

1 James P. Kneller, State Bar #009744
2 Law office of James Kneller, P.C
3 4800 N Scottsdale, Rd. #2900
4 Scottsdale, Arizona 85251
5 (480) 970-4500
6 (866) 834-7639 Fax
7 Jim@jimknellerlaw.com

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re:

SKYMALL, LLC,

Debtor

Joint Administration with:

**XHIBIT CORP.,
XHIBIT INTERACTIVE, LLC.,
FLYREPLY CORP.,
SHC PARENT CORP.,
SPYFIRE INTERACTIVE, LLC,
STACKED DIGITAL, LLC,
SKYMALL INTERESTS, LLC**

**Chapter 11 Cases
Case No. 2:15-bk-00679-BKM**

Jointly Administered with case no.:

**2-15-bk-00680-MCW
2-15-bk-00682-MCW
2-15-bk-00684-DPC
2-15-bk-00685-MCW
2-15-bk-00686-MCW
2-15-bk-00687-GBN
2-15-bk-00688-EPB**

This Filing Applies to:

- All Debtors
- Specified Debtors

**OBJECTION OF ARIZONA PUBLIC
SERVICE COMPANY TO THE
DEBTORS' MOTION FOR ENTRY OF
FINAL ORDERS UNDER 11 U.S.C § 366
DETERMINING ADEQUATE
ASSURANCE OF PAYMENT FOR
FUTURE UTILITY SERVICES AND
ESTABLISHING DETERMINATION
AND OBJECTION PROCEDURES**

**Date of Hearing: February 19, 2015
Time of Hearing: 1:30 p.m.**

Arizona Public Service Company (hereinafter, "APS"), by counsel, hereby objects to the Debtors' Motion for Entry of Final Orders Under 11 U.S.C § 366 Determining Adequate Assurance Of Payment For Future Utility Services And Establishing Determination And Objection Procedures (the "Utility Motion"), and set forth the following:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 is the two and a half month deposit requested by APS.

1 Accordingly, under the foregoing legal standard, it is the Debtors' burden to present evidence to
2 demonstrate, why, if at all, the amount of APS' deposit request should be modified. *See In re*
3 *Stagecoach Enterprises, Inc.*, 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979) (holding that the debtor,
4 as the petitioning party at a Section 366 hearing, bears the burden of proof); *see also Great*
5 *Atlantic & Pacific Tea Company, Inc.*, 2011 WL 5546954 at page 5 (Bankr. S.D.N.Y. 2011). A
6 Court that continues to allow a debtor to pick the form and/or amount of security, is simply
7 ignoring the plain language of the statute as amended in 2005.

8
9 In addition to changing the legal standard, Section 366(c) also changes the adequate
10 assurance of payment determination as follows: (1) The statute provides the Debtors with 30
11 days to provide adequate assurance of payment instead of 20 days; (2) Section 366(c)(1) defines
12 the forms of adequate assurance of payment, which was not included in Section 366(b); (3)
13 Section 366(c)(1)(B) and (c)(3)(B) limit what the Court can consider.

14
15 The post-petition deposit sought by APS in this case is the standard two and a half month
16 usage by the Debtors, which amounts to \$38,785. As set forth herein, this Court should deny
17 the Utility Motion because the amounts of the post-petition deposit requests of the Utilities are
18 reasonable and should not be modified.

19 20 **Facts**

21 **Procedural Facts**

22 1. On January 22, 2015 (the "Petition Date"), the Debtors commenced their cases
23 under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") that are now
24 pending with this Court. The Debtors continue to operate their businesses and manage their
25 properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

26
27 2. The Debtors' cases are being jointly administered.

28 **The Utility Motion**

1 3. On January 23, 2015, the Debtors filed the Utility Motion.

