

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

---

	)
	)
In re:	) Chapter 11
	)
SPORTS AUTHORITY HOLDINGS,	) Case No. 16-10527 (MFW)
INC., et al.,	)
	)
Debtors.	) (Jointly Administered)
	)
	) Re: Docket Nos. 6, 130
	)
	) Obj. Deadline: 3/22/16, 4:00 p.m.
	) Hearing Date: 3/29/16, 1:00 p.m.
	)

---

**OBJECTION OF CERTAIN UTILITY COMPANIES TO THE  
DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS  
(A) PROHIBITING UTILITY PROVIDERS FROM ALTERING,  
REFUSING OR DISCONTINUING SERVICE; (B) APPROVING  
THE DEBTORS' PROPOSED ADEQUATE ASSURANCE OF PAYMENT FOR  
POSTPETITION SERVICES; AND (C) ESTABLISHING PROCEDURES  
FOR RESOLVING REQUESTS FOR ADDITIONAL ASSURANCE OF PAYMENT**

American Electric Power ("AEP"), CenterPoint Energy Resources Corp. d/b/a CenterPoint Energy Minnesota Gas ("CE Minnesota"), CenterPoint Energy Texas Gas ("CE Texas"), Central Maine Power Company ("CMP"), Commonwealth Edison Company ("ComEd"), The Connecticut Light and Power Company ("CL&P"), Consolidated Edison Company of New York, Inc. ("Con Ed"), Florida Power & Light Company ("FPL"), Georgia Power Company ("Georgia Power"), NStar Electric & Gas Corporation ("NStar"), Orange and Rockland Utilities, Inc. ("ORU"), PECO Energy Company ("PECO"), Public Service Company of New Hampshire ("PSNH"), Public Service Electric and Gas Company



("PSE&G"), Public Service Enterprise Group Long Island ("PSEG Long Island"), Salt River Project ("SRP"), San Diego Gas & Electric Company ("SDG&E"), Southern California Edison Company ("SCE"), Southern California Gas Company ("SoCalGas"), Tampa Electric Company ("TEC"), Tucson Electric Power Company ("TEP"), Virginia Electric and Power Company d/b/a Dominion Virginia Power ("DVP"), Westar Energy, Inc. ("Westar"), Yankee Gas Services Company ("Yankee Gas"), Boston Gas Company ("BGC"), The Brooklyn Union Gas Company d/b/a National Grid NY ("NGNY"), Colonial Gas Company ("Colonial Gas"), KeySpan Gas East Corporation ("KGE"), Massachusetts Electric Company ("MEC"), Narragansett Electric Company ("NEC") and Niagara Mohawk Power Corporation ("NIMO") (collectively, the "Utilities"), by counsel, hereby object to the *Debtors' Motion For Interim and Final Orders (A) Prohibiting Utility Providers From Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment For Postpetition Services; and (C) Establishing Procedures For Resolving Requests For Additional Adequate Assurance of Payment* (the "Utility Motion"), and set forth the following:

**Introduction**

Based on the relief sought in the Utility Motion, the Debtors either believe that certain provisions of the United States Bankruptcy Code and the Federal Rules of Bankruptcy

Procedure do not apply to them or that they should not. Specifically, even though Rules 7001 and 7065 of the Federal Rules of Bankruptcy Procedure specifically provide how a party must proceed to obtain injunctive relief, the Debtors have completely ignored those requirements and sought and obtained injunctive relief (on an interim basis), via a motion and not via an adversary proceeding, that prohibits utilities from "drawing upon any existing security deposit, surety bond, or other form of security. . . ." (the "Injunctive Relief"). See Paragraph 5 of the Interim Utility Order (as that term is defined herein). The only factual allegation in the Utility Motion that pertains to the extraordinary relief the Debtors improperly sought, via a Motion and without proper notice to the Utilities, is found in paragraph 7 of the Utility Motion. If draws upon surety bonds issued by Zurich American Insurance Company will be problematic for the Debtors, as they allege, they needed to properly seek such relief via an adversary proceeding and upon proper notice to the Utilities, which was not done. Accordingly, the Court should vacate the improper injunctive relief in the Interim Utility Motion as to the Utilities and deny the Utility Motion to the extent the Debtors seek such relief on a final basis.

Moreover, there is absolutely no factual basis in the Utility Motion for the Court to have enjoined draws upon cash deposits or letters of credit. In addition, case law is clear that draws upon letters of credit (as well as demands upon surety bonds) do not require relief from the automatic stay because it is an obligation of a third party. Furthermore, Section 366(c)(4) specifically allows utilities to offset prepetition security deposits against prepetition debts without further order of the Court. Accordingly, the Court should:

(A) vacate the Injunctive Relief in the Interim Order that precludes the Utilities from exercising their rights under Section 366(c)(4) to offset prepetition deposits against prepetition debts; (B) vacate the Injunctive Relief in the Interim Order that precludes the Utilities from making demands upon surety bonds or letters of credit; (C) deny the Utility Motion to the extent it seeks such relief on a final basis as to cash deposits, surety bonds and letters of credit; and (D) award the Utilities costs and expenses for having to respond to the improper Injunctive Relief sought and obtained by the Debtors.

