



2. The G&E Department provides gas, electric and certain other utility services to the residents of the City of Westfield, Massachusetts. Westfield has approximately 40,000 residents.

See [www.cityofwestfield.org](http://www.cityofwestfield.org).

3. The G&E Department is governed by the Municipal Light Board, which consists of six elected Westfield community members and one member appointed by the Mayor. *Id.*

4. The G&E Department has about 17,500 electric and 10,000 gas customers; revenues in 2010 were about \$65 million, and the department purchases power from outside generators (whom it must pay whether or not its customers – including the Debtor – pay). *Id.*

5. As will be detailed below, the Debtors are billed about \$4,500 to \$5,500 per month for each of its two (2) restaurants located within the City of Westfield, Massachusetts.

### **The Bankruptcy**

6. On October 5, 2011 (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.

7. The Debtors’ cases are being jointly administered.

### **The Utility Motion**

8. On the Petition Date, the Debtors filed the Utility Motion.

9. No proper notice of the Utility Motion was given to the G&E Department prior to the Court entering the Interim Order Determining Adequate Assurance of Payment for Future Utility Services, D.I. 55 (the “Interim Utility Order”) on October 6, 2011, and the G&E Department had no opportunity to respond or be heard.

10. Through the Utility Motion, the Debtors seek to avoid the procedural and substantive requirements of Section 366. Rather than respond to adequate assurance demands of

their individual utilities as Section 366 requires, the Debtors elected to file the Utility Motion and seek Court approval for their own form of adequate assurance in the form of an escrow account containing \$900,000, which is supposedly the Debtors' average cost of utility goods/services for two (2) weeks of utility services, calculated as a historical average over the past 12 months.

Utility Motion at ¶ 6.

11. According to the Debtors, their average monthly cost for utility goods/services is \$1.8 million. Utility Motion at ¶ 16. Thus, the Debtors' costs for utilities will exceed \$5.4 million for the three month period covered by the current DIP budget.

12. If, as is typical, utility services are provided for about a month and then billed, and the Debtors take another 20-30 days to pay, two months or more of outstanding utility bills will be outstanding at any one time and the Debtors will owe \$3.6 million; thus, the escrow is woefully inadequate.

### **The Debtors' Financial Situation**

13. In recent years, the Debtors allege that the restaurant industry – including the Debtor's businesses – has been hurt by the significant U.S. downturn and increased food costs. Utility Motion at ¶ 13.

14. Given the Debtors' currently liquidity position and projected ongoing liquidity needs, the Debtors have insufficient liquidity to continue to operate outside of chapter 11 of the Bankruptcy Code.

### **The G&E Department's Experience with the Debtors**

15. The Debtors obtain electric and gas service for their 431 East Main Street, Store 90, restaurant and 21 Southampton Road, Store 1046, restaurant both in Westfield, Massachusetts from the G&E Department on credit.

16. Typically, about ten (10) to twenty (20) days after the end of an approximately thirty-day usage period, the G&E Department sends to Debtors a bill for that month’s usage; a typical month’s usage is about \$4,500 to \$5,500 per location. See Declaration in Support of the Objection of City of Westfield Gas & Electric Department to the Utility Motion, filed herewith (“Declaration”).

17. Invoices are due in twenty-eight (28) days after rendering. While the Debtor typically pays within the twenty-eight (28) days, the meter reading occurs, on average, ten (10) days prior to the bill date. Thus, the Debtor typically owes the G&E on the day prior to payment for at least sixty (60) days of billed and unbilled gas and electric service. Id.

18. The following is a list of the recent monthly bills rendered for each location:

<b>MOST RECENT BILLS</b>		
<b><u>21 Southampton Road – Store 1046</u></b>		
July 23 <sup>rd</sup> bill		\$5,474.76
August 23 <sup>rd</sup> bill		\$5,033.46
September 23 <sup>rd</sup> bill		\$5,041.19
<b><u>431 East Main Street – Store 90</u></b>		
July 3 <sup>rd</sup> bill		\$5,534.80
August 3 <sup>rd</sup> bill		\$5,008.62
September 3 <sup>rd</sup> bill		\$4,863.70
October 3 <sup>rd</sup> bill		\$4,955.26

Declaration at Exhibit A.

19. At the Petition Date, the Debtors owed the G&E Department for well over a full month of service at 21 Southampton Road and 431 East Main Street, all unpaid. Id.