2 4. Through the Utility Motion, the Debtors seek to avoid the procedural and
3 substantive requirements of Section 366 by seeking Court approval of their proposed adequate
4 assurance of payment in the form of a one week deposit to any utility provider that requests such
5 adequate assurance in writing. The Debtors propose that any utility provider that accepts a one-
6 week deposit shall be deemed to have waived its right to seek a modification of adequate
7 assurance in the future pursuant to Section 366(c)(3), despite any change in circumstances that
8 may occur. Utility Motion at ¶ 8 (g). There is nothing in Section 366(c) that allows a debtor to
9 avoid providing a utility with post-petition security or that would require a utility to waive it's
10 rights under Section 366(c)(3). Section 366(c)(3) allows a party in interest, such as the Debtors,
11 to seek to modify the amount of a utility's adequate assurance of payment, nothing more.
12

13 5. Because APS was not served with the Interim Utility Motion and the Debtors
14 never even attempted to contact APS regarding their adequate assurance requests prior to the
15 filing of the Utility Motion, APS had no opportunity to respond to the Interim Motion or
16 otherwise be heard at the *ex parte* hearing on the Interim Motion that took place on January
17 27, 2015, despite the fact that Section 366(c)(3) (presuming this was the statutory basis for
18 the relief sought by the Debtors) requires that there be "notice and a hearing" to the Utilities.
19

20 6. The Court entered the *Interim Order Under 11 U.S.C. § 366 Determining*
21 *Adequate Assurance of Payment For Future Utility Services* (the "Interim Utility Order") on
22 January 28, 2015.
23

24 7. The Interim Utility Order provides that objections to the Utility Motion must be
25 filed by February 17, 2015, and also provides that the final hearing on the Utility Motion is set
26 for February 19, 2015 at 1:30 p.m.
27
28

1 do not make any payments to APS, by the time termination takes place, **whether a bankruptcy**
2 **is involved or not**, the final unpaid bill will amount to a minimum of 2 ½ months of service.

3
4 11. In order to avoid the need to bring witnesses and have lengthy testimony
5 regarding APS' regulated billing cycles, APS requests that this Court, pursuant to Rule 201 of
6 the Federal Rules of Evidence, take judicial notice of the APS' billing cycles. Pursuant to the
7 this request and based on the voluminous size of the applicable documents, the web site link to
8 the tariffs and/or state laws, regulations and/or ordinances, and/or cooperative service rules for
9 APS is: <http://www.aps.com/library/rates/sched-01.pdf>

10
11 12. Subject to a reservation of APS' right to supplement its post-petition deposit
12 request if additional accounts belonging to the Debtors are subsequently identified, APS' post-
13 petition deposit request is \$38,785.00 which represents 2 ½ months of the estimated charges for
14 services to be provided to the Debtors in the future. That figure has a logical, cogent and
15 practical relationship to the actual risk APS has in going forward with supplying service to these
16 Debtors.

17 Discussion

18 **A. THE UTILITY MOTION SHOULD BE DENIED AS TO APS.**

19 Sections 366(c)(2) and (3) of the Bankruptcy Code provides:

20
21 (2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a
22 utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if
23 during the 30-day period beginning on the date of the filing of the petition, the utility
24 does not receive from the debtor or the trustee adequate assurance of payment for utility
25 service that is satisfactory to the utility;

26
27 (3)(A) On request of a party in interest and after notice and a hearing, the court may
28 order modification of the amount of an assurance of payment under paragraph (2).

13. 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

1 disposition required by the text is not absurd--is to enforce it according to its terms.” *Lamie v.*
2 *United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (*quoting*
3 *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct., 1942,
4 147 L. Ed. 2d 1 (2000)). *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, 597 (6th Cir. 1997)
5 (“Statutes . . . must be read in a ‘straightforward’ and ‘commonsense’ manner.”). A plain
6 reading of Section 366(c)(2) makes clear that a debtor is required to provide adequate assurance
7 of payment satisfactory to its utilities on or within thirty (30) days of the filing of the petition. If
8 a debtor believes the **amount** of the utility’s request needs to be modified, then the debtor can
9 file a motion under Section 366(c)(3) requesting the court to modify the **amount** of the utility’s
10 request.
11

