

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

In re:

CBC RESTAURANT CORP., et al.,

Debtors.

)
) Chapter 11
)
) Case No. 23-10245 (KBO)
)
) (Jointly Administered)
)
) Re: Docket Nos. 46, 97
)
) Obj. Deadline: 3/21/23, 1:00 p.m.
) Hearing Date: 3/28/23, 1:00 p.m.
)

**OBJECTION OF CERTAIN UTILITY COMPANIES
TO THE MOTION OF THE DEBTORS FOR ENTRY OF AN INTERIM
AND FINAL ORDER: (I) APPROVING DEBTORS' PROPOSED FORM
OF ADEQUATE ASSURANCE OF PAYMENT TO UTILITY COMPANIES;
(II) ESTABLISHING PROCEDURES FOR RESOLVING ADDITIONAL ADEQUATE
ASSURANCE REQUESTS; AND (III) PROHIBITING UTILITY COMPANIES FROM
ALTERING, REFUSING, OR DISCONTINUING SERVICE**

Georgia Power Company ("Georgia Power"), San Diego Gas and Electric Company ("SDG&E"), Southern California Edison Company ("SCE"), Southern California Gas Company ("SoCalGas"), Baltimore Gas and Electric Company ("BGE"), PECO Energy Company ("PECO"), Commonwealth Edison Company ("ComEd") and The Potomac Electric Power Company ("Pepco") (collectively, the "Utilities"), by counsel, hereby object to the *Motion of the Debtors for Entry of an Interim and Final Order: (I) Approving Debtors' Proposed Form of Adequate Assurance of Payment to Utility Companies; (II) Establishing Procedures for Resolving Additional Adequate Assurance Requests; and (III) Prohibiting Utility Companies from Altering, Refusing, or Discontinuing Service* (the "Utility Motion") (Docket No. 46), 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 \$150,000 that supposedly reflects an amount equal to approximately one-half of the Debtors' average monthly utility charges, net of prepetition security deposits, based on the Debtors' average monthly utility charges over the last twelve months (the "Bank Account"). As an initial matter, the Debtors' proposal that the monies contained in the Bank Account would be net of any prepetition deposits should not be approved by the Court because the Debtors do not know if any of the prepetition security will remain after utilities exercise their rights under Section 366(c)(4) of the Bankruptcy Code to recoup prepetition security against prepetition debt. It, however, appears that the Debtors have already factored the foregoing prepetition deposits into their proposed \$150,000 Bank Account because that total is only approximately thirteen (13) days of utility charges (the Debtors claim that they spend an average of \$350,000 per month on utility charges).

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, rules and regulations, and a two-week account is not sufficient in amount or in form to provide the Utilities with adequate assurance of payment even if that account contained two-weeks of charges on behalf of the Utilities; (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.

The Utilities are seeking the following two-month cash deposits from the Debtors, which are amounts that they are authorized to obtain pursuant to applicable state law: (a) Georgia Power - \$6,225; (b) SDG&E - \$58,014; (c) SCE - \$164,820; (d) SoCalGas - \$23,935; (e) BGE - \$3,080; (f) PECO - \$5,840; (g) ComEd - \$63,590; and (h) Pepco - \$27,460. 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 22, 2023 (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 27, 2023, the Debtors filed the Utility Motion.

4. On March 6, 2023, the Court entered the *Interim Order (I) Authorizing Debtors' Proposed Form of Adequate Assurance of Payment to Utility Companies, (II) Establishing Procedures for Resolving Objections by Utility Companies, and (III) Prohibiting Utility*

Companies From Altering, Refusing, or Discontinuing Service (the “Interim Utility Order”)(Docket No. 97). The Interim Utility Order set (i) an objection deadline of March 21, 2023 at 1:00 p.m., and (ii) the final hearing on the Utility Motion to take place on March 28, 2023 at 1:00 p.m. Interim Utility Order at ¶ 24.

5. Through the Utility Motion, 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 \$150,000 that supposedly reflects an amount equal to approximately one-half of the Debtors’ average monthly utility charges, net of prepetition security deposits, based on the Debtors’ average monthly utility charges over the last twelve months. Utility Motion at ¶ 12. Reducing the monies contained in the Bank Account by the amounts of alleged prepetition deposits does not make sense because the Debtors do not know if any prepetition security held by a utility will remain after a utility exercises its right under Section 366(c)(4) of the Bankruptcy Code to recoup prepetition security against prepetition debt.

6. 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 amount of the security sought by the Utilities under Section 366(c)(2).

7. The Debtors’ propose that the monies contained in the Bank Account will be returned to the Debtors upon the earliest to occur of (a) confirmation of a Chapter 11 plan or liquidation, (b) the closing of the sale of substantially all of the Debtors’ assets, (c) conversion of the Debtors’ Chapter 11 cases to cases under Chapter 7 of the Bankruptcy Code, (d) dismissal of the Debtors’ Chapter 11 cases, or (e) the conclusion of the Debtors’ Chapter 11 cases. Utility

Motion at ¶ 13. As the Utilities bill the Debtors in arrears, and the Utilities would likely provide post-petition utility goods/services to the Debtors through the effective date of a plan or sale closing, any monies contained in the Bank Account on behalf of the Utilities should not be returned to the Debtors until the Debtors confirm that they have paid in full their post-petition utility expenses owed to the Utilities.

