

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

NEWPAGE CORPORATION, et al.,

Debtors.¹

Chapter 11
Case No. 11-12804 (KG)

(Jointly Administered)

Re: Docket Nos. 13 and 75
Hearing Date: October 4, 2011 at 2:00 p.m.
Obj. Deadline: Sept. 27, 2011 at 4:30 p.m.

OBJECTION OF ALLETE, INC. (d/b/a MINNESOTA POWER) TO THE DEBTORS' MOTION PURSUANT TO SECTIONS 105(a) AND 366 OF THE BANKRUPTCY CODE FOR ORDER (I) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING, OR DISCONTINUING UTILITY SERVICES, (II) APPROVING THE DEBTORS' PROPOSED FORM OF ADEQUATE ASSURANCE, (III) ESTABLISHING PROCEDURES FOR RESOLVING OBJECTIONS THERETO BY UTILITY PROVIDERS, AND (IV) SCHEDULING A FINAL HEARING THEREON

ALLETE, Inc., doing business as Minnesota Power, a Minnesota corporation ("MP"), by and through its undersigned counsel, hereby object to the

Debtors' Motion Pursuant to Sections 105(a) and 366 of the Bankruptcy Code for Order (I) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Utility Services, (II) Approving the Debtors' Proposed Form of Adequate Assurance, (III) Establishing Procedures for Resolving Objections Thereto by Utility Providers, and (IV) Scheduling a Final Hearing Thereon

(the "Utility Motion") and respectfully states as follows:

JURISDICTION AND VENUE

1. Jurisdiction over these cases exists in this Court under 28 U.S.C. §§1334(a) and (b), and by reference from the District Court in accordance with 28 U.S.C. §157(a). Determination of the Utility Motion is a core proceeding, as defined in 28 U.S.C. §157(b),

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are: Chillicothe Paper Inc. (6154), Escanaba Paper Company (5598), Luke Paper Company (6265), NewPage Canadian Sales LLC (5384), NewPage Consolidated Papers, Inc. (8330), NewPage Corporation (6156), NewPage Energy Services LLC (1838), NewPage Group Inc. (2465), NewPage Holding Corporation (6158), NewPage Port Hawkesbury Holding LLC (8330), NewPage Wisconsin System Inc. (3332), Rumford Paper Company (0427), Upland Resources, Inc. (2996), and Wickliffe Paper Company LLC (8293). The Debtors' corporate headquarters is located at 8540 Gander Creek Drive, Miamisburg, OH 45342.



arising under the United States Bankruptcy Code (11 U.S.C. §§101 et seq., “Bankruptcy Code”).

Venue of the Utility Motion is properly placed in this Court pursuant to 28 U.S.C. §1409(a).

BACKGROUND

2. On September 7, 2011 (the “Petition Date”), each of the above-captioned debtors and debtors-in-possession (collectively, the “Debtors”) filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Court”).

3. The Debtors are operating their businesses and managing their affairs as debtors and debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

4. No trustee or examiner has been appointed in these chapter 11 cases.

5. MP is a Minnesota corporation with a place of business at 30 West Superior Street, Duluth, Minnesota 55802 and is a regular supplier of electrical, steam and other goods to the Debtors.

6. MP and NewPage Wisconsin System Inc. (a/k/a Stora Enso North America Corp.) (“NewPage Wisconsin”) are parties to a certain Amended and Restated Electric Service Agreement executed in November 2005 (the “ESA”) and separate Steam Service Agreement dated as of September 22, 2008 (the “Steam Service Agreement” and, with the ESA, collectively, the “Contracts”). The Contracts provide for the delivery of electrical service and steam to NewPage Wisconsin at its facility in Duluth, Minnesota.

7. NewPage Wisconsin is one of the Debtors in this jointly administered bankruptcy case (Case No. 11-12807). MP has been identified as one of the utilities subject to the Utility Motion. The account numbers for MP set forth in the Utility Motion correspond to the account numbers maintained by MP for both the ESA and Steam Service Agreement.

8. NewPage Wisconsin is invoiced under the Steam Service Agreement on or before the tenth day of each calendar month for services provided in the previous month. Charges under the Steam Service Agreement are due within 30 days of receipt.

9. NewPage Wisconsin is generally invoiced on or before the second business day of each calendar month for services provided in the previous month under the applicable Large Power Service tariff. Charges under the ESA are due within 15 days of receipt.

10. As set forth above, and as set forth in its standard billing and electric customer disconnection practices, NewPage Wisconsin could receive at least two months of unpaid charges under the ESA before MP could cease the supply of goods or services for post-petition payment default and at least two months of unpaid charges under the Steam Service Agreement before MP could cease the supply of goods or services under the Steam Service Agreement for post-petition payment defaults.

11. The obligations of NewPage Wisconsin under the Steam Service Agreement have been guaranteed by NewPage Corporation. As of the date of this objection, MP's exposure is not secured by a letter of credit or other pre-petition security established by the Debtors.