In the Utility Motion, the Debtors also seek 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 approximately two weeks of usage in the amount of \$2 million(the "Bank Account"). 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. 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 following reasons:

1. Unlike all of the identified and permissible forms of adequate assurance of payment listed in Section 366(c)(1)(A), the Bank Account is not something held by the Utilities, so the Utilities do not have any control over when the Bank Account will be terminated;
2. All funds contained in the Bank Account would remain subject to prepetition liens in favor of the Debtors' secured lenders (Interim Utility Order at ¶ 9; proposed

Final Utility Order at ¶ 9)(this is in complete contrast to the \$6 million Carve-Out received by the Debtors' professionals in the DIP Financing pleadings, which remains in place even if there is an event of default);

3. In order to access the Bank Account, the Utilities may 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;

4. It is underfunded from the outset because the Utilities issue monthly bills;

5. The Debtors are not required to replenish the Bank Account following pay-outs; and

6. The Debtors are proposing the return of all monies in the Bank Account before all post-petition utility invoices are paid.

The Utilities are seeking the following cash deposits from the Debtors that they are authorized to obtain from all of their customers pursuant to applicable state law: (A) AEP - \$25,361 (2-month); (B) CE Minnesota - \$20,170 (2-month); (C) CE Texas - \$2,160 (2-month); (D) CMP - \$15,441 (2-month); (E) ComEd - \$99,400 (2-month); (F) CL&P - \$20,940 (45-day); (G) Con Ed - \$80,725 (2-month); (H) FPL - \$436,237(2-month); (I) Georgia Power - \$101,220

(2-month); (J) NStar - \$59,500 (2-month); (J) ORU - \$10,140 (2-month); (K) PECO - \$21,405 (2-month); (L) PSNH - \$40,015 (2-month); (M) PSE&G - \$82,702 (2-month); (N) PSEG Long Island - \$58,266(2-month); (O) SRP - \$82,914 (2-month); (P) SDG&E - \$163,278; (Q) SCE - \$303,070 (2-month); (R) SoCalGas - \$1,480 (2-month); (S) TEC - \$44,135 (2-month); (T) TEP - \$105,562 (2.5-month); (U) DVP - \$78,154 (2-month); (V) Westar - \$20,990 (2-month); (W) Yankee Gas - \$4,335 (45-day); (X) BGC - \$3,996 (2-month); (Y) NGNY - \$3,404 (2-month); (Z) Colonial Gas - \$2,496 (2-month); (AA) KGE - \$7,512 (2-month); (BB) MEC - \$23,938 (2-month); (CC) NIMO - \$11,594 (2-month); (DD) NEC - \$29,440 (2-month).

Based on all the foregoing, this Court should deny the Utility Motion as to the Utilities because: (1) the extraordinary injunctive relief sought by the Debtors in the Utility Motion is contrary to applicable law and is not being properly sought through an adversary proceeding and the requirements of Rule 7065 of the Federal Rules of Bankruptcy Procedure; and (2) the amounts of the Utilities' post-petition deposit requests are reasonable under the circumstances and should not be modified.

**Facts**

**Procedural Facts**

1. On March 2, 2016 (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 the Petition Date, the Debtors filed the Utility Motion.

4. Proper notice of the Utility Motion was not provided to the Utilities prior to the Court entering the *Interim Order (A) Prohibiting Utility Providers From Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment For Postpetition Services; and (C) Establishing Procedures For Resolving Requests For Additional Adequate Assurance of Payment* (the "Interim Utility Order") on March 3, 2016.

5. Because the Utilities were not properly or timely 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 March 3, 2016, 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. Through the Utility Motion, the Debtors seek to improperly enjoin the Debtors' utility providers from drawing upon any existing security deposit, surety bond, or other form of security held by a utility company (the Injunctive Relief)(Utility Motion at ¶ 10). The Debtors' requested Injunctive Relief should be rejected by the Court because (i) injunctive relief can only be sought and granted through an adversary proceeding and by complying with the requirements of Rule 7065 of the Federal Rules of Bankruptcy Procedure, (ii) Section 366(c)(4) of the Bankruptcy Court expressly provides that a utility can offset prepetition deposits against prepetition debt without notice or court order, and (iii) nowhere other than paragraph 7 of the Utility Motion do the Debtors explain or justify the need for the Court to award them extraordinary Injunctive Relief.

7. The Debtors also 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 a bank account containing \$2 million that supposedly reflects two-weeks of utility charges based on the historical data for the past year. Utility Motion at ¶ 1.

