

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
Caption in Compliance with D.N.J. LBR 9004-1(b)	
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and	
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<i>Co-Counsel for Ohio Power Company d/b/a American Electric Power, et. al.,</i>	
In re: CYXTERA TECHNOLOGIES, INC., <i>et al.</i> , Debtors.	Chapter 11 Case No. 23-14853 (JKS) (Jointly Administered)

OBJECTION OF CERTAIN UTILITY COMPANIES TO THE DEBTORS’ MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) APPROVING THE DEBTORS’ PROPOSED ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE UTILITY SERVICES, (II) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING, OR DISCONTINUING SERVICES, (III) APPROVING THE DEBTORS’ PROPOSED PROCEDURES FOR RESOLVING ADEQUATE ASSURANCE REQUESTS, AND (IV) GRANTING RELATED RELIEF

Ohio Power Company d/b/a American Electric Power (“AEP”), Constellation NewEnergy, Inc. (“CNE”), Constellation NewEnergy – Gas Division, LLC (“CNEG”), Salt



River Project (“SRP”), Southern California Edison Company (“SCE”), Virginia Electric and Power Company d/b/a Dominion Energy Virginia (“DEV”), Commonwealth Edison Company (“ComEd”), NStar (East) Electric Company (“NStar East”), Tampa Electric Company (“TEC”) and Southern California Gas Company (“SoCalGas”) (collectively, the “Utilities”), hereby object to the *Debtors’ Motion For Entry of Interim and Final Orders (I) Approving the Debtors’ Proposed Adequate Assurance of Payment For Future Utility Services, (II) Prohibiting Utility Companies From Altering, Refusing, or Discontinuing Services, (III) Approving the Debtors’ Proposed Procedures For Resolving Adequate Assurance Requests, and (IV) Granting Related Relief* (the “Utility Motion”) (Docket No. 9), 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 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 clear statutory burden in this fashion.

Through the Utility Motion, the Debtors seek to have this Court approve their form of adequate assurance of payment, which is a bank account containing \$5.3 million that supposedly reflects approximately one-half of the Debtors’ average monthly utility charges, less any security deposits held by the Debtors’ utility providers as of the Petition Date (the “Bank Account”). As an initial matter, the Debtors’ proposal that the monies contained in the Bank Account would be net of any prepetition security does not make sense because the Debtors do not know if any of the prepetition security will remain after the Utilities recoup prepetition deposits against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. The Debtors’ propose

that the Bank Account will contain the following amounts on behalf of the Utilities: (a) AEP - \$13,600; (b) CNE - \$422,740; (c) CNEG - \$15,300; (d) SRP - \$0; (e) SCE -\$187,400; (f) DEV - \$319,500; (g) ComEd - \$115,773; (h) NStar East - \$118,600; and (i) TEC - \$0. The Debtors are not offering any adequate assurance of payment to SRP and TEC because those Utilities held prepetition deposits.

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 contracts, such that a two-week account maintained by the Debtors 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, this 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) AEP - \$54,648 (2-month); (b) CNE - \$963,858; (c) CNEG - \$58,826; (d) SRP - \$140,600; (e) SCE -\$912,618; (f) DEV - \$236,998; (g) ComEd - \$943,805; (h) NStar East - \$469,280; (i) TEC - \$223,893; and (i) SoCalGas - \$14,970. 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 June 4, 2023 (the “Petition Date”), the Debtors commenced their cases under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) 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 June 6, 2023, the Court entered the *Interim Order (I) Approving the Debtors’ Proposed Adequate Assurance of Payment For Future Utility Services, (II) Prohibiting Utility Companies From Altering, Refusing, or Discontinuing Services, (III) Approving the Debtors’ Proposed Procedures For Resolving Adequate Assurance Requests, and (IV) Granting Related Relief* (the “Interim Utility Order”) (Docket No. 60). The Utility Order provides that an objection to the Utility Motion must be filed on or before June 22, 2023 at 4:00 p.m., with a final hearing on the Utility Motion to take place on June 29, 2023 at 10:00 a.m. Utility Order at ¶ 2.

