

INTRODUCTION

1. M.A. joins in and incorporates by reference Sprague Energy Corp.'s Objection to the Utilities Motion [Docket No. 228] to the extent not otherwise inconsistent as set forth herein.

2. M.A., based in Overland Park, Kansas, markets tire-derived fuel ("TDF"), which is used by companies as a fuel in their power boilers that is burned along with wood/biomass and coal.

3. Through the Utilities Motion, Debtors seek approval of procedures that will allow the Debtors, at their option and without providing M.A. any opportunity to object, to "deem" M.A. to be a utility provider subject to the terms of 11 U.S.C. § 366.

4. M.A. is not a "utility" for purposes of Section 366 of the Bankruptcy Code and the Debtors concede as much in the Utilities Motion. *See* Utilities Motion ¶ 25 (stating that "the Debtors do not believe the Fuel Providers are entitled to relief under section 366 of the Bankruptcy Code.").

5. Moreover, it is inappropriate of Debtors to seek— by way of a utility order or otherwise— an injunction prohibiting M.A. from exercising its rights under 11 U.S.C. § 560 (although it has no present intent to do so) to terminate its TDF supply agreement (the "TDF Agreement") with debtor Rumford Paper Company ("Rumford"). 11 U.S.C. § 560 expressly prohibits any injunction that will prevent a swap participant under a swap agreement from terminating that agreement. Because the TDF Agreement is commodity forward agreement (and is, therefore, a "swap agreement" within the meaning of 11 U.S.C. § 101(53B), the TDF Agreement is entitled to the safe harbor treatment afforded it under 11 U.S.C. § 560.

JURISDICTION

6. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

7. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

8. Rumford operates a paper mill located in Rumford, Maine.

9. Since January 2009, M.A. has supplied TDF to Rumford, which is used as a fuel in Rumford's power boilers that is burned along with wood/biomass and coal to generate steam, which Rumford then uses to operate its paper mill (for example, to dry paper, operate steam driven pumps, provide space heat, etc.), and (b) generate electricity.

10. The TDF supplied by M.A. to Rumford is purchased and delivered pursuant to the terms of the TDF Agreement dated July 15, 2011.

11. M.A. has continued to provide TDF to Rumford since the Petition Date pursuant to the terms of the TDF Agreement.

12. On September 7, 2011, the Debtors filed the Utilities Motion. Among other things, the Utilities Motion seeks a final order pursuant to 11 U.S.C. § 366 (a) prohibiting utility providers, including "fuel providers" such as M.A. who the Debtors may "deem" at their option to be utility providers, from altering, refusing, or discontinuing service to Debtors, and (b) providing adequate assurance to utility providers (and fuel providers who Debtors "deem" at their option to be utility providers) in form and amounts proposed by Debtors in accordance with proposed adequate assurances procedures. *See* Utilities Motion ¶¶ 14 & 25.

13. On September 8, 2011, this Court entered an order granting the Utilities Motion on an interim basis, pending a final hearing and order. [Doc. No. 75].

OBJECTION

A. M.A. is Not a Utility Subject to the Injunctive and Other Restrictive Terms of 11 U.S.C. § 366

14. 11 U.S.C. § 366(c)(2) provides that a utility may not “alter, refuse, or discontinue utility service” to the debtor unless the utility receives “satisfactory” adequate assurance of payment for utility service from the debtor or trustee within 30 days of the petition date. 11 U.S.C. § 366(c)(2).

15. 11 U.S.C. § 366 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).

16. The Bankruptcy Code does not provide a definition of the term “utility.” The legislative history of 11 U.S.C. § 366, however, indicates that Congress intended Section 366 to apply only to those “utilities” that have a special position with respect to the debtor. Utilities may include, for example, “an electric company, gas supplier, or telephone company that is a monopoly in the area so the debtor cannot easily obtain comparable services from another utility.”¹

¹ The legislative history to 11 U.S.C. § 366 states, in relevant part:

This section gives debtors protection from a cut-off of service by a utility because of the filing of a bankruptcy case. This section is intended to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another utility. The utility may not alter, refuse, or discontinue service because of the nonpayment of a bill that would be discharged in the bankruptcy case.

House Report No. 95-595, 95th Cong., 1st Sess. 350 (1977); *see* Senate Report No. 95-989, 95th Cong., 2d Sess. 60 (1978) (emphasis added).

17. Consistent with the legislative history, courts that have construed Section 366 have consistently found that Section 366 only applies to traditional “utilities” that enjoy a monopolistic position. *See One Stop Realtour Place, Inc. v. Allegiance Telecom, Inc.*, 268 B.R. 430, 436 (Bankr. E.D. Pa. 2001) (telephone company is within the meaning of a utility); *Kiriluk v. Chester Water Auth.*, 76 B.R. 979 (Bankr. E.D. Pa. 1987) (a provider of sewer service is a utility); *In re Gehrke*, 57 B.R. 97 (Bankr. D. Or. 1985) (an electric co-op association is a utility); *Good Time Charlie’s Ltd. v. Black*, 25 B.R. 226 (Bankr. E.D. Pa. 1982) (shopping mall that supplied debtor with electricity was a utility). In each case, the debtor was dependent on the services provided by the utility and such services were unavailable from any other source.