8. The Utility Motion does not address why the Bank Account would be underfunded with less than thirteen (13) days of utility charges when the Debtors know that the Utilities are required by state-law tariffs, rules and/or regulations 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, the Debtors need to explain: (A) why they are only proposing to deposit supposed two-week amounts into the Bank Account for the Utilities; and (B) how such insufficient amounts could even begin to constitute adequate assurance of payment for the Utilities' monthly bills.

9. Furthermore, the Utility Motion does not address why this Court should consider modifying, if at all, the amounts of the Utilities' adequate assurance request pursuant to Section 366(c)(2). Rather, without providing any specifics, the Utility Motion merely states that the Bank Account, "in conjunction with the Debtors' ability to pay for future utility services in accordance with their prepetition practices," constitutes sufficient adequate assurance of payment to the Debtors' utility providers. Utility Motion at ¶ 12.

The Debtors' Cash Collateral Motion

10. On February 23, 2023, the Debtors filed the *Motion of the Debtors For Entry of an Interim Order: (A) Authorizing the Debtors' Use of Cash Collateral; (B) Scheduling a Final Hearing; and (C) for Related Relief* (the "Cash Collateral Motion") (Docket No. 18).

11. On March 3, 2023, the Court entered the *Stipulation and Agreed Bridge Order: (A) Extending Debtor's Authorized Use of Cash Collateral; and Granting Related Relief* (the "Cash Collateral Stipulation"). Attached at Exhibit "A" to the Cash Collateral Stipulation is a budget through the week ending March 10, 2023 (the "Budget"). The Debtors have not budgeted any funds for the timely payment of their post-petition utility expenses.

Facts Regarding the Utilities

12. 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 Utilities issues a bill for such charges. Once a bill is issued, the Debtors have approximately 20 to 30 days pay the applicable bill before a late charge 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' links to their tariffs, state laws, and regulations are as follows:

Georgia Power: <https://www.georgiapower.com/business/prices-rates/business-tariffs.cshtml>

SCE: <https://www.sce.com/regulatory/tariff-books>

SDG&E: <https://www.sdge.com/rates-and-regulations>

SoCalGas: <https://www2.socalgas.com/regulatory/tariffs/tariffs-rules.shtml>

BGE:

Electric –

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

Gas –

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

PECO:

Electric: <https://www.peco.com/SiteCollectionDocuments/CurrentElecTariff.pdf>

Gas: <https://www.peco.com/SiteCollectionDocuments/CurrentGasTariff.pdf>

ComEd:

Tariffs: <https://www.comed.com/customer-service/rates-pricing/rates-information/Pages/current-rates.aspx>

Regulations: <http://www.ilga.gov/commission/jcar/admincode/083/08300280sections.html>

Pepco:

Maryland: <https://www.pepco.com/MyAccount/MyBillUsage/Pages/Maryland.aspx>

District of Columbia:

<https://www.pepco.com/MyAccount/MyBillUsage/Pages/DC/CurrentTariffsDC.aspx>

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

<u>Utility</u>	<u>No. Accts.</u>	<u>Est. Pre. Debt</u>	<u>Dep. Request</u>
Georgia Power	2	\$3,991.18	\$6,225 (2-month)
SDG&E	9	\$25,051.74	\$58,014 (2-month)
SCE	24	To be supplemented	\$164,820 (2-month)

<u>Utility</u>	<u>No. Accts.</u>	<u>Est. Pre. Debt</u>	<u>Dep. Request</u>
SoCalGas	15	\$38,952.67	\$23,935 (2-month)
BGE	2	\$5,617.44	\$3,080 (2-month)
PECO	3	\$5,122.65	\$5,840 (2-month)
ComEd	19	\$22,466.55	\$63,590 (2-month)
Pepco	5	To be supplemented	\$27,460 (2-month)

16. Georgia Power held prepetition deposits totaling \$3,989.20 that it will recoup against the prepetition debt owing to Georgia Power from the Debtors pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition deposit amount 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. *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: (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 would have no control over how long the Bank Account will remain in place.

2. In order to access the Bank Account, the Utilities would 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 utility service.
4. The Debtors may close the Bank Account before all post-petition utility charges 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 20 to 20 days to pay a bill before a late fee may be charged, the timing of which is set forth in 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 60 days or more 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.

Despite the fact that the Utilities continue to provide the Debtors with crucial post-petition utility goods/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.

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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 amounts and form satisfactory to the Utilities, which is the form and amounts requested herein; and
3. Providing such other and further relief as the Court deems just and appropriate.

Dated: March 13, 2023

McCARTER & ENGLISH, LLP

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CERTIFICATE OF SERVICE

I hereby certify that in addition to the notice and service provided through the Court's ECF system, on March 13, 2023, I caused a true and correct copy of the *Objection of Certain Utility Companies to the Motion of the Debtors for Entry of an Interim and Final Order: (I) Approving Debtors' Proposed Form of Adequate Assurance of Payment to Utility Companies; (II) Establishing Procedures for Resolving Additional Adequate Assurance Requests; and (III) Prohibiting Utility Companies from Altering, Refusing, or Discontinuing Service* to be served by email on:

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