

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)
) Chapter 11
) Eastern Outfitters,) Case No. 17-10243 (LSS)
) LLC, et al.,)
) (Jointly Administered)
) Debtors.)
) Re: Docket Nos. 18, 54
))
) Obj. Deadline: 2/27/17, 4:00 p.m.
) Hearing Date: 3/6/17, 2:00 p.m.
)

OBJECTION OF CERTAIN UTILITY COMPANIES TO THE DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) APPROVING THE DEBTORS' PROPOSED ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE UTILITY SERVICES, (II) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING, OR DISCONTINUING SERVICES, (III) APPROVING THE DEBTORS' PROPOSED PROCEDURES FOR RESOLVING ADEQUATE ASSURANCE REQUESTS, AND (IV) GRANTING RELATED RELIEF

Baltimore Gas and Electric Company ("BGE"), The Connecticut Light and Power Company ("CL&P"), New York State Electric and Gas Corporation ("NYSEG"), PECO Energy Company ("PECO"), Public Service Company of New Hampshire ("PSNH"), Public Service Electric and Gas Company ("PSE&G"), Rochester Gas & Electric Corporation ("RG&E"), Yankee Gas Services Company ("Yankee Gas"), Boston Gas Company ("BGC"), Colonial Gas Company ("Colonial Gas"), KeySpan Gas East Corporation ("KGE"), Massachusetts Electric Company ("MEC"), Narragansett Electric Company ("NEC") and Niagara Mohawk Power Corporation ("NIMO") (collectively, the "Utilities"), by counsel, hereby object to the *Debtors' Motion For Entry of Interim and Final Orders (I) Approving the Debtors' Proposed Adequate*



Assurance of Payment For Future Utility Services, (II) Prohibiting Utility Companies From Altering, Refusing, or Discontinuing Services, (III) Approving the Debtors' Proposed Procedures For Resolving Adequate Assurance Requests, and (IV) Granting Related Relief (the "Utility Motion"), and set forth the following:

Introduction

The Debtors' Utility Motion improperly seeks 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 \$303,481.22 that supposedly reflects approximately two-weeks of the Debtors' estimated utility charges calculated over the past three months (the "Bank Account"). 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.

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 following reasons:

1. Unlike all of the identified and permissible forms of adequate assurance of payment listed in Section 366(c)(1)(A), the Bank Account is not something held by the Utilities, so the Utilities do not have any control over when the Bank Account will be terminated;
2. All funds contained in the Bank Account may remain subject to prepetition liens in favor of the Debtors' secured lenders (this is in complete contrast to the \$300,000 Carve-Out received by the Debtors' professionals in the DIP financing pleadings, which remains in place even if there is an event of default);
3. In order to access the Bank Account, the Utilities have to incur the expense to draft, file and serve a default pleading with the Court and possibly litigate the demand if the Debtors refuse to honor a disbursement request;
4. It is underfunded from the outset because the Utilities issue monthly bills;
5. The Debtors are not required to replenish the Bank Account following pay-outs;
6. The Debtors fail to state whether draws from the Bank Account would be limited to two-week amounts; and

7. 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.

The Utilities are seeking the following cash deposits from the Debtors, which are amounts that they are authorized to obtain pursuant to applicable state law or contracts: (a) BGE - \$3,762; (b) NYSEG - \$985 (2-month); (c) PECO - \$16,860 (2-month); (d) PSE&G - \$10,554 (2-month); (e) RG&E - \$2,345 (2-month); (f) NEC - \$12,618 (2-month); (g) MEC - \$54,896 (2-month); (h) NIMO - \$6,648 (2-month); (i) KGE - \$3,634 (2-month); (j) BGC - \$775 (2-month); (k) Colonial Gas - \$270 (2-month); (l) CL&P - \$89,810 (1.3-month); (m) PSNH - \$5,280 (2-month); and (n) Yankee Gas - \$1,330 (1.3-month). 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 February 5, 2017 (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 February 6, 2017, the Debtors filed the Utility Motion.

4. Proper notice of the Utility Motion was not provided to the Utilities prior to the Court entering the *Interim Order (I) Approving the Debtors' Proposed Adequate Assurance of Payment For Future Utility Services, (II) Prohibiting Utility Companies From Altering, Refusing, or Discontinuing Services, (III) Approving the Debtors' Proposed Procedures For Resolving Adequate Assurance Requests, and (IV) Granting Related Relief* (the "Interim Utility Order") on February 8, 2017.

