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HONORABLE FRANK L. KURTZ

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

IN RE: ASTRIA HEALTH, et al. Debtors and Debtors in Possession.[1]	Lead Case No. 19-01189-11 (Jointly Administered) **DEBTORS' REPLY TO RESPONSE OF PACIFICORP, *d/b/a* PACIFIC POWER & LIGHT, TO DEBTOR'S MOTION FOR ORDER DETERMINING ADEQUATE ASSURANCE OF PROPOSED PAYMENT TERMS; DECLARATION OF JOHN M. GALLAGHER**

[1] The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center-Toppenish (19-01190-11), SHC Medical Center-Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-19-01200-11).

Astria Health ("Astria") and the above-referenced affiliated debtors (collectively, the "Debtors"), the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy cases (collectively, the "Chapter 11 Cases"), hereby reply (the "Reply") to the *Response Of PacifiCorp, d/b/a Pacific Power & Light, To Debtor's Motion For Order Determining Adequate Assurance Of Proposed Payment Terms* [Docket No. 478] (the "Response"). In support hereof, the Debtors submit the attached Declaration of John M. Gallagher (the "Gallagher Declaration").

I.

INTRODUCTION

The Debtors filed a motion [Docket No. 19] (the "Utilities Motion"),[2] common in operating chapter 11 cases, to establish guidelines for the Debtors to satisfy the obligations of § 366 of the United States Bankruptcy Code (the "Bankruptcy Code") with regard to utility contracts.[3] One utility company, PacifiCorp *d/b/a* Pacific Power & Light ("Pacific Power"), objected and demanded significantly more of a deposit than granted by the order granting the Utility Motion [Docket No. 84] (the "Utilities Order"). As required by the Utilities Order, the Debtors filed a motion to have the

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Utilities Motion.

[3] All references to "§" or "section" herein are to sections of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, as amended, unless otherwise noted.

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Court decide what is an appropriate deposit for Pacific Power [Docket No. 412] (the "Determination Motion"), with the Declaration of Cary Rowan (the "Rowan Declaration") attached thereto. In the Determination Motion, the Debtors proposed: (a) the Debtors' previous payment of $71,868.27 (the "Deposit") to Pacific Power plus the additional proposed adequate assurance deposit of $71,868.27, for a total of $143,736.54, which is equivalent to one (1) month's average utility services from Pacific Power (together with the previous Deposit, the "New Deposit"), combined with (b) the ability of Pacific Power, pursuant to the Utilities Order, to obtain an expedited hearing regarding further adequate assurance if the Debtors fail to cure a postpetition payment default within twenty (20) days after written notice of such default.

In response to this fair and market-appropriate compromise, Pacific Power insists on a deposit totaling $206,250.00[4] and a cure period of no more than five (5) days. Pacific Power's demands are unsupported, unreasonable, and, if granted, would unduly burden the Debtors' estates and jeopardize patient care. Unable to rebut the Debtors' proof, Pacific Power raises two basic arguments that are

[4] Dividing $275,000.00 (the initial dollar amount Pacific Power requested) by eight (8) weeks, and then multiplying by six (6) weeks, the Debtors assume $206,250.00 (*i.e.*, ($275,000.00 / 8) x 6 = $206,250.00) is the exact final dollar amount requested. *See* Response at 5, lines 24-25; at 16, lines 8-10.

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fundamentally flawed and that do not otherwise justify the relief it seeks.

First, Pacific Powers argues that the relief previously granted by the Court does not comply with the timing, form, or amount requirements under § 366. This argument is without merit as demonstrated by the authority provided in the Utilities Motion and the Determination Motion, and as further addressed herein.

Second, Pacific Power asserts without support that its demand is "reasonable." To the contrary, neither the law nor the facts of this case warrant such draconian relief, particularly in light of the fact that the Debtors have obtained significant postpetition financing and have remained current on their postpetition obligations to Pacific Power, other Utility Companies, and the Debtors' creditor body on the whole.

II.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

III.