5. The Debtors claim that they pay approximately \$13 million each month for utility services. Utility Motion at ¶ 13.

6. 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 \$5.3 million that supposedly reflects approximately one-half of the Debtors’ average monthly utility charges, less any security deposits held by the Debtors’ utility providers as of the Petition Date. Utility Motion at ¶ 12.

7. The Utility Services List attached as Exhibit “C” to the Utility Motion reflects that the Debtors are not offering any adequate assurance of payment for SRP and TEC apparently because those Utilities held prepetition cash deposits. As utilities such as SRP and TEC can exercise their right to recoup prepetition deposits against prepetition debt without notice or court order pursuant to Section 366(c)(4) of the Bankruptcy Code, it is not clear why the Debtors believe they can reduce the amount of adequate assurance they provide to utility companies such as SRP and TEC based on the existence of prepetition security.

8. The Debtors refer to the proposed Bank Account as the “Adequate Assurance Deposit.” Utility Motion at ¶ 12. Monies contained in an escrow account controlled by a customer of a utility such as the proposed Bank Account are not recognized as a “cash deposit” provided by a customer to a utility by any public utility commission. Additionally, 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 utility bank account. Simply put, the Debtors are not proposing to provide the Utilities with cash deposits as adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy Code.

9. 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).

10. The Debtors claim that “[t]o the best of the Debtors’ knowledge, there are no defaults or arrearages with respect to undisputed invoices for prepetition Utility Services.” Utility Motion at ¶ 10. However, Section 366(c)(3)(B)(ii) expressly provides that in making an

adequate assurance of payment determination, a court may not consider a debtor's timely payment of prepetition utility charges.

11. The Debtors also propose that monies contained in the Bank Account on behalf of a utility shall be returned to the Debtors (i) upon the Debtors' termination of utility service if there are no outstanding disputes related to post-petition utility charges, or (ii) the conclusion of the Debtors' Chapter 11 cases, if not applied earlier. 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 a sale closing date or the effective date of any plan, any monies contained in the Bank Account should not be returned to the Debtors until the Debtors confirm that they have paid in full all of their post-petition utility expenses owed to the Utilities.

12. Although not requested in the Utility Motion, the Interim Utility Order provides that any payments authorized to be made pursuant to the Interim Utility Order shall be subject to the requirements imposed on the Debtors under the terms of the interim and final debtor-in-possession ("DIP") financing orders, including compliance with any budget or cash flow forecasts in connection therewith. Interim Utility Order at ¶ 20. It is not clear if the Debtors and the secured lenders are trying to subordinate all of the post-petition payments made to the Utilities to the secured lenders' liens. At a minimum, all post-petition payments made by the Debtors to the Utilities, including any post-petition security, should not be subordinated to the lenders' liens or subject to subsequent disgorgement by the secured lenders. If the Debtors want the Utilities to provide post-petition utility goods/services, then any and all post-petition payments made to the Utilities should be free and clear of any and all liens. Otherwise, all of the relief sought in the Utility Motion is effectively nothing more than a subterfuge.

13. The Utility Motion does not address why the Bank Account would be funded at approximately two-weeks of utility charges when the Debtors know that the Utilities are required by applicable state laws, regulations, tariffs and/or contracts to bill the Debtors monthly. Moreover, the Debtors presumably want the Utilities to continue to bill them 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 two-week amounts for their utilities; and (B) how such an insufficient amount could even begin to constitute adequate assurance of payment for the Utilities' monthly bills even if the Bank Account contained funds on behalf of the Utilities.

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' cash flow from operations and ability to pay for future Utility Services in accordance with the prepetition practice," somehow constitutes sufficient adequate assurance to the Debtors' utility providers. Utility Motion at ¶ 14.

The Debtors' Financing Motion

15. On June 5, 2023, the Debtors filed the *Debtors' Motion For Entry of Interim and Final Orders (I) Authorizing the Debtors To Obtain Postpetition Financing, (II) Authorizing the Debtors To Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* (the "Financing Motion") (Docket No. 23).

16. Through the Financing Motion, the Debtors seek approval of a \$200 million super-priority senior secured DIP loan financing facility (“DIP Facility”). Financing Motion at ¶ 2.

