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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
THE McCLATCHY COMPANY, *et al.*,	**Case No. 20-10418 (MEW)**
Debtors.	**(Jointly Administered)**

OBJECTION OF CERTAIN UTILITY COMPANIES TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) APPROVING DEBTORS' PROPOSED FORM OF ADEQUATE ASSURANCE OF PAYMENT; (II) ESTABLISHING PROCEDURES FOR RESOLVING OBJECTIONS BY UTILITY COMPANIES; AND (III) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING, OR DISCONTINUING SERVICE

West Penn Power Company ("WPP"), Florida Power & Light Company ("FPL"),

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Evergy, Inc. ("Evergy") (collectively, the "Utilities") for their Objection to the *Debtors' Motion For Entry Of Interim And Final Orders (I) Approving Debtors' Proposed Form Of Adequate Assurance Of Payment; (II) Establishing Procedures For Resolving Objections By Utility Companies; And (III) Prohibiting Utility Companies From Altering, Refusing, Or Discontinuing Service* (the "Utility Motion") (Docket No. 29), state as follows:

Introduction

The Debtors' Utility Motion improperly seeks to shift the Debtors' obligations under Section 366(c)(3) from modifying the amounts 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.

Specifically, the Debtors seek to have this Court approve their form of adequate assurance of payment, which is a bank account containing approximately $371,000 that supposedly reflects two weeks' of average utility charges, less any deposit amounts held by a utility company (the "Bank Account") regardless of whether utilities will exercise their rights under Section 366(4) against such deposits or make demands upon letters of credit or surety bonds to satisfy unpaid prepetition charges. Utility Motion at ¶ 11. As the Debtors claim in paragraph 10 of the Utility Motion that they spend approximately $930,000 each month for utility charges, the proposed $371,000 to be contained in the Bank Account only represents approximately twelve (12) days of utility charges incurred by the Debtors.

Further, the proposed interim and final orders approving the proposed Bank Account authorize the Debtors, in their sole discretion, to amend Schedule 1 to remove any Utility Company. Thus, the Bank Account does not provide any real protection at all because the

obligation to maintain a Utility Deposit in the Bank Account expressly applies only to Utility Companies listed on Schedule 1.

Additionally, the Court should reject the Debtors' proposed Bank Account because: (1) The Utilities bill the Debtors on a monthly basis and provide the Debtors with generous payment terms pursuant to applicable state law, tariffs and/or regulations and the amounts proposed in the Bank Account are not sufficient in amount or in form to provide the Utilities with adequate assurance of payment; (2) 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 (3) 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. Accordingly, not only have the Debtors failed to satisfy their statutory burden under Section 366 as to why the Utilities' deposit requests should be modified, but Debtors have also failed to demonstrate why their alternative adequate assurance of payment proposal should be accepted by the Utilities and approved by the Court.

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: (a) FPL - $165,715.00 (2-month); (b) WPP - $18,596 (2-month); and (c) Evergy - $272,550 (2-month). Based on all of 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.

Procedural Facts

1. On February 13, 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. On February 20, 2020, the Debtors filed a *Notice of Hearing* (Docket No. 89) that established (i) a deadline of March 2, 2020 to file an objection to the Utility Motion, and (ii) a hearing on the Utility Motion to take place on March 9, 2020 at 11:00 a.m.

5. In the Utility Motion, the Debtors seek to avoid the applicable legal standards under Sections 366(c)(2) and (3) by seeking Court approval of the Debtors' proposed form of adequate assurance of payment, which is the Bank Account containing approximately $371,000 that supposedly reflects the costs of two weeks' of average utility charges, less any deposit amounts already held by a utility company (the "Bank Account"). Utility Motion at ¶ 11; Exhibit A to Utility Motion (the "Interim Order"), at ¶ 3.

6. The Debtors claim that they spend approximately $930,000 each month for utility charges. Utility Motion at ¶ 10. Accordingly, the proposed $371,000 to be contained in the Bank Account would actually reflect approximately twelve (12) days of utility charges incurred by the Debtors.

7. Schedule 1 of the Interim Order reflects that the Debtors propose that the Bank Account would contain the following amounts for each of the Utilities, which purportedly reflect a two-week amount for each Utility, less any prepetition deposit supposedly held by such Utility:

A. WPP - $4,324.47, which reflects 13 days of utility goods/services that the Debtors receive from WPP ($9,298 of average monthly usage by Debtors/30 days = $309.93 per day).

B. FPL - $0

C. Evergy

i. $45,196.49 for Evergy

ii. $1,915.33 for Westar Energy, which is now Evergy

8. 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 amounts of security sought by the Utilities under Section 366(c)(2).

