

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

)	Case No. 20-43597-399
In re:)	Chapter 11
)	
BRIGGS & STRATTON)	(Jointly Administered)
CORPORATION, et al.,)	
)	Objection Deadline: August 5, 2020
Debtors.)	
)	Hearing Date: August 11, 2020
)	Hearing Time: 10:00 am (CT)
)	Hearing Location: Courtroom 5 North

OBJECTION OF CONSTELLATION NEWENERGY – GAS DIVISION, LLC AND GEORGIA POWER COMPANY TO THE MOTION OF DEBTORS FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING ASSURANCE OF PAYMENT TO UTILITY PROVIDERS, (II) ESTABLISHING PROCEDURES PROVIDING ADEQUATE ASSURANCE AND RESOLVING OBJECTIONS BY UTILITY PROVIDERS, AND (III) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING, OR DISCONTINUING UTILITY SERVICE; (IV) AUTHORIZING DEBTORS TO HONOR OBLIGATIONS TO PAYMENT PROCESSOR IN ORDINARY COURSE OF BUSINESS, AND (V) GRANTING RELATED RELIEF

Constellation NewEnergy – Gas Division, LLC (“CNEG”) and Georgia Power Company (“Georgia Power”)(collectively, the “Utilities”), by counsel, hereby object to the *Motion of Debtors For Interim and Final Orders (I) Authorizing Assurance of Payment To Utility Providers, (II) Establishing Procedures Providing Adequate Assurance and Resolving Objections By Utility Providers, and (III) Prohibiting Utility Providers From Altering, Refusing, or Discontinuing Utility Service; (IV) Authorizing Debtors To Honor Obligations To Payment Processor In Ordinary Course of Business, and (V) Granting Related Relief* (the “Utility Motion”) (Docket No. 6), and set forth the following:

Introduction

The Debtors’ Utility Motion improperly seeks to shift the Debtors’ obligations under



Section 366(c)(3) from modifying the amounts 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 \$907,505 that supposedly reflects an amount equal to two weeks' of utility charges, less any prepetition deposits that have not been applied to prepetition amounts (the "Bank Account"). The Court should reject the Debtors' proposed Bank Account because: (1) the Utilities bill the Debtors on a monthly basis and provide the Debtors with generous payment terms pursuant to applicable state law, tariffs, regulations and/or contract, and a two-week account is not sufficient in amount or in form to provide the Utilities with adequate assurance of payment; (2) 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; and (3) 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 reasons set forth in Section A.1. of this Objection.

The Utilities are seeking the following two-month cash deposits from the Debtors, which are amounts that they are authorized to obtain pursuant to applicable state law or contract: (a) CNEG - \$144,896; and (b) Georgia Power - \$294,925. Based on all of the foregoing, this Court should deny the Utility Motion as to the Utilities because the amounts of the Utilities' post-petition deposit requests are reasonable under the circumstances and should not be modified.

Facts

Procedural Facts

1. On July 20, 2020 (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. On July 21, 2020, the Debtors filed the *Notice of Hearing* (Docket No. 113) that set (i) an objection deadline of August 5, 2020 and (ii) the hearing on the Utility Motion to take place on August 11, 2020 at 10:00 a.m.

5. Through the Utility Motion, the Debtors 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 the Bank Account containing approximately \$907,505 that supposedly reflects an amount equal to two weeks’ of utility charges, less any prepetition deposits that have not been applied to prepetition amounts. Utility Motion at ¶ 10.

6. 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 amounts of the security sought by the Utilities under Section 366(c)(2).

7. The Debtors propose that monies contained in the Bank Account would be

returned to the Debtors upon the earlier of (i) the reconciliation and payment by the Debtors of a utility's final invoice following the Debtors' termination of utility services, and (ii) the effective date of any Chapter 11 plan. Utility Motion at ¶ 13. As the Utilities bill the Debtors in arrears, and the Utilities would likely provide post-petition utility goods/services to the Debtors through the effective date of a plan or a sale closing date, any monies contained in the Bank Account on behalf of the Utilities should not be returned to the Debtors until the Debtors confirm that they have paid in full their post-petition utility expenses owed to the Utilities.

8. The Utility Motion does not address why the Bank Account would be underfunded with only two-weeks of utility charges when the Debtors know that the Utilities are required by applicable state laws, regulations, tariffs and/or contract to bill the Debtors monthly. Moreover, presumably the Debtors want the Utilities to continue to bill the Debtors monthly and provide them with the same generous payment terms that they received prepetition. Accordingly, if the Bank Account is relevant, which the Utilities dispute, the Debtors need to explain: (A) why they are only proposing to deposit supposed two-week amounts into the Bank Account for the Utilities; and (B) how such insufficient amounts could even begin to constitute adequate assurance of payment for the Utilities' monthly bills.