17. On June 6, 2023, the Court entered the *Interim Order (I) Authorizing The Debtors To Obtain Postpetition Financing, (II) Authorizing the Debtors To Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* (the “Interim Financing Order”) (Docket No. 70).

18. The Interim Financing Order authorized the Debtors to borrow up to an aggregate principal amount of \$200 million in DIP Loans, with \$54 million available to be drawn on an interim basis. Interim Financing Order at page 24.

19. The Interim Financing Order approved a carve-out for the payment of fees of the Debtors’ professionals incurred prior to a Carve-Out Trigger Notice, plus an additional \$7 million following delivery of a Carve-Out Trigger Notice (the “Carve-Out”). Interim Financing Order at pages 45-46.

20. Attached as Exhibit “B” to the Interim Financing Order is a 13-week initial approved DIP budget through the week ending September 3, 2023 (the “Budget”). Although the Budget includes monies to fund the Bank Account, the Budget does not include any line-item for the payment of post-petition utility charges. As such, it is not apparent from the Budget whether sufficient funds have in fact been budgeted for the timely (and full) payment of the Debtors’ post-petition utility charges.

The Debtors’ Critical Vendor Motion

21. On June 5, 2023, the Debtors filed the *Debtors’ Motion Seeking Entry of Interim*

and Final Orders (I) Authorizing Debtors To Pay Prepetition Claims of Certain Critical Vendors, Foreign Vendors, 503(b)(9) Claimants, and Lien Claimants, (II) Granting Administrative Expense Priority To All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief (the “Critical Vendor Motion”)(Docket No. 16). Through the Critical Vendor Motion, the Debtors sought authority to pay “Critical Vendor Claims” of up to \$2.9 million on an interim basis and \$6.4 million on a final basis. Critical Vendor Motion at ¶ 1.

22. On June 6, 2023, the Court entered the *Interim Order (I) Authorizing Debtors To Pay Prepetition Claims of Certain Critical Vendors, Foreign Vendors, 503(b)(9) Claimants, and Lien Claimants, (II) Granting Administrative Expense Priority To All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief* (the “Interim Critical Vendor Order”)(Docket No. 65). The Interim Critical Vendor Order authorized the Debtors to pay supposed critical vendor claims in an aggregate amount not to exceed \$2.9 million on an interim basis. Interim Critical Vendor Order at ¶ 3.

23. The Debtors’ claim in Paragraph 8 of the Utility Motion that “[u]ninterrupted Utility Services are essential to the Debtors’ ongoing business operations and, hence, the overall success of these chapter 11 cases.” However, the Critical Vendor Motion does not reflect that the Debtors sought Court authority to pay prepetition utility charges.

Facts Regarding CNE

24. CNE provides electricity and related services to the Debtors pursuant to a Master Electricity Supply Agreement, Amendments thereto, Transaction Confirmation and Retail Trade Transactions (collectively, the “Electricity Agreement”) that set forth the terms and conditions concerning CNE’s provision of electricity and related services to the Debtors. CNE has

continued to provide the Debtors with electricity and related services pursuant to the Electricity Agreement since the Petition Date.

25. Pursuant to the Electric Agreement, the Debtors receive approximately one month of electricity and related services before CNE issues a bill. 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 late fee may be subsequently imposed on the account. Accordingly, the Debtors could receive more than two months of electricity and related services before CNE could terminate the Electric Agreement after a post-petition payment default.

26. CNE requests that the Debtors provide CNE with a two-month Section 366 adequate assurance of payment cash deposit of \$963,858. Prior to the Petition Date, CNE received a cash security deposit of \$900,000 (the “Pre-petition Deposit”) from the Debtors. CNE is in the process of applying the Pre-petition Deposit to the pre-petition claims of CNE. The remainder of the Pre-petition Deposit, if any, after its application to CNE’s pre-petition claims, shall be added to CNE’s Section 366 post-petition deposit.

Facts Regarding CNEG

27. CNEG provides natural gas and related services to the Debtors pursuant to a Base Contract for Sale and Purchase of Natural Gas (NAESB) (the “Gas Agreement”) that sets 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 Agreement since the Petition Date.