9. In the Utility Motion and the proposed Interim and Final Orders attached as Exhibits to the Utility Motion, the Debtors also seek to impose procedures on how requests from the Adequate Assurance Account can be made (i.e., by requesting a disbursement and giving notice each of the Adequate Assurance Notice Parties and how long after such request a disbursement request may be honored (*see* Exhibit B to the Utility Motion (the "Final Order"), at ¶ 5); but no procedures regarding (A) how objections to such disbursement requests shall be asserted or resolved, (B) how to obtain a disbursement if the Debtors fail to honor the request, or (C) how the Adequate Assurance Account will be operated, maintained, replenished, or closed.

10. Rather than specifying the events upon which monies contained in the Bank Account on behalf of a utility may be returned to the Debtors, paragraph 6 of the Interim Order and paragraph 7 of the Final Order provide that "[t]he Debtors are authorized, ***in their sole discretion*** to amend Schedule 1… to add ***or remove*** any Utility company…." Thus, under the proposed orders and procedures, the Debtors presumably could remove any utility at any time from Schedule 1, thus terminating the Debtors' obligation to hold any Utility Deposit in the Bank Account on behalf of the removed utility. As the Utilities bill the Debtors in arrears, the Debtors should not be permitted to remove any Utility from Schedule 1, and any monies contained in the Bank Account on behalf of the Utilities should not be returned to the Debtors, until the Debtors confirm with the Utilities that the Debtors have paid in full all of their post-petition utility expenses owed to the Utilities.

11. The Utility Motion does not address why the Bank Account would be underfunded at only approximately twelve (12) days of utility charges when the Debtors know that the Utilities are required by applicable state laws, regulations and/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, and monies were put into the Bank Account for all of the Utilities, the Debtors need to explain: (A) why they are only proposing to deposit supposed two-week amounts into the Bank Account for utilities that did not hold prepetition security; and (B) how such an insufficient amount could even begin to constitute adequate assurance of payment for the Utilities' monthly bills.

12. 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 Debtors do not believe that any adequate assurance beyond that proposed [i.e., the Bank Account and/or remaining prepetition deposits, if any, held by utilities] is necessary" and that "[t]he Adequate Assurance Procedures provide the Utility Companies fair and ample opportunity to safeguard their interests, while also protecting the Debtors from potential abuse by a Utility Company." Utility Motion at ¶¶ 13 and 24.

13. The Interim Order at paragraph 16 and the Final Order at paragraph 17 each provide as follows:

> Notwithstanding anything to the contrary contained in this Interim Order, (a) any payment to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtors under the DIP Financing Orders approved by this Court in the Chapter 11 Cases, and (b) to the extent there is any inconsistency between the terms of such DIP Financing Orders and any action taken or proposed to be taken hereunder, the terms of such DIP Financing Orders shall control.

Facts Concerning The Debtors

14. The Debtors operate a diversified digital and print media business focused on providing strong, independent local journalism to 30 communities across 14 states, as well as selected national news coverage through the Debtors' Washington D.C. based bureau. *Disclosure Statement With Respect To The Joint Chapter 11 Plan Of Reorganization Of The McClatchy Company And Its Affiliated Debtors And Debtors In Possession* (the "Disclosure Statement") at p.1.

15. "The entire industry of print and digital journalism has experienced serious challenges in recent years, particularly with the increased volume and momentum of internet journalism. As a consequence, many industry participants have pursued and continue to pursue efforts to consolidate with other market participants in order to achieve business synergies for the

purpose of remaining viable and relevant. Relevant to its peers, the [Debtors'] significant leverage and contingent pension exposure render it impossible for the [Debtors] to participate in the industry consolidation that has become inevitable for local news outlets." *Declaration of Sean M. Harding In Support Of Chapter 11 Petitions And First Day Papers* ("First Day Declaration") at ¶ 8.

16. "The Great Recession (commencing in 2007) and the impact of internet journalism and alternative digital advertising sources has undermined the revenue model of the entire news industry. Between 2006 and 2018, [the Debtors'] advertising revenues fell by 80%.... [B]etween 2006 and 2018, total daily print circulation fell by 58.6%. This decline in daily circulation and associated revenues is reflective of the fragmentation of audiences faced by all media companies. The [Debtors] ha[ve] responded to these trends by exploring synergies through purchases or sales, implementing a business plan that focuses on a shift to digital news circulation and subscriptions, digital advertising, and strategically implementing cost-cutting initiatives." First Day Declaration at ¶ 36.

17. The Debtors, like many other newspaper and media companies, have pursued consolidation transactions, but have been unable to execute those transactions due to the Debtors' funded debt and pension obligations impeding their ability to obtain the required financing. First Day Declaration at ¶ 37.