9. 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 cash flows from operations, cash on hand, the use of the Debtors' DIP Financing, and an existing cash deposits held by the Utility Providers," constitutes sufficient adequate assurance of payment. Utility Motion at ¶

14.

Facts Regarding CNEG

10. CNEG provides natural gas and related services to the Debtors pursuant to (i) a Natural Gas Supply Agreement and related Transaction Confirmation, and (ii) a Master Natural Gas Agreement, related Amendment and Managed Portfolio Services Rider (collectively, the “Gas Agreements”) that set forth the terms and conditions concerning CNEG’s provision of natural gas and related services to the Debtors. CNEG has continued to provide the Debtors with natural gas and related services pursuant to the Gas Agreements since the Petition Date.

11. Pursuant to the Gas Agreements, the Debtors receive approximately one month of natural gas and related services before CNEG issues a bill. Once a bill is issued, the Debtors have between 10 days and 15 days to pay the applicable bill. If the Debtors fail to timely pay a bill, a late fee may be subsequently imposed on the account. Accordingly, the Debtors could receive approximately two months of natural gas and related services before CNEG could terminate the Gas Agreements after a post-petition payment default.

12. The estimated pre-petition debt owed by the Debtors to CNEG is approximately \$50,106. CNEG is requesting a two-month cash deposit of \$144,896 as adequate assurance of payment from the Debtors, which is an amount it can obtain from the Debtors pursuant to the terms and conditions of the Gas Agreements.

Facts Regarding Georgia Power

13. Georgia Power provided the Debtors with prepetition utility goods and/or services and has continued to provide the Debtors with utility goods and/or services since the Petition Date.

14. Under Georgia Power's billing cycle, the Debtors receive approximately one month of utility goods and/or services before Georgia Power issues a bill for such charges. Once a bill is issued, the Debtors have approximately 20 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, Georgia Power issues a notice that informs the Debtors that they must cure the arrearage within a certain period of time or their service will be disconnected. Accordingly, under Georgia Power's billing cycle, 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.

15. In order to avoid the need to bring witnesses and have lengthy testimony regarding Georgia Power's regulated billing cycle, Georgia Power requests that this Court, pursuant to Rule 201 of the Federal Rules of Evidence, take judicial notice of Georgia Power's billing cycle. Pursuant to the foregoing request and based on the voluminous size of the applicable documents, Georgia Power's link to its tariffs, state laws, and regulations is as follows: <https://www.georgiapower.com/business/prices-rates/business-tariffs.cshtml>

16. Subject to a reservation of Georgia Power's right to supplement its post-petition deposit request if additional accounts belonging to the Debtors are subsequently identified, Georgia Power's post-petition deposit request is as follows:

<u>Number of Accounts</u>	<u>Estimated Prepetition Debt</u>	<u>Deposit Request</u>
5	To be supplemented	\$294,925 (2-month)

Discussion

A. THE UTILITY MOTION SHOULD BE DENIED AS TO THE UTILITIES.

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. *In re Lucre*, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005). 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:

1. 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.
2. 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 received approximately 60 days of commodity or service.
3. The Debtors are not required to replenish the Bank Account following pay-outs.
4. The Debtors should not reduce the amount of Bank Account on account of the termination of utility services to a Debtor account until the Debtors confirm that all post-petition charges on a closed account are paid in full.

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 No Set Forth Any Basis For Modifying The Utilities' Request 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.

B. 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 10 to 30 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 contract. Based on the foregoing state-mandated and contract-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 have potential exposure of approximately 45 to 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, or contract, permit 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 or contract are binding on this Court, but, instead are introducing those amounts as evidence of amounts that their regulatory entity or contract permit the Utilities to request from their customers.

Despite the fact that the Utilities continue to provide the Debtors with crucial post-petition utility 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. Denying the Utility Motion as to the Utilities;
2. 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
3. Providing such other and further relief as the Court deems just and appropriate.

Dated: August 3, 2020

/s/ Norah J. Ryan
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CERTIFICATE OF SERVICE

The undersigned certifies that on August 3, 2020, a true and correct copy of the above and foregoing *Objection* was served via electronic filing through the CM/ECF system of the U.S. Bankruptcy Court, Eastern District of Missouri upon all parties to this matter requesting service by electronic filing.

/s/ Norah J. Ryan _____
Norah J. Ryan