8. 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).

9. The Debtors contend that the Bank Account would consistently provide their utility providers with a half-month deposit. However, the Debtors' monthly utility charges during the 2015 calendar year was approximately \$4.3 million. Utility Motion at ¶ 6. As such, \$2 million contained in the Bank Account would not reflect one-half month of utility charges.

10. The Debtors ceased making any payments to their utility providers on February 19, 2016. Utility Motion at 6.

11. The Debtors request that monies contained in the Bank Account attributable to each utility shall be returned to the

Debtors (i) upon the closure of one of the Debtors' retail locations and the discontinuance of utility services associated therewith, or (ii) termination of utility services. Utility Motion at ¶ 13(i); Interim Utility Order at ¶ 6(i); proposed Final Utility Order at ¶ 6(i). Even if the Utilities have access to the Bank Account, the Utilities bill the Debtors in arrears and the proposed two-week Bank Account is insufficient to cover their monthly billing charges. If, however, the Bank Account is approved despite the lack of authority for it, this Court should not allow funds to be released from the Bank Account until the Debtors confirm payment in full of all their post-petition utility bills from the Utilities.

12. Although not requested in the Utility Motion, the Debtors propose that all funds contained in the Bank Account remain subject to the prepetition liens in favor of the Debtors' secured lenders. Interim Utility Order at ¶ 9; proposed Final Utility Order at ¶ 9. If the Bank Account is subject to the secured lenders' liens, the Bank Account is essentially worthless because in the event of a DIP financing default it is unlikely that the Bank Account will remain available for payment of post-petition utility expenses.

13. The Utility Motion does not address why the Bank Account would be undercapitalized at less than two-weeks of

average utility charges when the Debtors know that regulated utilities, such as the Utilities, are required by applicable state laws, regulations or tariffs to bill the Debtors monthly. Moreover, the Utilities presume that the Debtors want the Utilities to continue to bill the Debtors monthly in arrears pursuant to their billing cycles established by applicable state law and/or applicable contract.

14. Furthermore, the Utility Motion does not address why this Court should consider modifying, if at all, the amounts of the Utilities' adequate assurance requests 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 the ordinary course of business" constitutes sufficient adequate assurance of payment to the Debtors' utility providers. Utility Motion at ¶ 12.

**The Debtors' Post-Petition Financing**

15. On the Petition Date, the Debtors filed the *Debtors' Motion For Interim and Final Orders (I) Authorizing Debtors To Obtain Post-Petition Secured Financing Pursuant To 11 U.S.C. §§ 105, 362, 263, and 364; (II) Granting Liens and Superpriority Claims To Post-Petition Lenders Pursuant To 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and*

*Providing Adequate Protection To Prepetition Secured Parties and Modifying the Automatic Stay Pursuant To 11 U.S.C. §§ 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant To Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2 (the "Financing Motion").*

16. Through the Financing Motion, the Debtors are seeking authorization to borrow \$595,285,000 through a DIP Facility consisting of (a) a senior secured super-priority asset based revolving credit facility of up to \$500 million in aggregate principal amount, and (ii) a senior secured, superpriority, first in last out term loan credit facility of up to \$95,285,000 in aggregate principal amount. Financing Motion at page 26.

17. The DIP Credit Agreement is conditioned on the following case milestones:

(i) Petition Date: Debtors must file (a) a motion seeking approval of bidding procedures in connection with the proposed sale transaction (the "Bidding Procedures Motion"); (b) a motion seeking authority to close and liquidate up to 180 stores operated by the Debtors and to engage a liquidator (the "Store Closing Motion"); and (c) a motion seeking to extend the time period to assume or reject leases to not less than 210 days from the Petition

- Date (the "Lease Designation Extension Motion");
- (ii) March 16, 2016: Debtors must have obtained an order approving the Store Closing Motion on an interim basis;
  - (iii) April 1, 2016: Debtors must have obtained an order approving the Lease Designation Extension Motion;
  - (iv) April 11, 2016: Debtors must deliver bid packages to any potential bidders for the Debtors' businesses or assets that are identified by the DIP Agent;
  - (v) April 21, 2016: Deadline to receive/submit binding bids with respect to the Proposed Sale Transaction;
  - (vi) April 25, 2016: Auction (if necessary);
  - (vii) April 27, 2016: Hearing for the Proposed Sale Transaction; and
  - (viii) April 28, 2016: Deadline to close Proposed Sale Transaction.

Financing Motion at ¶ 39.

18. The Financing Motion provides that all DIP obligations shall be due and payable on the date that is the earliest to occur of any of the following: (i) June 30, 2016; (ii) the closing date of a sale of all or substantially all of the Debtors' assets; and (iii) the effective date of a plan of reorganization or liquidation is confirmed. Financing Motion at page 27.