20. From the Petition Date to the date of this filing (October 17), the Debtors have obtained an additional twelve (12) days of service at 21 Southampton Road and 431 East Main Street, estimated to cost about \$5,000, also unpaid.

21. These unpaid amounts are an extreme and unfair burden on the customers of G&E Department, who must pick up the tab.

### ARGUMENT

#### **A. THE UTILITY MOTION SHOULD BE DENIED OUTRIGHT**

22. Sections 366(b) and (c) of the Bankruptcy Code, in pertinent part, provide:

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date.

(c)(1)(A) For purposes of this subsection, the term “assurance of payment” means

- (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.

(B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment,

(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).

(B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider

- (i) the absence of security before the date of the filing of the petition;
- (ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or
- (iii) the availability of an administrative expense priority.

(4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility may recover or set off against a security deposit provided to the utility by the debtor before the date of the filing of the petition without notice or order of the court.

11 U.S.C. §366 (emphasis added).

23. 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.”).

24. 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.

25. In this case, the Debtors completely overrode the statute, which requires a Debtor to satisfy the utility as to the nature of the assurance but allows modification of the amount. Instead, the Debtors filed the Utility Motion to improperly shift the focus of their obligations under Section 366(c) from modifying the amount of the utilities’ adequate assurance of payment

requests to establishing a different framework – one acceptable to the Debtors but not consistent with the statute.

26. Accordingly, this Court should not allow the Debtors to avoid compliance with the requirements of Section 366(c) and should deny the Utility Motion. *See In re Viking Offshore (USA), Inc.*, 2008 WL 782449 at \*3 (Bankr. S.D. Tex. Mar. 20, 2008) (“The relief requested by Debtors would reverse the burden, by making an advance determination that the proposed assurance was adequate. . . . the court lacks the power to reverse the statutory framework for provision of adequate assurance of payment.”).<sup>2</sup>

27. Accordingly, the G&E Department requests that the Court enter an order denying the Utility Motion outright and vacating its Interim Order (D.I. 55).

**B. IF THE COURT WISHES TO ADDRESS ADEQUATE ASSURANCE OF PAYMENT IN THIS MOTION, AS TO THE G&E DEPARTMENT IT SHOULD (1) REQUIRE PREPAYMENT OF THE ESTIMATED MONTHLY USAGE OR (2) DEFER TO THE G&E DEPARTMENT’S RIGHT TO A THREE MONTH DEPOSIT UNDER MASSACHUSETTS LAW**

28. As noted, the Utility Motion is improper for a variety of reasons, not the least of which is that it contravenes 11 U.S.C. § 366, and should simply be denied out of hand; the Debtors should then arrange for proper security in accordance with § 366 and any “modification of the amount of the deposit or other security” can be brought before the Court and determined pursuant to § 366(b).

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<sup>2</sup> See also *In re Pilgrim’s Pride Corporation*, Case No. 08-45664 (DML) (Docket No. 447), United States Bankruptcy Court For the Northern District of Texas, *Memorandum Order* entered on January 5, 2009 (Denying debtors’ motion seeking to establish adequate assurance of payment); see also *In re Ramsey Holdings, Inc.*, Case No. 09-13998-M (TLM), United States Bankruptcy Court For the Northern District of Oklahoma, *Order Denying Debtor’s Amended Motion For Entry of an Order Pursuant To Section 366 of the Bankruptcy Code Deeming Utility Companies Adequately Assured of Future Performance* entered on December 21, 2009 (Denying debtor’s motion seeking to establish adequate assurance of payment, and holding that the debtor is required by Section 366 to first approach its utility providers and attempt to arrange a mutually agreeable form of adequate assurance of payment, and if such attempts are unsuccessful, the debtor can then petition the Court to establish adequate assurance.).

29. To the extent that the Court wishes to address adequate assurance of payment in the context of this motion, it is apparent that the Debtors' proposal of a commingled account containing a half of the Debtors' monthly utility costs is improper on its face for the reasons set forth above.

30. Moreover, as to the G&E Department, even if the proposed deposit was being made in with the Department, it would be woefully inadequate as:

- The Debtors owe the G&E Department for month of unpaid service at 21 Southampton Road and 431 East Main Street on the Petition Date. Declaration, Exhibit A.
- The Debtors have run up another month of unpaid service, and based on the history will not pay those bills until several months after service began. Id.
- The Debtors have run up about \$15,000 in unpaid pre-petition bills and are well on their way to running up another \$10,000 in monthly unpaid post-petition bills.

