

**United States Bankruptcy Court  
Central District of California  
Los Angeles  
Judge Ernest Robles, Presiding  
Courtroom 1568 Calendar**

**Wednesday, September 5, 2018**

**Hearing Room 1568**

10:00 AM

**2:18-20151 Verity Health System of California, Inc.**

**Chapter 11**

**#24.00** Hearing  
RE: [28] Debtors Emergency Motion For Order (A) Prohibiting Utilities From Altering, Refusing, Or Discontinuing Service And (B) Determining Adequate Assurance Of Payment For Future Utility Services

Docket 28

**Matter Notes:**

9/5/2018

**The tentative ruling will be the order.  
Party to lodge order: Movant**

**POST PDF OF TENTATIVE RULING TO CIAO**

**Tentative Ruling:**

9/4/2018

Subject to any opposition which may be presented at the hearing, the Court is prepared to grant the Utility Motion on a final basis.

**Pleadings Filed and Reviewed:**

- 1) Emergency Motion for Order (A) Prohibiting Utilities from Altering, Refusing, or Discontinuing Service and (B) Determining Adequate Assurance of Payment for Future Utility Services [Doc. No. 28] (the "Utility Motion" or "Motion")
  - a) Declaration of Richard Adcock in Support of Emergency First-Day Motions [Doc. No. 8]
  - b) Order Setting Hearing on First Day Motions [Doc. No. 18]
  - c) Amended Notice of Hearings on Emergency First-Day Motions Filed by Debtors [Doc. No. 34]
  - d) Declaration of Service by Kurtzman Carson Consultants, LLC re Emergency First-Day Motions, Exhibit D [Doc. No. 50]



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**I. Facts and Summary of Pleadings**

A. Background

Background information on the Debtors is set forth in the tentative ruling on the Debtors' emergency motion for authorization to obtain secured credit and to authorize the use of cash collateral, and is not repeated here.

B. Motion for Order (A) Prohibiting Utilities from Altering, Refusing, or Discontinuing Service and (B) Determining Adequate Assurance of Payment for Future Utility Services

Debtors assert that they receive essential utility services from a number of utility providers identified in Exhibit A to the Motion (collectively, the "Utility Companies" and individually a "Utility Company") and seek emergency relief to avoid irreparable harm to the Debtors and their patients that might result if any one of the Utility Companies altered or discontinued service. Accordingly, by this motion, Debtors seek entry of an order: (i) prohibiting the Utility Companies from altering, refusing, or discontinuing service without further order of the Court; and (ii) determining adequate assurance of payment for future utility services, as already provided for in the Debtors' Budget submitted in connection with the Debtors' Cash Collateral Motion.

Debtors propose to give each Utility Company adequate assurance of future performance for their future services in the form of cash deposits (the "Utility Deposits" and each, a "Utility Deposit") in amounts that are equal to the average monthly invoice for one month of prepetition services provided to the Debtors by each Utility Company. *See* Utility Motion, Exhibit B. The Debtors propose to pay the Utility Deposits within days after the Court's entry of an order granting this Motion. Additionally, Debtors state that they will have adequate cash to meet all of their necessary postpetition operating expenses on a current basis, including payment to the Utility Companies.

Debtors also seek to establish a reasonable procedure by which a Utility Company may request further adequate assurance of future payment, in the event that such Utility Company believes that their Utility Deposit does not provided it with satisfactory adequate assurance (the "Procedures"). Debtors proposed Procedures are

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set forth on pages 13 – 15 of the Utility Motion.

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Debtors submit that tendering the Utility Deposit and approval of the Procedures will provide adequate assurance of payment as required by 11 U.S.C. § 366(c).

**II. Findings of Fact and Conclusions of Law**

As a preliminary matter, the Court notes that the declarations regarding service show compliance and attempted compliance with the Court's order setting this matter on shortened notice. Given the exigencies of first day motions, the Court finds that notice of the hearing was adequate.

Section 366(c)(2) provides that a utility companies 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 . . . adequate assurance of payment for utility service that is satisfactory to the utility." However, § 366(c)(3) provides that upon 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 § 366(c)(2).

In *In re Circuit City Stores, Inc.*, 2009 WL 484553 (Bankr. E.D. Va. Jan. 14, 2009), the court evaluated proposed procedures for determining adequate assurance of payment to utility providers. The *Circuit City* court concluded that the statute "does not prohibit a court from making a determination about the adequacy of an assurance of payment until only after a payment 'satisfactory to the utility' has been received from the debtor under § 366(c)(2). The first clause of § 366(c)(2) clearly renders the entire section subject to the court's authority outlined in § 366(c)(3). See 11 U.S.C. § 366(c)(2); see also 3 *Collier on Bankruptcy* ¶ 366.03[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.2008) (stating § 366(c)(2) means that the debtor must 'pay what the utility demands, unless the court orders otherwise.')." *In re Circuit City Stores, supra*, at \*5.

The *Circuit City* court rejected the interpretation of § 363(c)(2) that "concludes that a bankruptcy court may not determine the appropriate amount of adequate assurance until the debtor has first paid whatever amount the utility has demanded." *Id.* at \*3. Such an interpretation, the court reasoned, "is simply unworkable" and "could lead to absurd results." *Id.* For instance, a utility company might "simply fail to

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respond to a debtor's offer of adequate assurance, or it may choose to respond on the thirtieth day. In either event, the result would be calamitous for a debtor in the throes of bankruptcy." *Id.*

"The requirement is for 'adequate assurance' of payment, which . . . need not necessarily be provided by deposit." *In re Adelpia Bus. Solutions, Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002). "Whether utilities have adequate assurance of future payment is determined by the individual circumstances of each case." *Id.* "Accordingly, bankruptcy courts must be afforded reasonable discretion in determining what constitutes 'adequate assurance' of payment for continuing utility services." *Virginia Elec. & Power Co. v. Caldor, Inc.-New York*, 117 F.3d 646, 650 (2d Cir. 1997) (citations omitted).

Here, the Court finds that the Debtors' proposed Utility Deposit constitutes "adequate assurance of payment" pursuant to § 366(c)(2). The Debtors operate hospitals, medical centers and clinics. Any interruption in utility services could irreparably harm the Debtors and their patients and hamper the Debtors' ability to reorganize. Requiring the Debtors to first meet a utility company's demands for adequate assurance of payment before requesting a court order modifying that request would enable utility companies to subject the Debtors to unreasonable demands. Additionally, Debtors contends that they are current with all utility companies as of filing for bankruptcy and represent that they will remain current on all post-petition debts owed.

For these reasons, subject to oppositions at the hearing, the Court's tentative ruling is to GRANT the Utility Motion on the terms set forth herein. Debtors are directed to tender the Utility Deposits within 7 business days following entry of an order approving the motion. The Utility Companies will be deemed to be receiving adequate assurance of payment on these terms.

The Debtors must lodge a conforming proposed order within 7 days of the hearing.

**Party Information**

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**Debtor(s):**

Verity Health System of California,

Represented By  
Samuel R Maizel  
John A Moe  
Tania M Moyron