5. 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 February 8, 2017, 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.

6. 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 \$303,481.22 that supposedly reflects approximately two-weeks of the Debtors' average utility charges calculated over the past three months. Utility Motion at ¶ 14.

7. The prop 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 Utility Motion does not address why the Bank Account would be undercapitalized at less than two-weeks of average utility charges when the Debtors know that regulated utilities, such as the Utilities, are required by applicable state laws, regulations, tariffs or contracts to bill the Debtors monthly. Moreover, the Utilities presume that the Debtors want the Utilities to continue to bill the Debtors monthly in arrears pursuant to their billing cycles established by applicable state law.

9. 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 constitutes sufficient adequate assurance of payment to the Debtors' utility providers. Utility Motion at ¶ 14.

Facts Regarding the Debtors

10. The Debtors' operating business consists of Bob's Stores and Eastern Mountain Sports, each of which is a regional multi-channel retailer of apparel, footwear and sporting goods lines of business. *Declaration of Mark T. Walsh In Support of First Day Motions* ("First Day Declaration") at ¶ 5.

11. Since the Debtors acquired their primary assets out of bankruptcy in 2016, the Debtors' vendors have supposedly imposed restrictive credit terms, thereby depressing inventories. The Debtors contend that as a result of inventory pressure, they have been unable to meet their sales plan. Facing operational challenges and tightening liquidity, the Debtors engaged in a process to explore alternatives, including the sale of all, or a material business unit of, the Debtors. *First Day Declaration* at ¶ 6.

12. The Debtors received an offer from Sportsdirect.com Retail Ltd. ("Sportsdirect") to purchase substantially all of the Debtors' assets. Sportsdirect is also the holder of the Debtors' second lien debt. *First Day Declaration* at ¶ 6.

13. In order to facilitate the sale of the Debtors' assets, the Debtors, Vestis Investments II, LLC ("Vestis") (the then

existing equity owner of the Debtors), and Sportsdirect entered into a letter of intent (the "LOI") on January 27, 2017. Pursuant to the LOI, Sportsdirect acquired the Debtors' second lien debt from Vestis and provided \$10 million of bridge financing to allow the Debtors to continue operations while the parties negotiated the purchase transaction. First Day Declaration at ¶ 9.

The Debtors' Post-Petition Financing

14. On the *Petition Date*, the Debtors filed the *Debtors' Motion For Entry of Interim and Final Orders Pursuant To 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 and 507 (I) Authorizing the Debtors To Obtain Secured Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protections, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* (the "Financing Motion").

15. Through the Financing Motion, the Debtors seek authorization to obtain senior secured post-petition financing in an aggregate maximum principal amount not to exceed \$85 million. Financing Motion at page 17.

16. On February 8, 2017, the Court entered the *Interim Order Pursuant To 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 and 507 (I) Authorizing the Debtors To Obtain Secured Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Liens and*

Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief (the "Interim Financing Order").

17. The Interim Financing Order authorized the Debtors to borrow \$65 million on an interim basis. Interim Financing Order at page 18.

18. The Interim Financing Order also approved a carve-out for the payment of all unpaid fees and expenses of the Debtors' professionals prior to Carve-Out Notice, and up to \$300,000 after the delivery of a Carve-Out Notice (the "Carve-Out"). Interim Financing Order at page 56.

19. Exhibit "A" to the Interim Financing Order is 6-week DIP budget through March 18, 2017 (the "Budget"). It is unclear from the Budget whether the Debtors have budgeted sufficient sums for the timely payment of their post-petition utility expenses.

The Debtors' Critical Vendor Motion

20. On February 7, 2017, the Debtors filed the *Debtors' Motion For Entry of Interim and Final Orders Under 11 U.S.C. §§ 105(a), 363(b) and 503(b)(9) Authorizing, But Not Directing, Payment of Prepetition Claims of Certain Critical Vendors* (the "Critical Vendor Motion"). Through the Critical Vendor Motion, the Debtors sought authority to pay prepetition obligations to certain "critical vendors" in an amount not to

exceed \$1.5 million on an interim basis and \$5 million on a final basis. Critical Vendor Motion at ¶ 10. The Debtors state in paragraph 11 of the Utility Motion that “[u]ninterrupted Utility Services are essential to the Debtors’ preservation of estate value, the sale of assets, and the overall success of these Cases.” However, the Debtors do not consider their utility providers to be Critical Vendors for the purposes of the Critical Vendor Motion.