31. As noted, the G&E Department is a city utility; it serves less than 18,000 electric customers and 10,000 gas customers and must buy electricity from entities that generate the power and gas from suppliers. It also must pay those generators for the power and gas that the Debtors have used and are using.

32. Requiring G&E Department to continue to provide utility service to the Debtors without payment is egregiously inequitable, and a taking. Thus, any requirement of continued service must be conditioned upon:

- (a) Prepayment of the estimated monthly bill at the beginning of the billing period of \$5,000 for 431 East Main Street, Store 90, restaurant and \$5,000 for the 21 Southampton Road restaurant, Store 1046, respectively, with a true up within ten (10) days of the invoice date; or
- (b) A deposit equal to three months' service as permitted by the relevant state statute.



33. Such prepayment is equitable, is precisely what § 366(c)(1)(A)(v) requires, and it is exactly what this Court required in In re SA Telecommunications, Inc., 1998 Bankr. LEXIS 2040 at \*7-9 (Bankr. D. Del. March 27, 1998) (Walsh, J.). This allows the Debtors to avoid having to escrow cash for a substantial period of time.

34. Alternatively, if the Debtors wish to avoid prepayment, the billing history and the Massachusetts statute applicable here require a deposit with the G&E Department equal to three months service. As noted, the Debtors' payment history is that payments are not received for several months after the service began, and the Debtors have already run up a pre-petition tab for unpaid services at 21 Southampton Road and 431 East Main Street. M.G.L. Ch 164, Sect. 58A provides that the G&E Department may require a deposit for three months of service. Given the G&E Department's status a part of a municipality in Massachusetts, the Court should not interfere with or limit this provision of Massachusetts law – applicable to all – for the benefit of these Debtors. Indeed, in a case that predated the 2005 amendment to § 366, the Court required a two month security deposit from a consumer debtor. In re Broadmax, 37 B.R. 909, 911 (Bankr. E.D. Pa. 1984).

35. Thus, in the absence of prepayment, the Court should not limit the G&E Department's right under Massachusetts law to require a three month deposit.

### **C. ADEQUATE ASSURANCE REQUEST**

36. The G&E Department has made an adequate assurance request upon the Debtors, a copy of which is attached as Exhibit A and incorporated by reference as if fully set forth.

WHEREFORE, if the Utility Motion is not denied out of hand, the Court should require monthly prepayment of the estimated bill as a condition of continued service, and in any event should not override the G&E Department's state law right to require a three month deposit.

Dated: October 17, 2011

MONTGOMERY, McCracken,  
WALKER & RHOADS, LLP

Of Counsel:  
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/s/ RGPlacey  
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and

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Attorneys for The City of Westfield Gas  
& Electric Light Department

EXHIBIT A

WELCH & BARBA, P.C.

ATTORNEYS AT LAW

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EMAIL: JWELCH@WELCHBARBA.COM

October 17, 2011

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Attn: Jeffrey D. Pawlitz and  
Inbal Hasbani

Friendly Ice Cream Corporation  
Pachulski Stang Ziehl & Jones LLP  
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Attn: Laura Davis Jones

The Office of the United States Trustee  
for the District of Delaware  
J. Caleb Boggs Federal Building  
844 King Street, Suite 2207, Lockbox 35  
Wilmington, Delaware 19801  
Attn: Richard L. Schepacarter

**Re: Additional Assurance Request – Friendly Ice Cream Corporation  
City of Westfield Gas & Electric Light Department**

Dear Sir/Madam:

I represent the Westfield Gas & Electric Light Department (“G&E”) with principal offices at 100 Elm Street, Westfield, Massachusetts. The G&E is a municipal lighting plant created by Massachusetts Statutes. See M.G.L. Chapter 164, Sect. 34 et seq.

By this letter and in accordance with the Bankruptcy Courts Interim Order Determining Adequate Assurances of Payment for Future Utility Services, the G&E is requesting Additional Assurances be provided by Friendly Ice Cream Corporation (the “Debtor”) as specified below. The Debtors obtain electric and gas service for their 431 East Main Street, Store 90, restaurant and 21 Southampton Road, Store 1046, restaurant both in Westfield, Massachusetts from the G&E Department on credit. Typically, about ten (10) to twenty (days) days over the past twelve (12) months after the end of an approximately thirty-day usage period, the G&E Department sends to Debtors a bill for that month’s usage; a typical month’s usage is about \$4,500 to \$5,500 per location.