18. M.A. is not a utility subject to 11 U.S.C. § 366. M.A. is not a public service provider, it does not have “ratepayers,” its TDF sales to Rumford are not regulated by a state public utilities commission or the Federal Energy Regulatory Commission, and it does not hold a monopoly with respect to the sale of TDF.

19. M.A. is instead a private TDF marketer, subject to competition from multiple other TDF marketers. Unlike a regulated utility, M.A. is free to sell TDF to whomever it wishes and subject to whatever business terms it determines are appropriate.

20. Similarly, Rumford is free to purchase TDF and whatever other fuel supplies it determines are best suited for its business from whomever it wishes and subject to whatever business terms it can negotiate. And while some fuel suppliers to Rumford’s paper mill may be more economically advantageous to purchase from than others, the very fact that Rumford has a choice of fuel suppliers to do business with makes it apparent that M.A. is not a utility subject to Section 366. *See Darby v. Time Warner Cable, Inc. (In re Darby)*, 470 F.3d 573, 575 (5th Cir. 2006) (The availability in and of itself of other options, such as satellite or network service,

dictated that cable service was not a necessity and that the cable service provider was not subject to the terms of Section 366).

21. Nor do Debtors argue, or even attempt to argue, that M.A. is a utility subject to the terms of 11 U.S.C. § 366. To the contrary, Debtors expressly note in paragraph 25 of the Utilities Motion that “the Debtors do not believe the Fuel Providers [which term includes M.A.] are entitled to relief under section 366 of the Bankruptcy Code.”

22. Finally, “[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 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)). Absolutely nothing in the plain language of Section 366 or in its legislative history so much as remotely suggests that Congress intended to make private fuel sellers such M.A. subject to the terms of Section 366.

23. 11 U.S.C. § 366 has no application to M.A., and Debtors cannot simply “deem” M.A. to be a utility to obtain the considerable benefits afforded debtors by Section 366.

B. The Injunction Provided for in 11 U.S.C. § 366 Cannot Override the Protection Afforded M.A. With Respect to the TDF Agreement Under 11 U.S.C. § 560

24. The current TDF Agreement was entered into by Rumford and M.A. on July 15, 2011 and provides for M.A. to sell TDF to Rumford, with a fixed delivery point at a fixed price over an extended term. As such, the TDF Agreement squarely fits within the definition of a commodity forward agreement and is entitled to the protections afforded M.A. by 11 U.S.C. § 560. *See In re National Gas Distributors, LLC*, 556 F.3d 247 (4th Cir. 2009) (holding that a supply agreement with physical deliveries can be a “commodity forward agreement” and therefore a “swap agreement” under 11 U.S.C. § 101(53B)); *Calyon New York Branch v.*

American Home Mortgage Corp. (In re American Home Mortgage Corp.), 379 B.R. 503 (Bankr. D. Del. 2008) (“[I]f the definition of [the financial transaction] is met, the . . . safe harbor provisions apply, period.”).

25. 11 U.S.C. § 560 provides that the exercise of any contractual right of any swap participant² or financial participant

to cause the liquidation, termination, or acceleration of one or more swap agreements because of a condition of the kind specified in section 365(e)(1) of this title or to offset or net out any termination values or payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more swap agreements **shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title.**

11 U.S.C. § 560 (emphasis added).

26. Thus, 11 U.S.C. § 560 dictates that the rights of M.A. to terminate the TDF Agreement remain undisturbed by either (i) the automatic stay, or (ii) an “order of a court in any proceeding under this title,” which includes any interim or final order granting the relief sought in the Utilities Motion, that forbids M.A. from “altering, refusing, or discontinuing service to, or discriminating against, the Debtors solely on the basis of the commencement of these chapter 11 cases or a debt that is owed by the Debtors for services rendered prior to the Commencement Date.”

27. Although M.A. has no present intent to terminate the TDF Agreement— as it is permitted to do without a court order under 11 U.S.C. § 560— an order approving the Utilities Motion cannot and should not interfere with that right should M.A. subsequently exercise it.³

² The term “swap participant” means “an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor.” 11 U.S.C. § 101(53C).

³ Nothing contained in this Objection should be construed as a waiver by M.A. of any rights it has under any of Sections 555 through 562 of the Bankruptcy Code, all of which rights M.A. hereby expressly reserves.

WHEREFORE, M.A. respectfully requests that this Court deny the Debtors the relief they request in the Utilities Motion as to M.A. or, alternatively, order the Debtors to provide M.A. with reasonable advance notice and an opportunity to object to application of the proposed Section 366 procedures to M.A. if and when they ever elect to “deem” M.A. as a utility provider subject to the terms of the Utilities Motion.

Date: September 27, 2011

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ATTORNEYS FOR M.A. ASSOCIATES, INC.

CERTIFICATE OF SERVICE

I, Theodore J. Tacconelli, certify that I am not less than 18 years of age, and that service of the foregoing Objection of M.A. Associates, Inc. to 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, And Joinder In Sprague Energy Corp.'s Objection was made on September 27, 2011, upon the following in the manner indicated:

SEE ATTACHED SERVICE LIST

Under penalty of perjury, I declare that the foregoing is true and correct.

/s/ Theodore J. Tacconelli
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