

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

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<b>In re:</b>	:	<b>Chapter 11</b>
	:	
	:	<b>Case No. 11-13167 (KG)</b>
<b>FRIENDLY ICE CREAM CORPORATION, et al.,<sup>1</sup></b>	:	<b>(Jointly Administered)</b>
	:	
	:	<b>Re: D.I. Nos. 14 and 55</b>
<b>Debtors.</b>	:	<b>Objection Date: October 17, 2011</b>
	:	<b>Hearing Date: October 24, 2011</b>
	:	<b>at 3:00pm</b>
	:	

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**OBJECTION OF THE CITY OF CHICOPEE ELECTRIC  
LIGHT DEPARTMENT THE DEBTORS’ MOTION FOR ENTRY  
OF INTERIM AND FINAL ORDERS DETERMINING ADEQUATE  
ASSURANCE OF PAYMENT FOR FUTURE UTILITY SERVICES (D.I. 14)  
AND REQUEST FOR ADDITIONAL ADEQUATE ASSURANCE**

The City of Chicopee Electric Light Department objects to the Debtors’ Motion For Entry of Interim and Final Orders Determining Adequate Assurance of Payment for Future Utility Services, D.I. 14 (the “Utility Motion”) as follows:

**FACTUAL BACKGROUND**

**The Chicopee Electric Light Department**

1. The Chicopee Electric Light Department (“CEL”) is a municipal lighting plant created by Massachusetts Statutes. See M.G.L. Chapter 164, Sect. 34 et seq.
  
2. CEL provides electric and certain other utility services to the residents of the City of Chicopee, Massachusetts. Chicopee has approximately 54,000 residents.

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: Friendly Ice Cream Corporation (3130); Friendly’s Restaurants Franchise, LLC (3693); Friendly’s Realty I, LLC (2580); Friendly’s Realty II, LLC (2581); and Friendly’s Realty III, LLC (2583). The location of the Debtors’ corporate headquarters and the Debtors’ service address is: 1855 Boston Road, Wilbraham, Massachusetts 01095.

3. CEL is governed by the Municipal Light Board, which consists of three members appointed by the Mayor and confirmed by the Board of Alderman.

4. CEL has about 25,500 electric customers; revenues in 2010 were about \$57 million, and the department purchases electricity from outside power generators (whom it must pay whether or not its customers – including the Debtor – pay).

5. As will be detailed below, the Debtors are billed about \$4,500 to \$26,000 per month for each of its three (3) facilities located within the City of Chicopee, 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 CEL 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 CEL 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 Debtor has insufficient liquidity to continue to operate outside of chapter 11 of the Bankruptcy Code.

#### **CEL's Experience with the Debtors**

15. The Debtors obtain electric service for their 1045 Sheridan Street, Distribution Center, 529 Memorial Drive, Store 816, and 411 East Street, Store 118 locations, all located in Chicopee, Massachusetts from CEL on credit.

16. Typically, about ten (10) to twenty (days) days over the past twelve (12) months after the end of an approximately thirty-day usage period, CEL sends to Debtors a bill for that

month's usage; a typical month's usage is about \$4,500 to \$26,000 per location. See Declaration in Support of the Objection of City of Chicopee Electric Department to the Utility Motion, filed herewith ("Declaration").

17. Invoices are due in thirty (30) days after rendering. While the Debtor typically pays within the thirty (30) days, the meter reading occurs, on average, ten (10) days prior to the bill date. Thus, the Debtor typically owes CEL on the day prior to payment for at least sixty (60) days of billed and unbilled electric service. Id.

18. The most recent bills of the Debtor from CEL are for the following service:

<b>MOST RECENT BILLS</b>		
<b><u>529 Memorial Drive – Store 816</u></b>		
July 26 <sup>th</sup> bill		\$4,325.25
August 26 <sup>th</sup> bill		\$4,509.11
September 27 <sup>th</sup> bill		\$3,923.03
October 12 <sup>th</sup> bill		\$1,837.22
<b><u>411 East Street – Store 118</u></b>		
July 26 <sup>th</sup> bill		\$3,181.80
August 26 <sup>th</sup> bill		\$3,043.88
September 27 <sup>th</sup> bill		\$2,992.17
October 12 <sup>th</sup> bill		\$1,458.00
<b><u>1045 Sheridan Street – Distribution Center</u></b>		
July 29 <sup>th</sup> bill		\$24,744.98
August 31 <sup>st</sup> bill		\$24,926.62
September 30 <sup>th</sup> bill		\$26,574.42
October 12 <sup>th</sup> bill		\$4,825.84

Declaration at Exhibit A.

19. Thus, at the Petition Date, the Debtors owed CEL for several months of service for 1045 Sheridan Street, Distribution Center, 529 Memorial Drive, Store 816, and 411 East Street, Store 118, 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 1045 Sheridan Street, Distribution Center, 529 Memorial Drive, Store 816, and 411 East Street, Store 118, estimated to cost at least \$15,000, also unpaid.

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

### **ARGUMENT**

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

22. CEL joins in the Objection of the City of Westfield Gas & Electric Light Department to the Debtors' Motion for Entry of Interim and Final Orders Determining Adequate Assurance of Payment for Future Utility Services (D.I. 14) and Request for Additional Adequate Assurance and incorporates the argument made in that objection; for the reasons set forth therein which will not be reargued here, the Utility Motion should be denied outright

23. Accordingly, CEL requests that the Court enter an order denying the Utility Motion and vacating its Interim Order (D.I. 55).

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

24. 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).

25. To the extent that the Court wishes to address adequate assurance of payment in the context of this motion, it is apparent that the Debtor's 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.