18. As of January 15, 2020, the Debtors had approximately $703.3 million in total aggregate principal amount of debt outstanding. First Day Declaration at ¶ 46.

The Debtors' Post-Petition Financing

19. On the Petition Date, the Debtors filed the *Debtors' Motion For Interim and Final Orders (I) Authorizing the Debtors To Obtain Postpetition Financing, (II) Authorizing the*

Debtors To Use 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 "Financing Motion")(Docket No. 11).

20. Through the Financing Motion, the Debtors seek approval of a DIP Facility in the amount of $12.5 million on an interim basis and $50 million on a final basis (the "DIP Proceeds") to be used for, *inter alia*, working capital purposes during the Chapter 11 Cases, including funding of administrative expenses. Financing Motion at ¶ 3.

21. Use of the DIP Proceeds shall at all times be subject to an approved budget. Financing Motion at p. 9. Attached as Exhibit "B" to the Financing Motion is the 13-Week Budget through the week of May 10, 2020 (the "Budget"). It is unclear whether the Debtors have budgeted sufficient sums for the timely payment of their post-petition utility expenses.

22. Repayment of the DIP Proceeds is to be secured by a priming, first priority lien on certain DIP Collateral, comprised of substantially all of the Debtors' assets, expressly including all presently owned and hereafter acquired "Accounts" and "Deposit Accounts." Financing Motion at ¶¶ 25 and 38; Interim Order at ¶ 6(a).

23. Through the Financing Motion, the Debtors also seek the approval of a carve-out from the DIP Liens and from the superpriority claim of the DIP lender for the payment of fees of the Debtors' professionals incurred prior to a Carve-Out Trigger Notice, plus an additional $500,000 following delivery of a Carve-Out Trigger Notice (the "Carve-Out"). Financing Motion at p. 14.

24. Pursuant the terms of the proposed DIP financing, the automatic stay of bankruptcy will be modified so that seven (7) days after a declaration of termination, the DIP

parties shall be entitled to exercise all rights and remedies against the DIP Collateral in accordance with the DIP Loan Documents and applicable law without further notice or court order. Financing Motion at p. 16.

25. The DIP financing is subject to the following Bankruptcy Milestones, among others: (a) on or before 45 days after the Petition Date, the Final Financing Order authorizing and approving the Loan Documents on a final basis shall have been entered by the Bankruptcy Court; (b) on or before 60 days after the Petition Date, the Debtors shall provide written notice to the Agent as to whether the Debtors are electing to proceed with the Plan Milestones or Sale Milestones; (C) Plan Milestone – on or before 120 days after the Petition Date, the Bankruptcy Court shall have entered an order approving the disclosure statement and voting and solicitation procedures for an Acceptable Plan; (D) Plan Milestone – on or before 160 days after the Petition Date, the Bankruptcy Court shall have entered an order confirming an Acceptable Plan; (E) Plan Milestone – on or before 180 days after the Petition Date, the effective date of the Acceptable Plan shall have occurred in accordance with its terms, and the Debtors shall have emerged from Chapter 11; (F) Sale Milestone – on or before 90 days after the petition Date, the Debtors shall file a Sale Motion seeking approval of a sale transaction for all or substantially all of the Debtors' assets and sales procedures; (G) Sale Milestone – on or before 120 days after the Petition Date, the Bankruptcy Court shall have entered an order approving Sale Procedures; (H) Sale Milestone – on or before 150 days after the Petition Date, the Debtors shall hold an auction, if required; (I) Sale Milestone – on or before 160 days after the Petition Date, the Bankruptcy Court shall enter an order approving an acceptable Sale Transaction; (J) Sale Milestone – on or before 170 days after the Petition Date, the Sale Transaction shall close. Schedule 5.23 to DIP Credit Agreement, attached as Exhibit 2 to Interim Order.

26. The Debtors require access to liquidity to ensure that they are able to continue operating during these Chapter 11 Cases and to preserve the value of their estates for the benefit of all parties in interest. Absent access to the DIP Facility and the Cash Collateral, the Debtors would experience disruption to their operations, jeopardizing a successful and efficient reorganization. The Debtors would also be unable to pay wages for their employees or the invoices of suppliers and vendors critical to business operations, preserve and maximize the value of their estates, and administer these Chapter 11 Cases. Financing Motion at ¶ 26, 28.

27. On February 14, 2020, the Court entered the *Interim Order (I) Authorizing the Debtors To (A) Obtain Post-Petition Financing and (B) Use Cash Collateral, (II) Granting (A) Liens and Providing Superpriority Administrative Expense Status and (B) Adequate Protection to Certain Prepetition Lenders, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* (the "Interim Financing Order")(Docket No. 64).

