

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

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In re: : Chapter 11  
: :  
HI-CRUSH INC., *et al.*,<sup>1</sup> : Case No. 20-33495 (DRJ)  
: :  
Debtors. : (Jointly Administered)  
: :  
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**DEBTORS' EMERGENCY MOTION  
FOR ENTRY OF ORDER (I) PROHIBITING UTILITY  
COMPANIES FROM ALTERING OR DISCONTINUING  
SERVICE ON ACCOUNT OF PREPETITION INVOICES,  
(II) APPROVING DEPOSIT AS ADEQUATE ASSURANCE OF PAYMENT,  
AND (III) ESTABLISHING PROCEDURES FOR RESOLVING REQUESTS  
BY UTILITY COMPANIES FOR ADDITIONAL ASSURANCE OF PAYMENT**

**EMERGENCY RELIEF HAS BEEN REQUESTED. A HEARING WILL BE CONDUCTED ON THIS MATTER ON JULY 13, 2020 AT 3:30 P.M. PREVAILING CENTRAL TIME IN COURTROOM 400, 4TH FLOOR, 515 RUSK STREET, HOUSTON, TX 77002. IF YOU OBJECT TO THE RELIEF REQUESTED OR YOU BELIEVE THAT EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU MUST EITHER APPEAR AT THE HEARING OR FILE A WRITTEN RESPONSE PRIOR TO THE HEARING. OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.**

**RELIEF IS REQUESTED NOT LATER THAN JULY 13, 2020.**

<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Hi-Crush Inc. (0530), OnCore Processing LLC (9403), Hi-Crush Augusta LLC (0668), Hi-Crush Whitehall LLC (5562), PDQ Properties LLC (9169), Hi-Crush Wyeville Operating LLC (5797), D & I Silica, LLC (9957), Hi-Crush Blair LLC (7094), Hi-Crush LMS LLC, Hi-Crush Investments Inc. (6547), Hi-Crush Permian Sand LLC, Hi-Crush Proppants LLC (0770), Hi-Crush PODS LLC, Hi-Crush Canada Inc. (9195), Hi-Crush Holdings LLC, Hi-Crush Services LLC (6206), BulkTracer Holdings LLC (4085), Pronghorn Logistics Holdings, LLC (5223), FB Industries USA Inc. (8208), PropDispatch LLC, Pronghorn Logistics, LLC (4547), and FB Logistics, LLC (8641). The Debtors' address is 1330 Post Oak Blvd, Suite 600, Houston, Texas 77056.



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Please note that on March 24, 2020, through the entry of General Order 2020-10, the Court invoked the Protocol for Emergency Public Health or Safety Conditions.

It is anticipated that all persons will appear telephonically and also may appear via video at this hearing.

Audio communication will be by use of the Court's regular dial-in number. The dial-in number is +1 (832) 917-1510. You will be responsible for your own long-distance charges. You will be asked to key in the conference room number. Judge Jones' conference room number is 205691.

Parties may participate in electronic hearings by use of an internet connection. The internet site is [www.join.me](http://www.join.me). Persons connecting by mobile device will need to download the free [join.me](http://www.join.me) application.

Once connected to [www.join.me](http://www.join.me), a participant must select "join a meeting". The code for joining this hearing before Judge Jones is "judgejones". The next screen will have a place for the participant's name in the lower left corner. Please complete the name and click "Notify".

Hearing appearances should be made electronically and in advance of the hearing. You may make your electronic appearance by:

- 1) Going to the Southern District of Texas website;
- 2) Selecting "Bankruptcy Court" from the top menu;
- 3) Selecting "Judges' Procedures & Schedules";
- 4) Selecting "view home page" for Judge David R. Jones;
- 5) Under "Electronic Appearance," select "Click here to submit Electronic Appearance";
- 6) Select "Hi-Crush Inc., et al." from the list of Electronic Appearance Links; and
- 7) After selecting "Hi-Crush Inc., et al." from the list, complete the required fields and hit the "Submit" button at the bottom of the page.

Submitting your appearance electronically in advance of the hearing will negate the need to make an appearance on the record at the hearing.