12. NewPage Wisconsin was indebted to MP as of the Petition Date for charges under both the ESA and Steam Service Agreement. This indebtedness includes charges incurred in the 20 days prior to the Petition Date in the total amount of \$2,545,223.27, which charges are the subject of a separate application filed by MP for the allowance and payment of an administrative expense claim under Section 503(b)(9) of the Bankruptcy Code (Docket No. 170).

13. The Utility Motion incorporates an offer of adequate assurance of future payment on behalf of the Debtors. Among other things, the Debtors have proposed under the Utility Motion to establish an interest bearing segregated account (the "Adequate Assurance Account")

in an amount estimated by the Debtors at \$5,000,000. The relief sought by the Debtors in the Utility Motion was granted by this Court on an interim basis by order dated as of September 8, 2011 (Docket No. 75) (the “Interim Order”).

14. For the reasons set forth below, MP believes that the adequate assurance proposal set forth in the Utility Motion fails to meet the requirements of Section 366(b) and (c) of the Bankruptcy Code.

RELIEF REQUESTED

15. MP respectfully requests that this Court deny the Utility Motion at the final hearing scheduled for October 4, 2011 and affirmatively require that the Debtors provide MP with post-petition adequate assurance of payment in amount and form satisfactory to MP.

16. MP has simultaneously herewith delivered an Additional Assurance Request in the form contemplated under the Interim Order and has requested that the Debtors deposit with MP an amount equal to two (2) months of average services provided by MP under the Contracts.

DISCUSSION

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

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the Debtors, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date.

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

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

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

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

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

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

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

(4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility may recover or set off against a security deposit provided to the utility by the Debtors before the date of the filing of the petition without notice or order of the court.

11 U.S.C. § 366.

18. Debtors are required under Section 366(c)(2) to provide adequate assurance of payment satisfactory to its utilities on or within thirty (30) days of the filing of the petition. A debtor may file a motion under Section 366(c)(3) requesting the court to modify the amount of the utility's request if the debtor believes that the amount of the utilities request should be modified. Section 366 does not provide a debtor expand the definition of "assurance of payment" to include forms of adequate assurance not contemplated under the statute.

19. MP appreciates that the Utility Motion is similar to motions that have been filed in other Chapter 11 cases. Ultimately, however, "the determination of 'adequate assurance' inescapably involves an exercise in judgment." In re Utica Floor Maintenance, Inc., 25 B.R. 1010, 1016 (N.D. N.Y. 1982). For this reason, "every Section 366 proceeding must be decided

upon its unique facts and the ultimate finding by the Court must be that the utility involved has or has not been provided with adequate assurance of payment.” Id., quoting In re George C. Frye Co., 7 B.R. 856, 858 (Bankr. D. Me. 1980). In making this determination, courts “have considered the length of time necessary for the utility to effect termination once one billing cycle is missed.” Begley v. Philadelphia Electric Co., 760 F.2d 46, 49 (3rd Cir. 1985).

20. The adequate assurance proposal set forth in the Utility Motion fails to meet the requirements of Section 366 and fails to provide adequate assurance to MP. The defects in the proposal set forth in the motion include, but are not limited to the following:

- (a) This Court only has authority under Section 366(c)(3) to modify the amount of the MP deposit requests. Neither the Debtors nor this Court have the authority to establish the form of adequate assurance of payment, including the establishment of a segregated account of the type contemplated in the Utility Motion.
- (b) The Debtors have failed to propose any procedure for the recovery of funds from the Adequate Assurance Deposit (as defined in the Utility Motion). MP would presumably have to incur legal fees and costs to file and litigate an application for payment of post-petition administrative expenses, which would be for at least one month’s service because MP bills the Debtors on a monthly basis.
- (c) The Adequate Assurance Deposit may not continue to exist if the Debtors default on their post-petition lending.
- (d) MP bills monthly in arrears so any request by MP upon the Adequate Assurance Deposit would be, at a minimum, for monthly bills. Accordingly, the Adequate Assurance Deposit that would merely contain the estimated cost of 50% of the Debtors’ monthly utility charges would be undercapitalized from the outset.
- (e) The Debtors have not provided MP or its other utility suppliers with an adequate evidentiary basis for its assertions as to its monthly post-petition utility expenses.

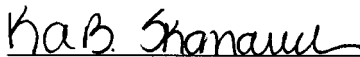
21. For the reasons set forth below, MP requests that the Utility Motion be denied and that the Debtors be required to establish with MP an initial amount equal to two (2) months of Debtors’ estimated average monthly charges under the Contracts.

WHEREFORE, MP respectfully requests that this Court enter an order:

1. Denying the Utility Motion as to MP;
2. Awarding MP the post-petition adequate assurance of payment pursuant to Section 366 in the amount and form satisfactory to MP; and
3. Providing such other and further relief as the Court deems just and appropriate.

Dated: September 26, 2011
Wilmington, Delaware

ASHBY & GEDDES, P.A.



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CERTIFICATE OF SERVICE

I, Karen B. Skomorucha, hereby certify that on September 26, 2011, I caused one copy of the foregoing document to be served upon the parties detailed on the attached service list via first class U.S. mail, postage pre-paid unless otherwise indicated.

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