19. The Debtors also sought a carve-out for the payment of the budgeted fees of the Debtors' professionals incurred prior to the delivery of a Carve-Out Trigger Notice, plus an additional \$3 million (\$2.75 million allocable to the Debtors' case professionals and \$250,000 allocable to any Committee case professionals) incurred subsequent to the delivery of a Carve-Out Trigger Notice (the "Carve-Out"). Financing Motion at pages 29-30.

20. Attached as Exhibit "1" to the Financing Motion is a budget through the week of July 2, 2016. It is unclear to the Utilities from the Budget line items whether the Debtors have budgeted sufficient sums for the payment of their post-petition utility expense.

21. On March 3, 2016, the Court entered the *Interim Order (I) Authorizing Debtors To Obtain Post-Petition Secured Financing Pursuant To 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims To Post-Petition Lenders Pursuant To 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection To Prepetition Secured Parties and Modifying the Automatic Stay Pursuant To 11 U.S.C. §§ 261, 362, 363 and 364; and (IV) Scheduling a Final Hearing Pursuant To Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2* (the "Interim Financing Order").

22. The Interim Financing Order authorized the Debtors to borrow up to \$275 million on an interim basis. Interim Financing Order at page 16. The Interim Financing Order also approved the Carve-Out. Interim Financing Order at page 35.

**The Sale Motion**

23. On the Petition Date, the Debtors filed the *Debtors' Motion Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, Fed. R. Bankr. P. 2002, 6003, 6004, 6006, 9007, 9008 and 9014 and Del. Bankr. L.R. 2002-1, 6004-1 and 9006-1, For Entry of (A) An Order (I) Approving Bid Procedures In Connection With the Sale of Substantially All of the Debtors' Assets, (II) Scheduling An Auction For and Hearing To Approve Sale of Assets, (III) Approving Notice of Respective Date, Time and Place For Auction and For Hearing on Approval of Sale, (IV) Approving Procedures For the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (V) Approving Form and Manner of Notice Thereof, and (VI) Granting Related Relief; and (B) An Order Authorizing and Approving (I) the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Rights, Encumbrances, and Other Interests, (II) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (III) Related Relief (the "Sale Motion")*.



24. The Debtors will run the following dual-track process: (i) initiate and run an expedited sale process; and (ii) negotiate with the Debtors' creditors regarding a plan of reorganization. Sale Motion at ¶ 8.

25. Through the Sale Motion, the Debtors are seeking the entry of a Bid Procedures Order that establishes the following dates/deadlines, subject to modification as needed, related to the bidding and approval of the Sale: (i) April 10, 2016 - stalking horse bid deadline; (ii) April 19, 2016 - sale objections and cure cost/assignment objection deadline; (iii) April 20, 2016 - bid deadline; (iv) April 24, 2016 - auction; (v) April 25, 2016 - post-auction objection deadline; and (v) April 26, 2016 - sale hearing if any Qualified Bids are received. Sale Motion at ¶ 15.

#### **The Store Closing Motion**

26. On the Petition Date, the Debtors filed the *Debtors' Emergency Motion For Interim and Final Orders (A) Authorizing the Debtors To Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments To Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures and (E) Approving the Debtors' Store Closing Plan*

(the "Store Closing Motion"). The Closing Sales will commence on February 23, 2016 and will terminate on or before June 7, 2016. Store Closing Motion at page 6.

27. On the Petition Date, the Debtors filed the *Notice of Filing of List of Designated Closing Store Locations* (the "Notice of Closing Store Locations"). Exhibit "1" to the Notice of Closing Store Locations identified 143 store locations.

28. On March 3, 2016, the Court entered the *Interim Order (A) Authorizing the Debtors To Assume Closing Store Agreement; (B) Authorizing and Approving Closing Sales Free and Clear of All Liens, Claims and Encumbrances; (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments To Non-Insiders Thereunder; (D) Approving Dispute Resolution Procedures; and (E) Approving the Debtors' Store Closing Plan* (the "Interim Store Closing Order"). The Interim Store Closing Order granted the Store Closing Motion on an interim basis through and including March 29, 2016.

**The Debtors' Critical Vendor Motion**

29. On the Petition Date, the Debtors filed the *Debtors' Motion For Entry of Interim and Final Orders Authorizing Debtors To Pay Certain Prepetition Claims of Critical Vendors* (the "Critical Vendor Motion"). Through the Critical Vendor

Motion, the Debtors sought authority to pay the prepetition claims of certain supposed "critical vendors" in an amount up to \$15 million on an interim basis and \$40 million on a final basis.

30. On March 3, 2016, the Court entered the *Interim Order Authorizing Debtors To Pay Certain Prepetition Claims of Critical Vendors* (the "Interim Critical Vendor Order"). The Interim Critical Vendor Order authorized the Debtors' to pay critical vendor claims in an amount not to exceed \$15 million on an interim basis. Interim Critical Vendor Order at page 2.