STATEMENT OF FACTS

3. On May 6, 2019, the Debtors each filed a voluntary petition for relief under the Bankruptcy Code. These Chapter 11 Cases are being jointly administered. The Debtors are operating their businesses as debtors in possession pursuant to

§§ 1107 and 1108.

4. As part of the First Day Motions, the Debtors filed the Utilities Motion [Docket No. 19], which the Court granted in the Utilities Order [Docket No. 84].

5. The Debtors remitted $154,111.79 in deposits to the Utility Companies, including the Deposit of $71,868.27 to Pacific Power. Rowan Declaration at ¶ 4.

6. On May 24, 2019, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors in these Chapter 11 Cases.

7. Pacific Power contacted the Debtors with their demand. Before filing the Determination Motion [Docket No. 412] as required by the Utilities Order, the Debtors attempted to reach a reasonable agreement with Pacific Power but were unable to reach an amicable resolution out of court. Rowan Declaration at ¶ 10.

8. On August 13, 2019, Pacific Power filed its Response and declaration in support thereof [Docket No. 479] (the "Geertsen Declaration.").

IV.

ARGUMENT

A. Section 366 Grants this Court Authority to Limit The Adequate Assurance.

Pacific Power mistakenly argues this Court exceeded the scope of its authority—in direct contravention of § 366(c) and Washington law—because the Court entered its Utilities Order (a) *before* the Debtor and Pacific Power had the opportunity to negotiate, (b) *before* the Debtor paid Pacific Power's demand, and

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(c) directing both the *form* and *amount* of adequate assurance. Response at 9, lines 1-20. However, "both the structure of the statute [§ 366(c)] and later cases have dismissed such a reading." *In re Cont'l Common, Inc.*, No. 3:10-CV-2591-O, 2011 WL 13238210, at *6 (N.D. Tex. Feb. 14, 2011).

Undeniably, "Congress cannot have intended to place in peril the entire reorganization process by prohibiting courts from fashioning reasonable procedures to implement the protections afforded under § 366 of the Bankruptcy Code." *In re Circuit City Stores, Inc.*, No. 08-35653, 2009 WL 484553, at *3 (Bankr. E.D. Va. Jan. 14, 2009) (citing H.R. REP. No. 595, 95th Cong., 1st Sess. 350 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6306; *In re Syroco, Inc.*, 374 B.R. 60 (Bankr. D.P.R. 2007)). Indeed, courts have outright rejected the analysis suggested by Pacific Power. For example, the Central District of California, in a well-reasoned and thoughtful opinion, held that

> In the absence of controlling authority, the Court finds more persuasive the cases permitting court intervention prior to a utility provider receiving what it demands. "In addition to giving effect to the plain language of the statute," this interpretation best balances the protections afforded debtors and utility providers by "provid[ing] substantial protection to a utility while at the same time providing an avenue of relief for debtors, who believe a utility's request is unreasonable or unworkable." *In re Bedford Town Condo.*, 427 B.R. at 384; *see also id.* at 386 (explaining that the court's order regarding adequate assurance of payment was issued "without prejudice to any party's right to seek modification in the event circumstances dictate[d]" subsequent modification would be appropriate).

In re Crystal Cathedral, 454 B.R. 124, 130 (C.D. Cal. 2011); *see also In re Great*

Atl. & Pac. Tea Co., Inc., No. 11-CV-1338 CS, 2011 WL 5546954, at *3-*4 (S.D.N.Y. Nov. 14, 2011) (rejecting *In re Lucre* 333 B.R. 151 (Bankr. W.D.Mich. 2005), the case relied upon by the utility company, because the statute "does not contemplate that Section 366(c)(3)(A) comes into play only after the utility provider has made a demand for assurances, the debtor has met such demand, and the debtor files a motion for modification."); *Bedford Town Condo. v. Wash. Suburban Sanitary Comm'n* (*In re Bedford Town Condo.*), 427 B.R. 380, 383 (Bankr. D. Md. 2010) (rejecting *In re Lucre* as making a "conclusory statement without specifically addressing the statutory language of § 366" because "neither § 366(c)(2) nor (3)(A) require a debtor to pay the adequate assurance demanded by a utility before the Court can modify that amount."); *In re Syroco,* 374 B.R. at 61 (rejecting the argument that the court cannot set a deposit until after the debtor agrees with the utility company as to some deposit because such a procedural timeline would create an "absurd result").