21. On February 8, 2017, the Court entered the *Interim Order Under 11 U.S.C. §§ 105(a) and 363(b) Authorizing Payment of Pre-Petition Claims of Certain Critical Vendors* (the “Interim Critical Vendor Order”). The Interim Critical Vendor Order authorized the Debtors to pay supposed Critical Vendor Claims in an amount not to exceed \$1.5 million on an interim basis. Interim Critical Vendor Order at ¶ 22.

The Sale Motion

22. On February 10, 2017, the Debtors filed the *Debtors’ Motion For Orders (A)(I) Authorizing and Approving Bidding Procedures, Break-Fee and Expense Reimbursement; (II) Authorizing and Approving the Debtors’ Entry Into the Stalking Horse APA; (III) Approving Notice Procedures; (IV) Scheduling a Sale Hearing; and (V) Approving Procedures For Assumption and Assignment of Executory Contracts and Unexpired Leases and Determining Cure Amounts and (B)(I) Authorizing the Sale of Substantially All of*

the Debtors' Assets Free and Clear of All Claims, Liens, Rights, Interests, and Encumbrances; (II) Approving the Stalking Horse APA; and (III) Authorizing the Debtors To Assume and Assign Certain Executory Contracts and Unexpired Leases (the "Sale Motion").

23. Through the Sale Motion, the Debtors seek the entry of an order authorizing the sale of the Acquired Assets free and clear of any and all claims, liens, rights, interests and encumbrances to Sportsdirect, as the stalking horse bidder, or another party otherwise submitting the highest or otherwise best offer pursuant to the Bidding Procedures. Sale Motion at page 2.

24. The Debtors seek approval of the Stalking Horse APA between the Debtors and Sportsdirect that was finalized on February 8, 2017. Sale Motion at ¶ 15.

25. The Debtors also seek the following schedule: (i) March 17, 2017 as the deadline for the submission of Qualified Bids; (ii) scheduling the Auction, if necessary, for March 20, 2017; and (iii) scheduling the Sale Hearing no later than March 24, 2017. Sale Motion at ¶ 18.

Facts Concerning the Utilities

26. 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.

27. 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 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.

28. 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 the tariffs and/or state laws, regulations and/or ordinances are as follows:

BGE:

Electric -
<https://www.bge.com/MyAccount/MyBillUsage/Pages/ElectricServiceRatesTariffs.aspx>

Gas -

<https://www.bge.com/MyAccount/MyBillUsage/Pages/GasServiceRatesTariffs.aspx>

CL&P: http://www.cl-p.com/Rates/Rates_and_Tariffs/

NYSEG:

Electric -

<http://www.nyseg.com/SuppliersAndPartners/pricingandtariffs/electricitytariffs/default.html>

Gas -

<http://www.nyseg.com/SuppliersAndPartners/pricingandtariffs/naturalgastariffs/default.html>

PECO:

Electric -

<https://www.peco.com/CustomerService/RatesandPricing/RateInformation/Pages/CurrentElectric.aspx>

Gas -

<https://www.peco.com/MyAccount/MyBillUsage/Pages/CurrentGas.aspx>

PSNH:

<http://www.psnh.com/Templates/Content.aspx?id=4294967779&terms=tariffs>

PSE&G:

Electric -

http://www.pseg.com/family/pseandg/tariffs/gas/pdf/gas_tariff.pdf

Gas -

http://www.pseg.com/family/pseandg/tariffs/electric/pdf/electric_tariff.pdf

RG&E:

<https://www.rge.com/SuppliersAndPartners/pricingandtariffs/default.html>

Yankee Gas:

http://www.yankeegas.com/For_Your_Business/Current_Rates/List_and_Application_of_Rates_and_Riders/

BGC:

<http://www.mass.gov/?pageID=eoeesubtopic&L=4&L0=Home&L1=Energy%2C+Utilities%26+Clean+Technologies&L2=Natural+Gas+Industry&L3=Natural+Gas+Tariffs%2C+Applications+and+Forms&sid=Eoeea>

Colonial Gas:

https://www1.nationalgridus.com/Files/ESCO/Colonial_Tariffs_and_TC.pdf

KGE:

https://www2.dps.state.ny.us/ETS/search/searchShortcutEffective.cfm?companyID=3569154&serviceType=GAS&psc_num=1

MEC:

http://www.nationalgridus.com/masselectric/non_html/rates_tariff.pdf

NEC:

http://www.nationalgridus.com/Narragansett/non_html/rates_tariff.pdf

NIMO:

<http://www.nationalgridus.com/niagaramohawk/business/rates/rates.asp>

29. 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, the Utilities' estimated prepetition debt and post-petition deposit requests are as follows:

<u>Utility</u>	<u>No. of Accts</u>	<u>Est. Prepet. Debt</u>	<u>Dep. Request</u>
BGE	2	\$3,032	\$3,762 (2-month)
NYSEG	1	\$616.47	\$985 (2-month)
PECO	4	\$6,040.30	\$16,860 (2-month)
PSE&G	3	\$14,207.72	\$10,554 (2-month)
RG&E	1	\$1,705.95	\$2,345 (2-month)
NEC	4	\$7,981.38	\$12,618 (2-month)
MEC	9	\$51,328.68	\$54,896 (2-month)
NIMO	6	\$2,042.85	\$6,648 (2-month)
KGE	3	\$7,721.95	\$3,634 (2-month)
BGC	4	\$1,419.23	\$775 (2-month)
Colonial Gas	2	\$817.01	\$270 (2-month)
CL&P	19	n/a	\$89,810 (1.3-month)
PSNH	2	n/a	\$5,280 (2-month)
Yankee Gas	3	n/a	\$1,330 (2-month)

30. NEC held prepetition deposits totaling \$6,870 that it will recoup against prepetition debt pursuant to Section 366(c) of the Bankruptcy Code. None of the prepetition deposits will remain after recoupment.

31. MEC held prepetition deposits totaling \$30,034 that it

will recoup against prepetition debt pursuant to Section 366(c) of the Bankruptcy Code. None of the prepetition deposits will remain after recoupment.

32. NIMO held prepetition deposits totaling \$2,682 that it will recoup against prepetition debt pursuant to Section 366(c) of the Bankruptcy Code. Any remaining deposit credit after recoupment can be applied to NIMO's post-petition deposit request.

33. KGE held prepetition deposits totaling \$1,245 that it will recoup against prepetition debt pursuant to Section 366(c) of the Bankruptcy Code. None of the prepetition deposits will remain after recoupment.

34. BGC held prepetition deposits totaling \$775 that it will recoup against prepetition debt pursuant to Section 366(c) of the Bankruptcy Code. None of the prepetition deposits will remain after recoupment.

35. Colonial Gas held prepetition deposits totaling \$270 that it will recoup against prepetition debt pursuant to Section 366(c) of the Bankruptcy Code. None of the prepetition deposits will remain after recoupment.

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. 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. In order to access the Bank Account, the Utilities have to incur the expense to draft, file and serve a default pleading with the Court and possibly litigate the demand if the Debtors refuse to honor a Disbursement Request.
3. 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.
4. The Debtors are not required to replenish the Bank Account following pay-outs.
5. All funds contained in the Bank Account may remain subject to prepetition liens in favor of the Debtors' secured lenders (this is in complete contrast to the \$300,000 Carve-Out received by the Debtors' professionals in the DIP Financing pleadings, which remains in place even if there is an event of default).
6. The Debtors may close the Bank Account before all post-petition utility charges are paid in full.
7. The Debtors fail to state whether draws from the Bank Account would be limited to two-week amounts.
8. 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' Requested 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 20 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, tariffs, regulations and/or contracts. 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.

Moreover, 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 of prepetition critical vendor claims of up to \$1.5 million on an interim basis and \$5 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 cash collateral, by seeking a \$300,000 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 are seeking to deprive 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. Against this factual background, it is reasonable for the Utilities to seek and be awarded the full security they have requested herein.

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: February 23, 2017

STEVENS & LEE, P.C.

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Company, Boston Gas Company,
Colonial Gas Company, KeySpan Gas
East Corporation, Massachusetts
Electric Company, Narragansett
Electric Company and Niagara
Mohawk Power Corporation*

CERTIFICATE OF SERVICE

I hereby certify that in addition to the notice and service provided through the Court's ECF system, on February 23, 2017, I caused a true and correct copy of the (i) *Objection of Certain Utility Companies To the Debtors' Motion For Entry of Interim and Final Orders (I) Approving the Debtors' Proposed Adequate Assurance of Payment For Future Utility Services, (II) Prohibiting Utility Companies From Altering, Refusing, or Discontinuing Services, (III) Approving the Debtors' Proposed Procedures For Resolving Adequate Assurance Requests, and (IV) Granting Related Relief, and (ii) Motion and Order For Admission Pro Hac Vice* to be served by email on:

Norman L. Pernick
Marion M. Quirk
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