28. Pursuant to the Gas Agreement, 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 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 Agreement after a post-petition payment default.

29. CNEG is requesting a two-month cash deposit of \$58,826 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 Agreement.

Facts Regarding the Utilities Other Than CNE and CNEG

30. 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.

31. 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 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.

32. 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 following tariffs and/or state laws, regulations and/or ordinances are as follows:

AEP:

Ohio - <https://www.aepohio.com/account/bills/rates/AEPOhioRatesTariffsOH.aspx>

SRP: Rules and Regulations: <http://www.srpnet.com/about/rulesregs.aspx>
 Price Plans: <https://www.srpnet.com/prices/pdfx/ratebook.pdf>

SCE: <https://www.sce.com/regulatory/tariff-books>

DEV: <https://www.dominionenergy.com/virginia/rates-and-tariffs/business-rates>

NStar - East: <https://www.eversource.com/content/general/about/about-us/doing-business-with-us/builders-contractors/interconnections/massachusetts-net-metering/massachusetts-tariffs-rules>

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>

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

SoCalGas: <https://www2.socalgas.com/regulatory/tariffs/tariffs-rules.shtml>

33. 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 Accounts</u>	<u>Estimated Prepet. Debt</u>	<u>Deposit Request</u>
AEP	1	To be supplemented	\$54,648 (2-month)
<u>Utility</u>	<u>No. of Accounts</u>	<u>Estimated Prepet. Debt</u>	<u>Deposit Request</u>
SRP	4	\$100,173.57	\$140,600 (2-month)
SCE	4	\$195,682.56	\$912,618 (2-month)
DEV	7	To be supplemented	\$236,998 (2-month)

ComEd	9	\$659,481.75	\$943,805 (2-month)
NStar East	2	To be supplemented	\$469,280 (2-month)
TEC	3	\$199,418.27	\$223,893 (2-month)
SoCalGas	4	n/a	\$14,970 (2-month)

34. SRP held prepetition deposits totaling \$140,600 that it recouped against the prepetition debt owing to SRP from the Debtors pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition deposit amount remains after recoupment.

35. SCE holds a surety bond in the amount of \$500,000 that it will make a claim upon for payment of the prepetition debt that the Debtors owe to SCE.

36. TEC held a prepetition deposit in the amount of \$214,197 that it recouped against the prepetition debt owing to TEC from the Debtors pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the TEC post-petition deposit request.

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)). See also *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 the 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 should 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. To access the Bank Account, the Utilities 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.
3. 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;
4. The Debtors may close the Bank Account before all post-petition utility charges 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 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 plain 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), holding 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-paying customers 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 20 to 30 days to pay the bill, the timing of which is set forth in applicable state laws, tariffs, regulations or contracts. Based on the foregoing state-mandated, or 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 60 days or more based on their billing cycles. Furthermore, the forms and amounts of the Utilities' adequate assurance requests are the forms and 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 cash deposits that they are entitled to obtain under applicable state law or contract are binding on this Court, but instead are introducing those forms and amounts as evidence of the forms and amounts that the applicable regulatory entity or contract permit the Utilities to request from their customers.

In contrast, the Debtors failed to address in the Utility Motion why this Court should modify, if at all, the amounts of the Utilities' adequate assurance of payment requests, which is the Debtors' statutory burden. Instead, the Debtors merely asked this Court to approve the Adequate Assurance Account supposedly containing approximately two-weeks of the Debtors' utility charges. The Debtors did not provide an objective, much less an evidentiary, basis for their proposed adequate assurance in the form of the Bank Account. Moreover, in contrast to the improper treatment proposed to the Debtors' 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 critical vendors claims of up to \$2.9 million on an interim basis and \$6.4 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 default on the use of DIP financing and cash collateral, by obtaining a \$7 million professionals' carve-out for the payment of their fees/expenses after a default and a guarantee of payment for fees incurred up to a default.

Despite the fact that the Utilities continue to provide the Debtors with admittedly 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.

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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: June 16, 2023

Respectfully Submitted,

/s/ Michael Kwiatkowski

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