31. Despite the Debtors' claim that "[u]ninterrupted Utility Services is vital to the Debtors' continued business operations" (Utility Motion at ¶ 21), the Debtors do not consider the Utilities to be "critical" vendors.

#### **Facts Concerning the Utilities**

32. 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.

33. 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 20 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 its 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.

34. 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' web site links to the tariffs and/or state laws, regulations and/or ordinances are attached hereto at Exhibit "A."

**Prepetition Security Held By the Utilities**

35. Even though the Debtors have admitted to ceasing payments to their Utilities nearly two weeks prior to the Petition Date, the

Debtors seek to improperly enjoin the Debtors' utility providers from drawing upon any existing security deposit, surety bond, or other form of security held by a utility company (the Injunctive Relief")(Utility Motion at ¶ 10).

36. The Utilities holding prepetition deposits will recoup deposits against prepetition pursuant to Section 366(c)(4) (which provides that utilities can recoup prepetition deposits against prepetition debt without notice or Court order), with any deposit credit applied toward the respective Utility's post-petition deposit request. Utilities that have surety bonds should be allowed to make claims upon the bonds for payment of prepetition debt because the Debtors have no legal or factual basis to seek to enjoin the Utilities' claims upon bonds through the Utility Motion.

37. The Utilities hold the following prepetition security:

A. CE Minnesota: Cash deposit in the amount of \$20,170 (estimated prepetition debt totaling \$10,951.39);

B. CE Texas: Cash deposit in the amount of \$2,160 (estimated prepetition debt totaling \$982.66);

C. CMP: Two surety bonds totaling \$12,000 (estimated prepetition debt totaling \$12,556.04);

D. FPL: Surety bond in the amount of \$437,190 (estimated prepetition debt totaling \$251,798.48);

E. Georgia Power: Surety bond in the amount of \$137,150 (estimated prepetition debt totaling \$58,770.34);

F. PSEG Long Island: Surety bonds in the amounts of \$54,100, \$5,000 and \$8,755 (estimated prepetition debt totaling \$24,046.28);

G. O&R: Cash deposit of \$7,267.41 (estimated prepetition debt totaling \$2,498.87);

H. SRP: Six surety bonds totaling \$91,320 (estimated prepetition debt totaling \$21,734.42);

I. SCE: Cash deposit in the amount of \$4,500 and surety bonds in the total amount of \$326,815 (estimated prepetition debt totaling \$145,060);

J. TECO: Cash deposit in the amount of \$5,000 and three surety bonds totaling \$36,200 (estimated prepetition debt totaling \$26,265.39); and

K. TEP: Four surety bonds each the amount of \$18,750 (estimated prepetition debt totaling \$37,119.66).

38. 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' 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>
----------------	----------------------	--------------------------	---------------------

AEP	3	\$4,927.52	\$25,361 (2-month)
CE Minnesota	14	\$10,951.39	\$20,170 (2-month)
<b><u>Utility</u></b>	<b><u>No. of Accts.</u></b>	<b><u>Est. Prepet. Debt</u></b>	<b><u>Dep. Request</u></b>
CE Texas	7	\$982.66	\$2,160 (2-month)
CMP	3	\$12,556.04	\$15,441 (2-month)
ComEd	32	\$39,677.61	\$99,400 (2-month)
CL&P	3	\$28,705.07	\$20,940 (45-day)
Con Ed	14	\$46,550.12	\$80,725 (2-month)
FPL	40	\$251,798.48	\$436,327 (2-month)
Georgia Power	7	\$58,770.34	\$101,220 (2-month)
NStar	11	\$27,102.03	\$59,500 (2-month)
O&R	1	\$2,498.87	\$10,140 (2-month)
PECO	7	\$10,804.75	\$21,405 (2-month)
PSE&G	20	\$37,026.03	\$82,702 (2-month)
PSNH	3	\$n/a	\$40,015 (2-month)
PSEG			
Long Island	8	\$24,046.28	\$58,265.74 (2-month)
SRP	6	\$21,734.42	\$82,914 (2-month)
SDG&E	15	\$n/a	\$163,278 (2-month)
SCE	24	\$n/a	\$303,070 (2-month)
SoCalGas	20	\$1,679.32	\$1,480 (2-month)
TECO	4	\$26,265.39	\$44,135 (2-month)
TEP	4	\$37,119.66	\$105,562 (2.5-month)
DVP	8	\$48,074.79	\$78,154 (2-month)

