

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re:)		Chapter 11
)		
SOUTHERN AIR)		Case No. 12-12690 (CSS)
HOLDINGS, INC., <i>et al.</i> ,)		(Jointly Administered)
)		
Debtors.)		Related Docket Nos. 10 & 75
)		
)		Obj. Deadline: October 18, 2012 @ 4:00 p.m.
)		Hearing Date: October 25, 2012 @ 1:00 p.m.

OBJECTION OF THE CONNECTICUT LIGHT AND POWER COMPANY AND YANKEE GAS SERVICES COMPANY TO THE MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS (I) PROHIBITING ANY UTILITY COMPANY FROM ALTERING, REFUSING, OR DISCONTINUING SERVICE, (II) APPROVING THE DEBTORS' PROPOSED ADEQUATE ASSURANCE, AND (III) ESTABLISHING PROCEDURES TO DETERMINE ADDITIONAL ADEQUATE ASSURANCE OF PAYMENT PURSUANT TO SECTIONS 105(a) AND 366 OF THE BANKRUPTCY CODE

The Connecticut Light and Power Company and Yankee Gas Services Company (collectively, the "Utilities"), by counsel, hereby object to the *Motion of Debtors For Entry of Interim and Final Orders (I) Prohibiting Any Utility Company From Altering, Refusing, or Discontinuing Service, (II) Approving the Debtors' Proposed Adequate Assurance, and (III) Establishing Procedures To Determine Additional Adequate Assurance of Payment Pursuant To Sections 105(a) and 366 of the Bankruptcy Code* (the "Utility Motion"), and set forth the following:

Introduction

In 2005, Congress amended Section 366 of the Bankruptcy Code to add, among other things, Section 366(c) to address adequate assurance of payment requests in Chapter 11 cases. Prior to 2005, Section 366(b) governed adequate assurance of payment determinations in all



bankruptcy cases, including Chapter 11 cases. Section 366(b), which has not been modified, provides, in pertinent part:

On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

As set forth above, the courts had the authority to modify the amount of the deposit or other security that was necessary to provide adequate assurance of payment, which is significantly broader than the legal standard established in Sections 366(c)(2) and (3).

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).

The significant difference between the two provisions is the pre-2005 standard required a court to focus on whether or not to “order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment” and Section 366(c) now requires a court to focus on whether or not to “order modification of the amount of an assurance of payment under paragraph (2).” The amount of assurance of payment under paragraph (2) (Section 366(c)(2)) in these cases are the forty-five (45) day deposits requested by the Utilities. Accordingly, under the foregoing legal standard, it is the Debtors’ burden to present evidence to demonstrate, why, if at all, the amount of the Utilities’ deposit 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); *see also Great Atlantic & Pacific Tea Company, Inc.*, 2011 WL 5546954 at page 5 (Bankr. S.D.N.Y. 2011). Courts that have found that the courts retain the same discretion as under Section 366(b), or allow the debtor to pick the form and/or amount of security, simply refuse to follow the plain language of the statute.

In addition to changing the legal standard, Section 366(c) also changes the adequate assurance of payment determination as follows: (1) The statute provides the Debtors with 30 days to provide adequate assurance of payment instead of 20 days; (2) Section 366(c)(1) defines the forms of adequate assurance of payment, which was not included in Section 366(b); and (3) Section 366(c)(1)(B) and (c)(3)(B) limit what the Court can consider.

The post-petition deposits sought by the Utilities in this case are as follows: (A) The Connecticut Light and Power Company (“CL&P”) – a forty-five day deposit in the amount of \$29,155; and (B) Yankee Gas Services Company (“Yankee Gas”) – a forty-five day deposit in the amount of \$5,320.

As set forth herein, this Court should deny the Utility Motion because the amounts of the post-petition deposit requests of the Utilities are reasonable and should not be modified.

Facts

Procedural Facts

1. On September 28, 2012 (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' cases are being jointly administered.

The Utility Motion

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

4. No proper notice of the Utility Motion was given to the Utilities prior to the Court entering the *Interim Order (I) Prohibiting Any Utility Company From Altering, or Discontinuing Service, (II) Approving the Debtors' Proposed Adequate Assurance, and (III) Establishing Procedures to Determine Additional Adequate Assurance of Payment Pursuant To Sections 105(a) and 366 of the Bankruptcy Code* (the "Interim Utility Order") on October 1, 2012.

5. Because the Utilities were not 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 October 1, 2012, 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. In the Utility Motion, the Debtors seek to avoid the applicable legal standards under Sections 366(2) and (3) by seeking Court approval for their own form of adequate assurance of payment, which is a newly-created segregated account (the "Bank Account") in the amount of \$53,000 that purportedly represents two-weeks of the Debtors' estimated average monthly utility charges. Utility Motion at ¶ 10. The foregoing proposal is unacceptable 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)(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).

7. The Debtors propose that all amounts in the Bank Account would remain as property of the Debtors' estates, subject to the prepetition and post-petition liens of the secured lender. Utility Motion at ¶ 11. Accordingly, the Bank Account would no longer exist if the Debtors default on their DIP Financing.

8. The Debtors also propose that the Bank Account would be returned to the Debtors upon confirmation of any plan of reorganization. The Utilities will likely continue to provide post-petition utility goods/services to the Debtors through the Effective Date of the Plan and would bill the Debtors for services through the Effective Date in arrears, i.e. after the Effective Date. As such, it does not make sense that any funds remaining in the Escrow Account on a plan confirmation date should be returned to the Debtors when utility service through the Effective Date would be billed subsequent to the Effective Date.