Furthermore, the Debtors are not required to pay "a demand that is *unilaterally* satisfactory to the utility company." *In re Circuit City Stores, Inc.*, 2009 WL 484553, at *5 (citing the plain language of § 366(c)(2), which allows court intervention) (emphasis added); *In re Great Atl. & Pac. Tea Co., Inc.*, 2011 WL 5546954, at *4 ("Section 366(c) does not intimate that only the utility provider [] is afforded the opportunity to set the form and amount of adequate assurance."). Despite § 366(c)(3)(B), Pacific Power incorrectly assumes adequate assurance is whatever *it*

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determines is "satisfactory," so long as Pacific Power makes its demand without *bad* faith. Response at 7, lines 6-8; at 9, lines 1-20; at 11, lines 5-11; and at 16, lines 6-10. Guided by its misunderstanding, Pacific Power has arbitrarily determined adequate assurance is nothing less than a total deposit amount of $206,250.00 and a cure period of no more than five (5) days. Response at 14, lines 1-4; at 15, lines 18-22 ("PacifiCorp will offer testimony at the hearing on the Determination Motion that it cannot agree to anything less than six weeks' cash deposit plus the ability to seek an expedited hearing within five (5) days of a post-petition payment default by Debtors"). *But see In re Cont'l Common, Inc.*, 2011 WL 13238210, at *6 (rejecting the utility's risk exposure argument because such argument institutes the impermissible "guarantee of payment" burden on the debtor without looking at the facts of the debtor's postpetition situation).

Both of these requests are excessive and unncessary. The latter request—that the Debtors have only five (5) days to seek a hearing—ignores that the Debtors operate three (3) acute care hospitals. If the Court allows Pacific Power to seek to terminate servicing the facilities on five (5) days' notice, it most certainly would be detrimental to patient care. Gallagher Declaration at ¶ 6. Moreover, notice on a Friday might result in the Debtors having only two (2) business days to file papers and seek a hearing before this Court. Gallagher Declaration at ¶ 6. This is not only unreasonable, but unsafe. Gallagher Declaration at ¶ 6.

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The amount of the deposit sought by Pacific Power is also unreasonable. The issue is to provide adequate assurance, not an absolute guaranty, as discussed below. Here, the Debtors monthly operating report shows that the Debtors have more than $15 million on hand, which, when added to the monthly cash intake, provides enough cash to cover administrative expenses which are incurred by the Debtors over a two-month period. Gallagher Declaration at ¶ 5.

At bottom, § 366 protects *both* Pacific Power *and* the Debtors, and specifically contemplates court authority to determine what constitutes "adequate assurance." *See* H.R. REP. No. 595, 95th Cong., 1st Sess. at 350; *In re Gospel Rescue Ministries of Washington, D.C. Inc.*, No. 12-00405, 2012 WL 2343698, at *2 (Bankr. D.D.C. June 20, 2012) (finding authority under § 366(c)(3) to decree "form of adequate assurance of payment different than what the utility would deem satisfactory"). As demonstrated by the cases cited above, the Court and the Debtors acted within the bounds of § 366 regarding timing, and the Court may properly exercise its discretion regarding the form and amount of adequate assurance awarded.