Westar	1	\$11,931.15	\$20,990 (2-month)
Yankee Gas	3	\$6,483.43	\$4,335 (45-day)
<b><u>Utility</u></b>	<b><u>No. of Accts.</u></b>	<b><u>Est. Prepet. Debt</u></b>	<b><u>Dep. Request</u></b>
BGC	4	\$5,216.37	\$3,996 (2-month)
NGNY	3	\$3,644.73	\$3,404 (2-month)
Colonial Gas	1	\$3,373.09	\$2,496 (2-month)
KGE	7	\$8,782.30	\$7,512 (2-month)
MEC	2	\$4,757.16	\$23,938 (2-month)
NIMO	3	\$6,207.12	\$11,594 (2-month)
NEC	10	\$17,664.26	\$29,440 (2-month)

**Discussion**

- A. THE COURT SHOULD DENY THE DEBTORS' REQUEST TO IMPROPERLY ENJOIN THE UTILITIES FROM DRAWING UPON ANY EXISTING SECURITY DEPOSIT, SURETY BOND OR OTHER FORM OF PREPETITION SECURITY.**

Rule 7001 of the Federal Rules of Bankruptcy Procedure in part provides:

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

\* \* \*

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

\* \* \*



Hence, Rule 7001 requires that all proceedings seeking to obtain injunctive or other equitable relief shall be brought as an adversary proceeding. *In re Best Products*, 203 B.R. 51 (Bankr. E.D. Va. 1996). In *Best Products*, the bankruptcy court, in the context of a chapter 11 bankruptcy case, held:

The final issue which the court must address is the status of the injunction included in my September 24, 1996, order providing adequate assurance to utility companies. Fed.R.Bankr.P. 7001(7) plainly requires that any request for an injunction or other equitable relief must be sought in the context of an adversary proceeding. Since the debtor has not filed the requisite action, I cannot enjoin any utility from pursuing its rights under state law should the debtor default in its payments post-petition.

*In re Best Products*, 203 B.R. at 54.

In addition to Rule 7001, Rule 7065 of the Federal Rules of Bankruptcy Procedure specifically sets forth how temporary and permanent injunctive relief should be sought in bankruptcy. The Debtors ignored all of the requirements of both Rules 7001 and 7065 of the Federal Rules of Bankruptcy Procedure. Specifically, in the Utility Motion the Debtors seek to improperly enjoin the Debtors' utility providers from drawing upon any existing security deposit, surety bond, or other form of security held by a utility company (previously defined as the "Injunctive Relief")(Utility Motion at ¶ 10). The Debtors' requested Injunctive Relief should be rejected by the Court because (i) injunctive relief can only be sought and

granted through an adversary proceeding in accordance with the requirements of Rule 7065 of the Federal Rules of Bankruptcy Procedure; (ii) applicable case law permits a creditor to make a demand upon a surety bond or letter of credit without obtaining relief from the automatic stay, see *In re American Film Technologies, Inc.*, 175 B.R. 847 (Bank. D. Del. 1994); *A.J. Lne & Company, Inc. v. BSC Group*, 115 B.R. 738 (Bankr. D. Mass. 1990); *Zenith Labs v. Security Pac. National Trust Co.*, 104 B.R. D.N.J. 1989); *In re Page Associates v. Page*, 18 B.R. 713 (Bankr. D.D.C. 1982); (iii) Section 366(c)(4) of the Bankruptcy Court expressly provides that a utility can offset prepetition deposits against prepetition debt without notice or court order; and (iv) nowhere in the Utility Motion do the Debtors explain or justify the need for the Court to award them extraordinary Injunctive Relief.

**B. THE UTILITY MOTION SHOULD BE DENIED BECAUSE THE DEBTORS' DIP FACILITY DOES NOT PROVIDE FOR PAYMENT OF ALL POST-PETITION UTILITY CHARGES.**

The DIP Facility provides that all DIP obligations shall be due and payable on the date that is the earliest to occur of any of the following: (i) June 30, 2016; (ii) the closing date of a sale of all or substantially all of the Debtors' assets; and (iii) the effective date of a plan of reorganization or liquidation is confirmed. Financing Motion at page 27. Hence, as of June 30, 2016, the Debtors will no longer have access to

post-petition financing to pay the Utilities bills. As this Court is aware, the Utilities bill the Debtors in arrears for post-petition utility goods/services provided to the Debtors. Accordingly, unless all post-petition accounts are closed and all charges are paid in full prior to June 30, 2016, the Utilities will have exposure for unbilled goods and/or services provided up to June 30, 2016, plus any invoices for previously billed charges that remain unpaid as of that date. Therefore, the Court should deny the Utility Motion and award the Utilities the cash deposits requested herein by the Utilities because the Utilities have potential exposure of approximately 60 days based on their billing cycles.

**C. THE UTILITY MOTION SHOULD BE DENIED AS TO THE UTILITIES BECAUSE: (1) THIS COURT HAS NO AUTHORITY TO APPROVE THE BANK ACCOUNT; AND (2) THE DEBTORS HAVE FAILED TO DEMONSTRATE THAT THE UTILITIES' REQUESTS FOR ADEQUATE ASSURANCE OF PAYMENT SHOULD BE MODIFIED.**

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.

