the Debtors timely pay their post-petition utility bills, the Utilities still have potential exposure of approximately 45 to 60 days based on their billing cycles. Furthermore, the amounts of the Utilities' deposit requests are the amounts that the applicable public service commission, which is a neutral third-party entity, permit the Utilities to request from their customers. The Utilities are not taking the position that the deposits that they are entitled to obtain under applicable state law are binding on this Court, but, instead are introducing those amounts as evidence of amounts that their regulatory entities permit the Utilities to request from their customers.

In contrast, the Debtors failed to address in the Utility Motion why this Court should modify, if at all, the amounts of the Utilities' adequate assurance of payment requests, which is the Debtors' statutory burden. Instead, the Debtors merely asked this Court to approve the Bank Account that contains little to no amounts for the Utilities. Moreover, the Debtors do not provide an objective, much less an evidentiary, basis for their proposed adequate assurance in the form of the Bank Account. Furthermore, in contrast to the improper treatment proposed to the Debtors' Utilities, the Debtors have made certain that supposed "critical vendors" and post-petition professionals are favored creditors over the Utilities by ensuring (i) the payment to

Critical and Foreign Vendors of up to \$8 million on an interim basis and \$14 million on a final basis, and that (ii) the post-petition bills/expenses of Debtors' counsel are paid, even in the event of a post-petition default on the use of DIP financing and cash collateral, by seeking a \$3 million professionals carve-out for the payment of their fees/expenses after a default and a guarantee of payment for fees incurred up to a default. Therefore, despite the fact that the Utilities continue to provide the Debtors with crucial post-petition utility services on the same generous terms that were provided prepetition, with the possibility of non-payment, the Debtors have deprived the Utilities of any adequate assurance of payment for which they are entitled to for continuing to provide the Debtors with post-petition utility goods/services.

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 payments pursuant to Section 366 in the amount and form satisfactory to the Utilities, which is the form and amount requested herein; and
3. Providing such other and further relief as the Court deems just and appropriate.

Dated: June 2, 2020

McCARTER & ENGLISH, LLP

/s/ William F. Taylor, Jr. _____

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CERTIFICATE OF SERVICE

I hereby certify that in addition to the notice and service provided through the Court's ECF system, on June 2, 2020, I caused a true and correct copy of the *Objection of Commonwealth Edison Company, PSEG Long Island and Public Service Electric and Gas Company to the Debtors' Motion Seeking Entry of Interim and Final Orders (I) Determining Adequate Assurance of Payment for Future Utility Services, (II) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Utility Services, (III) Establishing Procedures for Determining Adequate Assurance of Payment, and (IV) Granting Related Relief* to be served by email on:

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