B. Pacific Power's Demand Impermissibly Seeks Absolute Guarantee.

Pacific Power's demand is patently unreasonable. Pacific Power is only "entitled to receive adequate assurance of payment, which is not to be confused with actual payment or an absolute guarantee of payment." *In re Crystal Cathedral Ministries*, 454 B.R. at 131; *see also Va. Power & Elec. Co. v. Caldor*, 117 F.3d 646,

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650 (2d Cir. 1997); *In re Circuit City Stores, Inc.*, 2009 WL 484553, at *4; *In re Cont'l Common, Inc.*, 2011 WL 13238210, at *5; *In re Anchor Glass Container Corp.*, 342 B.R. 872, 875 (Bankr. M.D. Fla. 2005); *Steinebach v. Tucson Elec. Power Co.* (*In re Steinebach*), 303 B.R. 634, 641 (Bankr. D. Ariz. 2004); *In re Adelphia Bus. Solutions*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002); *In re Santa Clara Circuits W., Inc.*, 27 B.R. 680, 685 (Bankr. D. Utah. 1982); *In re George C. Frye Co.*, 7 B.R. 856 (Bankr. D. Me. 1980). In determining whether the Debtors have met their burden, the Court "should consider the debtor's payment history, the debtor's net worth, and the debtor's present and future ability to pay post-petition obligations." *In re Best Prod. Co.*, 203 B.R. 51, 54 (Bankr. E.D. Va. 1996); s*ee also Interim Order*, *In re Kennewick Pub. Hosp. Dist.*, Case No. 17-2025-FPC9 (Docket No. 81) (Bankr. E.D. Wash. July 18, 2017) (finding debtor's "ability and authority to pay all utility obligations arising postpetition [] constitutes adequate assurance to the Utility Providers within the meaning of Bankruptcy Code section 366").

Here, the Debtors have met their burden of producing facts to support their contention that they have provided adequate assurance at a lesser amount than that demanded by Pacific Power. *See In re Great Atl. & Pac. Tea Co., Inc.*, 2011 WL 5546954, at *4 (finding the debtors met their burden by setting forth facts and arguments supporting their case); *In re Adelphia Bus. Solutions*, 280 B.R. at 82-83, 86 n.127 (holding adequate assurance of payment is a fact-driven analysis based on

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the totality of the facts and circumstances of the case). Specifically, the Debtors have already paid Pacific Power the Deposit amount of $71,868.27, have timely paid all postpetition debts as they come due, and currently hold approximately $15 million cash on hand to continue paying postpetition debts as they come due. Rowan Declaration at ¶ 8. Furthermore, testimony at the final hearing on DIP Financing for the Debtors demonstrated that the value of the Debtors' assets was likely more than $100 million, far exceeding the amount of secured debt, thereby demonstrating that holders of administrative expense claims had some equity cushion on which to rely. Gallagher Declaration at ¶ 5.

Ignoring these facts, Pacific Power requests the Court focus on the Debtors' outstanding prepetition obligations to Pacific Power (Response at 3, ¶¶ 3-5); however, any such facts cannot be considered in determining what constitutes adequate assurance (11 U.S.C. § 366(c)(3)(B)(ii)). Rather, in light of the Debtors' above-mentioned postpetition financial status, the actual risk of nonpayment to all Utility Companies—including Pacific Power—is slight. Thus, granting Pacific Power's demands would impermissibly require the Debtors to provide an absolute guarantee of payment.

Nevertheless, the Debtors are willing and able to provide the New Deposit. However, because the success of these Chapter 11 Cases would be irreparably harmed if Pacific Power cuts services, it is unreasonable to require the postpetition

default cure period to be reduced from twenty (20) days. Five (5) days' notice is utterly insufficient to ensure patient care. Gallagher Declaration at ¶¶ 5-6 .

Notwithstanding the foregoing, Pacific Power essentially argues its demand is reasonable because it neither exceeds the maximum deposit amount allowed under Washington law nor "threatens the going-concern of the [Debtors'] business." Response at 12, lines 21-22; at 14, lines 5-11; Geertsen Declaration, Exhibit A at 2 ("The deposit shall not exceed two-twelfths of [Debtors'] estimate of annual billings"). To the extent Pacific Power argues that Washington law trumps the Bankruptcy Code protections for the Debtors, Pacific Power's arguments fails outright. *In re Great Atl. & Pac. Tea Co., Inc.*, 2011 WL 5546954, at *5 (affirming decision rejecting evidence and arguments concerning the governing authority of state tariffs on the amount of the cash deposit); *In re Steinebach*, 303 B.R. at 644 ("[T]he determination of what constitutes adequate assurance is a federal bankruptcy law question. While the state regulatory scheme may inform that determination, state law does not control."); *In re Adelphia Bus. Solutions*, 280 B.R. at 80 ("[B]ankruptcy courts are not bound by local or state tariff regulations."); *Begley v. Phila. Elec. Co.* (*In re Begley*), 41 B.R. 402, 406 (E.D. Pa.1984) ("[A] state regulation prescribing a particular security deposit does not bind the bankruptcy court."), *aff'd*, 760 F.2d 46 (3d Cir. 1985).