9. Although the Debtors establish the amount of the Bank Account (\$53,000), the Utility Motion does not address the following significant issues: (A) How would Utilities access the Bank Account, if at all? Specifically, would Utilities faced with a post-petition payment default by the Debtors be forced to draft and file an administrative expense application and litigate the matter to obtain access to the Bank Account?; (B) Why is the Bank Account undercapitalized at a two-week deposit amount when the Debtors know that the Utilities are required by applicable state laws, regulations and/or tariffs to bill the Debtors monthly?; and (C) Will the Bank Account be replenished after draws are made upon it?

10. The Utility Motion does not address why this Court should consider modifying, if

at all, the amount of the Utilities' adequate assurance requests pursuant to Section 366(c)(2).

11. The Interim Utility Order set the final hearing on the Utility Motion for October 25, 2012 at 1:00 p.m., and set the deadline for objections to the Utility Motion to be filed on or before seven days before the final hearing.

Facts Concerning the Utilities

12. 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.

13. 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 15 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 their 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.

14. 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 are

providing the following web site links to the tariffs and/or state laws, regulations and/or ordinances:

CL&P:

<http://www.cl-p.com/esuppliers/rates.aspx>

Yankee Gas:

http://www.yankeegas.com/AboutYG/rates_riders.asp

15. Subject to a reservation of the Utilities' rights to supplement their post-petition deposit request 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>
CL&P	6	\$12,593.49	\$29,155 (45-day)
Yankee Gas	3	\$3,017.95	\$5,320 (45-day)

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. *See In re Viking Offshore (USA), Inc.*, 2008 WL 782449 at *3 (Bankr. S.D. Tex. Mar. 20, 2008) (“The relief requested by Debtors would reverse the burden, by making an advance determination that the proposed assurance was adequate. . . . the court lacks the power to reverse the statutory framework for provision of adequate assurance of payment.”); *see also In re Pilgrim’s Pride Corporation*, Case No. 08-45664 (DML)(Docket No. 447), United States Bankruptcy Court For the Northern District of Texas, *Memorandum Order* entered on January 5, 2009 (Denying debtors’ motion seeking to establish adequate assurance of payment); *see also In re Ramsey Holdings, Inc.*, Case No. 09-13998-M (TLM).

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). Although the cases cited by the Debtors in the Utility Motion approved a bank account as adequate assurance, they only did so by improperly ignoring the plain language of Section 366(c)(3) and Section 366(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:

- i. It is underfunded from the outset because the Utilities are required by applicable law to issue monthly bills;
- ii. The Debtors do not propose any procedures concerning access to the Bank Account;
- iii. The Debtors are not required to replenish the Bank Account following pay-outs; and
- iv. Unlike the Debtors' professionals' Carve-Out, the Bank Account would not remain if the Debtors default on their post-petition financing.

Accordingly, the Court should not approve the Bank Account as adequate assurance to the Utilities because the Bank Account is: (a) not relevant under Section 366(c)(3) 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 amount of the Utilities' requests for the adequate assurance of payment. Under Section 366(c)(3), the Debtors have the burden of proof as to whether the amount 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 amount 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). Based on the Debtors' anticipated utility consumption, the minimum period of time the Debtors could receive service from the Utilities before termination of service for non-payment of bills is approximately two (2) months or more. Moreover, even if the Debtors timely pay their post-petition utility bills, the Utilities still have potential exposure of 45 to 60 days based on the Tariff mandated billing cycles. Furthermore, the amount 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. Although the Utilities recognize that this Court is not bound by the applicable Tariffs, the Tariffs are extremely relevant information of a determination made by an independent entity on the appropriate amount of adequate assurance that should be paid to the Utilities. Accordingly, the amount of the deposits requested by the Utilities are reasonable and should not be modified. *See In re Stagecoach*, 1 B.R. 732, 735-36 (Bankr. M.D. Fla. 1979) (holding that a two month deposit is appropriate where the debtor could receive sixty (60) days of service before termination of services because

of the utilities' billing cycle.); *see also In the Matter of Robmac, Inc.*, 8 B.R. 1, 3-4 (Bankr. N.D. Ga. 1979).

In contrast, the Debtors fail to address in the Utility Motion why this Court should modify, if at all, the amount of the Utilities' adequate assurance of payment requests, which is the Debtors' statutory burden. Instead, the Debtors merely ask this Court to approve their proposed form of adequate assurance of payment in the form of the two-week Bank Account. As set forth in Section A.1. above, the proposed Bank Account does not provide adequate assurance of payment to the Debtors' utility providers.

Furthermore, the Debtors' professionals, who have access to inside information regarding the Debtors' operations, are not taking any chances regarding the payment of their post-petition charges because they are seeking to secure the payment of their fees through a \$750,000 Carve-Out. Accordingly, based on the foregoing, the Debtors should be required to tender the deposits sought by the Utilities.

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

Dated: October 16, 2012
Wilmington, DE

McCARTER & ENGLISH, LLP

/s/ William F. Taylor, Jr.

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*Counsel For The Connecticut Light and Power
Company, and Yankee Gas Services Company*

CERTIFICATE OF SERVICE

I, William F. Taylor, Jr. do hereby certify that on October 16, 2012, I caused a true and correct copy of the (i) *Objection of The Connecticut Light and Power Company and Yankee Gas Services Company to the Motion of Debtors For Entry of Interim and Final Orders (I) Prohibiting Any Utility Company From Altering, Refusing, or Discontinuing Service, (II) Approving the Debtors' Proposed Adequate Assurance, and (III) Establishing Procedures To Determine Additional Adequate Assurance of Payment Pursuant To Sections 105(a) and 366 of the Bankruptcy Code* to be sent through the Court's ECF system, or by email or facsimile, to the following:

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