28. The Interim Financing Order authorized the Debtors to borrow $12.5 million under the DIP Facility secured by a senior, first priority lien on the DIP Collateral, expressly including all presently owned and hereafter acquired Accounts and Deposit Accounts of the Debtors. Interim Financing Order at pp. 24, 25 and 29.

29. The Interim Financing Order granted the DIP lender a superpriority claim against the Debtors securing amounts due and owing under the DIP loan documents. Financing Order at pp 32-33.

30. The Interim Financing Order approved the Carve-Out. Interim Financing Order at pages 56-58.

The Debtors' Critical Vendor Motion

31. On the Petition Date, the Debtors filed the *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors To Pay Certain Prepetition Claims of (A) Critical Vendors, and (B) Section 503(b)(9) Claimants, and (II) Granting Related Relief* (the "Critical Vendor Motion")(Docket No. 17). Through the Critical Vendor Motion, the Debtors sought authority to pay supposed Critical Vendor Claims in an aggregate amount not to exceed $2.1 million on an interim basis and $2.9 million on a final basis. Critical Vendor Motion at ¶ 1. Although the Debtors describe uninterrupted utility services as "essential services" to their ongoing operations (Utility Motion at ¶ 24), the Debtors do not consider their utility providers to be Critical Vendors for purposes of the Critical Vendor Motion.

32. On February 14, 2020, the Court entered the *Interim Order (I) Authorizing the Debtors To Pay Certain Prepetition Claims of (A) Critical Vendors, and (B Section 503(b)(9) Claimants, and (II) Granting Related Relief* (the "Critical Vendor Order") (Docket No. 67). The Critical Vendor Order authorized the Debtors to pay up to $2.1 million of supposed Critical Vendor Claims on an interim basis.

Facts Concerning the Utilities

33. 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.

34. 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.

35. 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:

WPP:
https://www.firstenergycorp.com/content/customer/customer_choice/pennsylvania/pennsylvania_tariffs.html

FPL:
http://www.fpl.com/customer/rates_and_bill/rules_tariffs.shtml

Evergy:
https://www.evergy.com/manage-account/rate-information/how-rates-are-set/rate-overviews-authentication

36. 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' post-petition deposit requests are as follows:

Utility	No. of Accts.	Estimated Prepet. Debt	Deposit Request
WPP	1	$19,511.48	$18,596 (2-month)
FPL	12	$110,420.83	$165,715 (2-month)
Evergy	8	$147,170.77	$272,550 (2-month)

37. FPL held a $170,044 cash deposit that it will recoup against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. If there is any excess deposit remaining after the foregoing recoupment, the excess can be applied toward FPL's post-petition deposit request.

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 the Bank Account: (1) 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)"; (2) Is not a form of adequate assurance of payment recognized by Section 366(c)(1)(A); (3) Would not contain sufficient amounts on behalf of the Utilities relative to their actual exposure. 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. The proposed Interim and Final Order give the Debtors sole discretion to remove a Utility from Schedule 1 at any time, which would terminate the Debtors' obligation to hold any Utility Deposit in the Bank Account on behalf of the Utility.

3. In order to access the Bank Account, the Utilities have to incur the expense to draft and serve a disbursement request on multiple parties and possibly litigate the demand if the Debtors refuse to honor a disbursement request or a notice party objects.

4. It is underfunded from the outset because: (a) 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; and (b) the Debtors propose that the Bank Account would be net of any prepetition deposits held by the Debtors' utility companies, which fails to take into account that utilities will be making demands upon and/or satisfying prepetition charges against the prepetition deposits.

5. The Debtors are not required to replenish the Bank Account following pay-outs.

6. The Bank Account appears to be subject to the liens of the Debtors' lenders.

7. The Debtors may close the Bank Account or remove a Utility from Schedule 1 before all post-petition utility charges owing to the Utilities are paid in full.

8. The Debtors should not reduce the amount of the Bank Account on account of the termination of utility services to a Debtor account until the Debtors have confirmed with the Utilities 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 and/or regulations. 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 or remaining prepetition deposits, if any, which together provide only a small fraction of the Utilities' actual exposure. As set forth above, the purported protection of the Bank Account is wholly illusory given the Debtors' ability, in their sole discretion, to amend Schedule 1 to remove a Utility at any time. 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 to Critical Vendors of up to $2.1 million on an interim basis and $2.9 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 $500,000 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 have deprived the Utilities of any adequate assurance of payment to which they are entitled 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 payment pursuant to Section 366 in the amount and form satisfactory to the Utilities, which are the cash deposits requested herein; and

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

Dated: Garden City, New York
February 28, 2020

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