26. Moreover, as to CEL, even if the proposed deposit was being made in with CEL, it would be woefully inadequate as:

- At the Petition Date, the Debtors owed CEL for several months of service for 1045 Sheridan Street, Distribution Center, 529 Memorial Drive, Store 816, and 411 East Street, Store 118, all unpaid. Declaration, Exhibit A.
- The Debtors have run up another month of unpaid service, and based on the history (Declaration Exhibit A) will not pay that bill until about two months after service began.
- The Debtors have run up about \$66,911.20 in unpaid pre-petition bills and are well on their way to running up another \$30,000 in monthly unpaid post-petition bills.

27. As noted, CEL is a city utility; it serves less than 25,500 electric customers and must buy electricity from entities that generate the power from suppliers. It also must pay those generators for the power that the Debtors have used and are using.

28. Requiring CEL to continue to provide utility service to the Debtor 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 \$3,000 for 411 East Street, Store 118, restaurant; \$4,000 for the 529 Memorial Drive restaurant, Store 816; and \$25,000 for 1045 Sheridan Street Distribution Center, respectively, with a true up within ten (10) days of the invoice; or
- (b) A deposit equal to three months' service as permitted by the relevant state statute in the total amount of ninety-six thousand dollars (\$96,000).

29. 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.

30. Alternatively, if the Debtors wish to avoid prepayment, the billing history and the Massachusetts statute applicable here require a deposit with CEL 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 several months of service for 1045 Sheridan Street, Distribution Center, 529 Memorial Drive, Store 816, and 411 East Street, Store 118. M.G.L. Ch 164, Sect. 58A provides that CEL may require a deposit for three months of service. Given CELs' 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).

31. Thus, in the absence of prepayment, the Court should not limit CEL's right under Massachusetts law to require a three month deposit.

**C. ADEQUATE ASSURANCE REQUEST**

32. CEL has made and 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 Utilities 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 CELs' 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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(413) 734-6734

Attorneys for The City of Chicopee  
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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Inbal Hasbani

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Attn: Laura Davis Jones

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

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

Dear Sir/Madam:

I represent the City of Chicopee Electric Light Department (“CEL”) with principal offices at 725 Front Street, Chicopee, Massachusetts. CEL 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, CEL is requesting Additional Assurances be provided by Friendly Ice Cream Corporation (the “Debtor”) as specified below. The Debtor obtain electric service for their 1045 Sheridan Street, Distribution Center, 529 Memorial Drive, Store 816, and 411 East Street, Store 118, all located in Chicopee, Massachusetts from CEL 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, CEL sends to Debtor a bill for that month’s usage; a typical month’s ranges between \$ 4,000 and \$26,000 per location.

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CEL provides gas, electric and certain other utility services to the residents of the City of Chicopee, Massachusetts. Chicopee has approximately 54,000 residents. CEL is governed by the Municipal Light Board, which consists of three members appointed by the Mayor and approved by the Board of Alderman.

CEL has about 25,500 electric customers; revenues in 2010 were about \$57 million, and CEL 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 Debtor is billed about \$4,000 to \$26,000 per month for each of its three (3) facilities located within the City of Chicopee, 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 thirty (30) days after rendering. While the Debtor typically pays within the thirty (30) days, the meter reading occurs, on average, ten (10) days prior to the bill date. Thus, the Debtor typically owes CEL on the day prior to payment for at least sixty (60) days of billed and unbilled gas and electric service.

As noted, CEL is a city utility; it serves less than 25,500 electric customers and must buy electricity from entities that generate the power. It also must pay those generators for the power that the Debtor has used and continues to use.

While we have seen newspaper reports that 411 East Street, Store 118, restaurant is being closed, no one has notified CEL to discontinue service to that location. Based on the continued service to the East Street location, CEL would request security for continued utility service.

At the Petition Date, the Debtors owed CEL for approximately sixty-seven (67) days of service for 1045 Sheridan Street, Distribution Center, approximately forty (40) days of service for 529 Memorial Drive, Store 816, and approximately forty (40) days of service for 411 East Street, Store 118, all unpaid.

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The most recent bills owed City of Chicopee Electric Light Department for the following service is:

<b>MOST RECENT BILLS</b>		
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From the Petition Date to the date of this filing (October 17), the Debtors have obtained an additional twelve (12) days of service at Friendly Ice Cream (Store 118) restaurant located at 411 East Street, Friendly Ice Cream (Store 816) restaurant located at 529 Memorial Drive, Chicopee, Massachusetts and Friendly Ice Cream Distribution Center located at 1045 Sheridan Street, also unpaid.

Requiring CEL to continue to provide utility service to the Debtor without payment is egregiously inequitable, and a taking. Thus, CEL 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 \$3,000 for 411 East Street, Store 118, restaurant; \$4,000 for the 529 Memorial Drive restaurant, Store 816; and \$25,000 for 1045 Sheridan Street Distribution Center, respectively, with a true up within ten (10) days of the invoice; or

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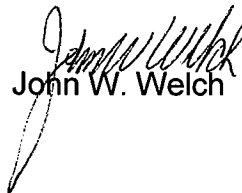
2. A deposit equal to three months' service for each location in the total amount of Ninety-Six Thousand Dollars (\$96,000) as permitted by the relevant state statute.

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 Debtor to avoid having to escrow cash for a substantial period of time.

Alternatively, if the Debtor wishes to avoid prepayment, the billing history and the Massachusetts statute applicable here require a deposit with CEL equal to three months service. M.G.L. Ch 164, Sect. 58A provides that CEL may require a deposit for three months of service. Given CEL'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: Jeffrey R. Cady, General Manager  
Debbie Pietras, Customer Service Supervisor