12
13 14. Furthermore, in the Utility Motion, the Debtors fail to address why this Court
14 should modify the amount of APS’ request for the adequate assurance of payment. Under
15 Section 366(c)(3), the Debtors have the burden of proof as to whether the amount of APS’
16 adequate assurance of payment requests should be modified. *See In re Stagecoach Enterprises,*
17 *Inc.*, 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979) (holding that the debtor, as the petitioning party at
18 a Section 366 hearing, bears the burden of proof); *see also Great Atlantic & Pacific Tea*
19 *Company, Inc.*, 2011 WL 5546954 at page 5 (Bankr. S.D.N.Y. 2011). However, the Debtors do
20 not provide the Court with any evidence or factually supported documentation to explain why
21 the amount of APS’ adequate assurance request should be modified. Accordingly, the Court
22 should deny the relief requested by Debtors in the Utility Motion and require the Debtors to
23 comply with the requirements of Section 366(c) with respect to APS.
24
25
26
27
28

1 **B. THE COURT SHOULD ORDER THE DEBTORS TO PROVIDE THE**
2 **ADEQUATE ASSURANCE OF PAYMENT REQUESTED BY APS**
3 **PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE.**

4 15. Section 366(c) was amended in 2005 to overturn decisions such as *Virginia*
5 *Electric and Power Company v. Caldor, Inc.*, 117 F.3d 646 (2d Cir. 1997), that held that an
6 administrative expense, without more, could constitute adequate assurance of payment in certain
7 cases. Section 366(c)(1)(A) specifically defines the forms that assurance of payment may take
8 as follows:

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

16 16. Section 366 of the Bankruptcy Code was enacted to balance a debtor's need for
17 utility services from a provider that holds a monopoly on such services, with the need of the
18 utility to ensure for itself and its rate payers that it receives payment for providing these
19 essential services. *See In re Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990). The deposit or other
20 security "should bear a reasonable relationship to expected or anticipated utility consumption by
21 a debtor." *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986).
22 In making such a determination, it is appropriate for the Court to consider "the length of time
23 necessary for the utility to effect termination once one billing cycle is missed." *In re Begley*,
24 760 F.2d 46, 49 (3d Cir. 1985). Based on the Debtors' anticipated utility consumption, the
25 minimum period of time the Debtors could receive service from APS before termination of
26 service for non-payment of bills is approximately two and a half (2 1/2) months or more.
27 Moreover, even if the Debtors timely pay their post-petition utility bills, APS still has potential
28 exposure of at least 75 days based on the Tariff mandated billing cycles. Furthermore, the

1 amount of APS' deposit request is the amount that the applicable public service commission (the
2 Arizona Corporation Commission), which is a neutral third-party entity, permits APS to request
3 from its customers. Although APS recognizes that this Court is not bound by the applicable
4 Tariffs, the Tariffs are certainly relevant information of a determination made by an independent
5 entity on the appropriate amount of adequate assurance that should be paid to APS.
6 Accordingly, the amount of the deposit requested by APS should be considered reasonable and
7 should not be modified. *See In re Stagecoach*, 1 B.R. 732, 735-36 (Bankr. M.D. Fla. 1979)
8 (holding that a two month deposit is appropriate where the debtor could receive sixty (60) days
9 of service before termination of services because of the utilities' billing cycle.); *see also In the*
10 *Matter of Robmac, Inc.*, 8 B.R. 1, 3-4 (Bankr. N.D. Ga. 1979).
11

12
13 17. In contrast, the Debtors fail to address in the Utility Motion why this Court
14 should modify, if at all, the amount of APS' adequate assurance of payment request, which is
15 the Debtors' statutory burden. Instead, the Debtors merely ask this Court to approve their
16 proposed form of adequate assurance of payment in the form of a one week deposit without
17 even attempting to justify why a one week deposit is adequate. Finally, Debtors' request that
18 Utilities be enjoined from terminating service to the Debtor for any reason, including
19 presumably a post petition default, is clearly outside of the scope of section 366.
20

21 WHEREFORE, APS respectfully requests that this Court enter an order:

- 22 1. Denying the Utility Motion as to APS;
- 23 2. Granting APS the post-petition adequate assurance of payment pursuant to
24 Section 366 in the amount and form satisfactory to APS; and

25 ...

26 ...