**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:

- (i) Unlike the statutory approved forms of adequate assurance of payment, the Bank Account is not something held by the Utilities. Accordingly, the Utilities have no control over how long the Bank Account will remain in place.
- (ii) In order to access the Bank Account, the Utilities may 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.
- (iii) 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 used approximately 60 days of commodity or service.

- (iv) The Debtors are not required to replenish the Bank Account following pay-outs.
- (v) The monies contained in the Bank Account would be returned to the Debtors prior to payment of all post-petition utility charges.
- (vi) All funds contained in the Bank Account would remain subject to prepetition liens in favor of the Debtors' secured lenders (Interim Utility Order at ¶ 9; proposed Final Utility Order at ¶ 9)(this is in complete contrast to the \$6 million Carve-Out received by the Debtors' professionals in the DIP Financing pleadings, which remains in place even if there is an event of default).

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.

**D. 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 approximately 20 days to pay a bill before a late fee may be charged, and also provide written notice before utility service can be terminated for non-payment pursuant to 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 has potential exposure of approximately 60 days 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, permits 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 is introducing those amounts as evidence of amounts that their regulatory entities permit the Utilities to request from their customers.

The Debtors access to DIP Financing expires on June 30, 2016. Unless all post-petition Debtor accounts are closed and all charges are paid in full prior to June 30, 2016, the Debtors will not have the money to pay the Utilities for charges up through June 30, 2016 and for any previously issued bills not yet paid by that date.

Finally, in contrast to the improper treatment proposed as to the Utilities, the Debtors have made certain that supposed "critical vendors" and post-petition professionals are favored

creditors over the Utilities by ensuring (i) the payment of prepetition critical vendor claims of up to \$15 million on an interim basis and \$40 million on a final basis, and that (ii) the post-petition bills/expenses of Debtors' counsel are paid, even in the event of a post-petition DIP Financing default, by seeking and obtaining a \$3 million Carve-Out for the payment of professional fees and costs (\$2.75 million allocable to the Debtors' case professionals and \$250,000 allocable to any Committee case professionals) incurred subsequent to the delivery of a Carve-Out Trigger Notice. Therefore, 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.

WHEREFORE, the Utilities respectfully request that this Court enter an order:

1. Vacating the Injunctive Relief in the Interim Utility Order;

2. Denying the Utility Motion as to the Utilities;
3. Awarding the Utilities the post-petition adequate assurance of payments pursuant to Section 366 in the amount and form satisfactory to the Utilities, which is the form and amount requested herein; and
4. Providing such other and further relief as the Court deems just and appropriate.

Dated: March 17, 2016

STEVENS & LEE, P.C.

/s/ John D. Demmy  
John D. Demmy (Bar No. 2802)  
1105 North Market Street, 7<sup>th</sup> Floor  
Wilmington, Delaware 19801  
Telephone: (302) 425-3308  
E-mail: [jdd@stevenslee.com](mailto:jdd@stevenslee.com)

and

Russell R. Johnson III  
John M. Craig  
Law Firm of Russell R. Johnson III, PLC  
2258 Wheatlands Drive  
Manakin-Sabot, Virginia 23103  
Telephone: (804) 749-8861  
Facsimile: (804) 749-8862  
E-mail: [russj4478@aol.com](mailto:russj4478@aol.com)

*Counsel for American Electric  
Power, CenterPoint Energy  
Resources Corp. d/b/a CenterPoint  
Energy Minnesota Gas, CenterPoint  
Energy Texas Gas, Central Maine  
Power Company, Commonwealth  
Edison Company, The Connecticut  
Light and Power Company,  
Consolidated Edison Company of  
New York, Inc., Florida Power &  
Light Company, Georgia Power  
Company, NStar Electric & Gas*

*Corporation, Orange and Rockland Utilities, Inc., PECO Energy Company, Public Service Company of New Hampshire, Public Service Electric and Gas Company, Public Service Enterprise Group Long Island, Salt River Project, San Diego Gas & Electric Company, Southern California Edison Company, Southern California Gas Company, Tampa Electric Company, Tucson Electric Power Company, Virginia Electric and Power Company d/b/a Dominion Virginia Power, Westar Energy, Inc., Yankee Gas Services Company, Boston Gas Company, The Brooklyn Union Gas Company d/b/a National Grid NY, Colonial Gas Company, KeySpan Gas East Corporation, Massachusetts Electric Company, Narragansett Electric Company and Niagara Mohawk Power Corporation*

**EXHIBIT "A"**

AEP:

Ohio:

<https://www.aepohio.com/account/bills/rates/AEPOhioRatesTariffSOH.aspx>

Oklahoma:

<https://www.psoklahoma.com/account/bills/rates/>

CE Minnesota: <http://www.centerpointenergy.com/en-us/Corp/Pages/rates-and-tariffs-MN.aspx>

CE Texas: <http://www.centerpointenergy.com/en-us/Corp/Pages/rates-and-tariffs-TX.aspx>

CMP:

<http://www.cmpco.com/YourBusiness/pricing/pricingSchedules/default.html>

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>

CL&P: [http://www.cl-p.com/Rates/Rates\\_and\\_Tariffs/](http://www.cl-p.com/Rates/Rates_and_Tariffs/)

Con Ed:

Electric - <http://www.coned.com/rates/elec-sched1.asp>

Gas - [http://www.coned.com/rates/gas\\_main.asp](http://www.coned.com/rates/gas_main.asp)

FPL:

[http://www.fpl.com/customer/rates\\_and\\_bill/rules\\_tariffs.shtml](http://www.fpl.com/customer/rates_and_bill/rules_tariffs.shtml)

Georgia Power: [http://www.georgiapower.com/pricing/gpc\\_rates.asp](http://www.georgiapower.com/pricing/gpc_rates.asp)

NStar:

Electric - <https://www.eversource.com/Content/docs/default-source/rates-tariffs/delivery.pdf?sfvrsn=2>

Gas - <https://www.eversource.com/Content/docs/default-source/default-document-library/rules-and-regulations.pdf?sfvrsn=0>

ORU:

<http://www.oru.com/aboutoru/tariffsandregulatorydocuments/>

PECO:

<https://www.peco.com/CustomerService/RatesandPricing/RateInformation/Pages/CurrentElectric.aspx>

<https://www.peco.com/CustomerService/RatesandPricing/RateInformation/Pages/CurrentGas.aspx>

PSE&G:

Electric -

[http://www.pseg.com/family/pseandg/tariffs/gas/pdf/gas\\_tariff.pdf](http://www.pseg.com/family/pseandg/tariffs/gas/pdf/gas_tariff.pdf)

Gas -

[http://www.pseg.com/family/pseandg/tariffs/electric/pdf/electric\\_tariff.pdf](http://www.pseg.com/family/pseandg/tariffs/electric/pdf/electric_tariff.pdf)

PSNH:

<http://www.psnh.com/Templates/Content.aspx?id=4294967779&terms=tariffs>

PSEG Long Island:

<https://www.psegliny.com/page.cfm/AboutUs/ServiceRates>

SDG&E: <http://www.sdge.com/rates-regulations/current-and-effective-tariffs/current-and-effective-tariffs>

SCE: <http://www.sce.com/AboutSCE/Regulatory/tariffbooks/rules.htm>

SoCalGas: <http://www.socalgas.com/regulatory/tariffs/tariff-Book.shtml>

TEP: <https://www.tep.com/customer/rates/>

TECO:

<http://www.tampaelectric.com/company/ourpowersystem/tariff/>

DVP: <http://www.dom.com/find-it-fast/rates/terms-and-conditions.jsp>.

Westar: <https://www.westarenergy.com/rates-and-regulations>

Yankee Gas:

[http://www.yankeegas.com/For\\_Your\\_Business/Current\\_Rates/List\\_and\\_Application\\_of\\_Rates\\_and\\_Riders/](http://www.yankeegas.com/For_Your_Business/Current_Rates/List_and_Application_of_Rates_and_Riders/)

BGC:

<http://www.mass.gov/?pageID=eoeasubtopic&L=4&L0=Home&L1=Energy%2C+Utilities+%26+Clean+Technologies&L2=Natural+Gas+Industry&L3=Natural>

[+Gas+Tariffs%2C+Applications+and+Forms&sid=Eoeea](#)

NGNY:

<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B02294C34-CF68-49FB-B497-F0F2F8052A25%7D>

Colonial Gas:

[https://www1.nationalgridus.com/Files/ESCO/Colonial\\_Tariffs\\_and\\_TC.pdf](https://www1.nationalgridus.com/Files/ESCO/Colonial_Tariffs_and_TC.pdf)

KGE:

[https://www2.dps.state.ny.us/ETS/search/searchShortcutEffective.cfm?companyID=3569154&serviceType=GAS&psc\\_num=1](https://www2.dps.state.ny.us/ETS/search/searchShortcutEffective.cfm?companyID=3569154&serviceType=GAS&psc_num=1)

MEC:

[http://www.nationalgridus.com/masselectric/non\\_html/rates\\_tariff.pdf](http://www.nationalgridus.com/masselectric/non_html/rates_tariff.pdf)

NEC:

[http://www.nationalgridus.com/Narragansett/non\\_html/rates\\_tariff.pdf](http://www.nationalgridus.com/Narragansett/non_html/rates_tariff.pdf)

NIMO:

<http://www.nationalgridus.com/niagaramohawk/business/rates/rates.asp>