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V.

CONCLUSION

WHEREFORE, for all the foregoing reasons and such additional reasons as may be advanced at or prior to the hearing regarding this Reply, the Determination Motion, and the Utilities Motion, the Debtors respectfully request that the Court enter an order (i) granting the relief as requested herein and (ii) providing the Debtors with all further relief as is just and equitable.

Dated: August 29, 2019

/s/ Sam J. Alberts
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Declaration of John M. Gallagher

I, John M. Gallagher, submit this Declaration in support of the reply (the "Reply") to the *Response Of PacifiCorp,* d/b/a *Pacific Power & Light, To Debtor's Motion For Order Determining Adequate Assurance Of Proposed Payment Terms* [Docket No. 478] (the "Response"), and in support of the *Debtors' Motion For Order Determining Adequate Assurance Of Proposed Payment Terms To Pacificorp* d/b/a *Pacific Power & Light* [Docket No. 412] (the "Determination Motion"), and hereby state and declare as follows:

1. I am the President and Chief Executive Officer ("CEO") of Astria Health ("Astria"). I am employed by AHM, Inc. ("AHM"), a nondebtor entity that provides management services to Astria and its affiliated debtors and debtors in possession (collectively, the "Debtors") under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq*. (the "Bankruptcy Code"),[5] in these chapter 11 cases (the "Chapter 11 Cases").

2. The statements herein are based upon my personal knowledge of the facts and information gathered by me in my capacity as CEO for Astria.

3. The Debtors operate as a nonprofit health care system in the state of Washington employing more than 1,500 staff statewide, with 315 licensed beds, three active emergency rooms, and a host of medical specialties. As life-saving medical

[5] All reference to § herein are to sections of the Bankruptcy Code.

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service providers, the Debtors rely on Pacific Power to provide service and without the continual flow of vital services of Pacific Power, the mission of the Debtors' business would unravel, irreparably harming the Debtors and their patients (the "Patients") who seek medical care in the Hospitals, medical center, and clinics operated by the Debtors.

4. As mentioned at the final hearing on DIP Financing for the Debtors, the value of the Debtors' assets was likely more than $100 million, far exceeding the amount of secured debt, thereby demonstrating that holders of administrative expense claims had some equity cushion on which to rely. That, combined with the approximately $15 million cash on hand, demonstrates the Debtors have the ability to pay all postpetition obligations in a timely fashion, and certainly provides enough cash to cover administrative expenses which are incurred by the Debtors over a two-month period. However, in the extremely unlikely event that the Debtors are unable to timely pay Pacific Power for postpetition services, and Pacific Power chooses to seek termination of such services, five (5) days would be entirely too short of a period of time to seek relief from the court. Any interruption, however brief, to utility services from Pacific Power to the Debtors' business will result in a serious disruption of the Debtors' business operations and dramatically affect Patient care.

5. If the Court allows Pacific Power to seek to terminate servicing the facilities on five (5) days' notice, it most certainly would be detrimental to Patient

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care. Moreover, notice on a Friday might result in the Debtors having only two (2) business days to file papers and seek a hearing before this Court. This is not only unreasonable, but unsafe.

I declare under penalty of perjury that, to the best of my knowledge and after reasonable inquiry, the foregoing is true and correct.

Dated: August 29, 2019

ASTRIA HEALTH

By: _____

John M. Gallagher

Chief Executive Officer

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