## Additional Assurance Request

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The G&E provides gas, electric and certain other utility services to the residents of the City of Westfield, Massachusetts. Westfield has approximately 40,000 residents. The G&E is governed by the Municipal Light Board, which consists of six elected Westfield community members and one member appointed by the Mayor.

The G&E has about 17,500 electric and 10,000 gas customers; revenues in 2010 were about \$65 million, and the G&E purchases electricity from outside power generators (whom it must pay whether or not its customers – including the Debtor – pay).

As will be detailed below, the Debtors are billed about \$4,500 to \$5,500 per month for each of its two (2) restaurants located within the City of Westfield, Massachusetts.

Given the Debtor's current liquidity position and projected ongoing liquidity needs, the Debtor represented that they have insufficient liquidity to continue to operate outside of chapter 11 of the Bankruptcy Code.

Invoices are due in twenty-eight (28) days after rendering. While the Debtor typically pays within the twenty-eight (28) days, the meter reading occurs, on average, ten (10) days prior to the bill date. Thus, the Debtor typically owes the G&E on the day prior to payment for at least sixty (60) days of billed and unbilled gas and electric service.

The most recent bills owed City of Westfield Gas & Electric Light Department for the following service are:

<b>MOST RECENT BILLS</b>		
<b><u>21 Southampton Road – Store 1046</u></b>		
July 23 <sup>rd</sup> bill		\$5,474.76
August 23 <sup>rd</sup> bill		\$5,033.46
September 23 <sup>rd</sup> bill		\$5,041.19
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September 3 <sup>rd</sup> bill		\$4,863.70
October 3 <sup>rd</sup> bill		\$4,955.26

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Thus, at the Petition Date, the Debtors owed the G&E for fifty-one (51) days of service for 21 Southampton Road and forty-two (42) days of service for 431 East Main Street, all unpaid.

From the Petition Date to the date of this letter, the Debtor has obtained an additional twelve (12) days of service at 21 Southampton Road and 431 East Main Street, estimated to cost about \$5,000, also unpaid. These unpaid amounts are an extreme and unfair burden on the customers of G&E Department, who must pick up the tab.

As noted, the G&E is a city utility; it serves less than 18,000 electric customers and 10,000 gas customers and must buy electricity from entities that generate the power and gas from suppliers. It also must pay those generators for the power and gas that the Debtor has used and continues to use

Requiring G&E to continue to provide utility service to the Debtors without payment is egregiously inequitable, and a taking. Thus, the G&E is requesting Additional Assurances for its requirement to continue to provide utility services upon:

1. Prepayment of the estimated monthly bill at the beginning of the billing period of \$5,000 for 431 East Main Street, Store 90, restaurant and \$5,000 for the 21 Southampton Road restaurant, Store 1046, respectively, with a true up within ten (10) days of the invoice date; or
2. A deposit equal to three months' service for each location in the total amount of Thirty thousand dollars (\$30,000) as permitted by the relevant state statute.

Such prepayment is equitable, is precisely what § 366(c)(1)(A)(v) requires, and it is exactly what this Court required in In re SA Telecommunications, Inc., 1998 Bankr. LEXIS 2040 at \*7-9 (Bankr. D. Del. March 27, 1998) (Walsh, J.). This allows the Debtors to avoid having to escrow cash for a substantial period of time.

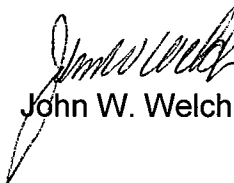
Alternatively, if the Debtors wish to avoid prepayment, the billing history and the Massachusetts statute applicable here require a deposit with the G&E equal to three months service. As noted, the Debtors' payment history is that payments are not received for up to thirty-nine (39) days after the service is rendered, and the Debtors have already run up a pre-petition tab for fifty-one (51) days of unpaid services at 21 Southampton Road and forty-two (42) days of unpaid

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service at 431 East Main Street. M.G.L. Ch 164, Sect. 58A provides that the G&E may require a deposit for three months of service. Given the G&E's status a part of a municipality in Massachusetts, the we would request the Court not interfere with or limit this provision of Massachusetts law – applicable to all – for the benefit of these Debtors. Indeed, in a case that predated the 2005 amendment to § 366, the Court required a two month security deposit from a consumer debtor. In re Broadmax, 37 B.R. 909, 911 (Bankr. E.D. Pa. 1984).

I look forward to discussing this matter with you.

Very truly yours,



John W. Welch

JWW/lss

cc: Daniel J Howard, General Manager  
Andrew P. Banas, Chief Business Officer  
Arlene Paton, Accounts Manager