The above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") respectfully state the following in support of this emergency motion (the "**Motion**"):

### **RELIEF REQUESTED**

1. By this Motion, the Debtors request entry of an order (the "**Order**"), substantially in the form attached hereto, approving procedures that would provide adequate assurance of payment to their utility service providers (the "**Utility Companies**") under section 366 of the Bankruptcy Code, while allowing the Debtors to avoid the threat of imminent termination of

electricity, water, fuel, waste services, telecommunications, and similar utility products and services (collectively, the “**Utility Services**”)<sup>2</sup> by the Utility Companies. Specifically, the Debtors request entry of an Order:

- (i) approving the Debtors’ deposit of \$463,000 (which is approximately fifty percent of the estimated monthly cost of the Utility Services based on historical averages over the preceding twelve months)<sup>3</sup> into a segregated, non-interest-bearing account, as adequate assurance of postpetition payment to the Utility Companies pursuant to section 366(b) of the Bankruptcy Code;
- (ii) approving the additional adequate assurance procedures described below as the method for resolving disputes regarding adequate assurance of payment to the Utility Companies; and
- (iii) prohibiting the Utility Companies from altering, refusing, or discontinuing service to, or discriminating against, the Debtors except as may be permitted by the proposed procedures.

### **JURISDICTION AND VENUE**

2. The United States Bankruptcy Court for the Southern District of Texas (the “**Court**”) has jurisdiction to consider this Motion under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b), and this Court may enter a final order consistent with Article III of the United States Constitution.

3. Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a) and 366 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “**Bankruptcy Code**”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), Rule 9013-1 of the

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<sup>2</sup> Subject to paragraph 17 below, a list of the Utility Companies that provide Utility Services to the Debtors is attached to the Motion as Exhibit 1 (the “**Utility Company List**”).

<sup>3</sup> To the extent a Utility Company holds a prepetition bond or deposit provided by the Debtors, the amount of adequate assurance provided for such Utility Company is calculated as set forth in paragraph 11 below.

Bankruptcy Local Rules for the Southern District of Texas (the “**Bankruptcy Local Rules**”), and the Procedures for Complex Chapter 11 Cases in the Southern District of Texas (the “**Complex Case Procedures**”).

## **BACKGROUND**

5. On the date hereof (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court commencing cases for relief under chapter 11 of the Bankruptcy Code (the “**Chapter 11 Cases**”). The factual background regarding the Debtors, including their business operations and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the *Declaration of J. Philip McCormick, Jr., Chief Financial Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings* (the “**First Day Declaration**”),<sup>4</sup> which is filed with the Court concurrently herewith and is fully incorporated herein by reference.

6. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested in the Chapter 11 Cases, and no committees have been appointed.

7. Simultaneously with the filing of this Motion, the Debtors have filed a motion with this Court pursuant to Bankruptcy Rule 1015(b) seeking joint administration of the Chapter 11 Cases.

## **BASIS FOR RELIEF**

### **A. The Debtors’ Utility Companies**

8. As of the Petition Date, approximately 50 Utility Companies provide Utility Services to the Debtors at various locations. The Utility Companies service the Debtors’

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<sup>4</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

operations and facilities related to the Debtors' mining, processing, and distribution of high-quality silica sand. On average, in the twelve months prior to the Petition Date, the Debtors incurred expenses totaling approximately \$1.1 million each month for utility costs and such utility costs were generally timely paid. Based on the timing of the filings of the Chapter 11 Cases in relation to the Utility Companies' billing cycles, however, there may be outstanding invoices reflecting prepetition utility costs that have been incurred by the Debtors but for which payment is not yet due, as well as prepetition utility costs for services provided to the Debtors since the end of the last billing cycle that have not yet been invoiced.

9. The success and smooth operation of the Debtors' businesses depend on the reliable delivery of electricity, water, and the other Utility Services. Specifically, the Debtors require the Utility Services to operate their headquarters, run their mines and plants, and maintain the equipment they use to service their customers. Uninterrupted Utility Services are therefore essential to the Debtors' ongoing operations and, accordingly, the success of the Chapter 11 Cases. Indeed, if the Utility Companies refuse or discontinue service, even for a brief period, the Debtors' business operations would be severely disrupted, and the Debtors could be forced to temporarily cease operations, which would negatively impact recoveries for creditors of the Debtors' estates.

10. In general, the Debtors have established satisfactory payment histories with the Utility Companies and payments have been made on a regular and timely basis. To the best of the Debtors' knowledge, there are no material defaults or arrearages with respect to invoices for prepetition Utility Services as of the Petition Date. The Debtors intend to pay any postpetition obligations to the Utility Companies in the ordinary course and in a timely fashion. The Debtors have budgeted for the payments and believe that cash on hand and cash generated through

operations will be sufficient to satisfy their obligations to the Utility Companies in the ordinary course on a postpetition basis.

**B. The Adequate Assurance Deposit**

11. The Debtors intend to pay all postpetition obligations owed to the Utility Companies in a timely manner. Nevertheless, to provide additional assurance of payment for future services to the Utility Companies, the Debtors propose to deposit \$463,000, which is the sum of the individual adequate assurance amounts for each of the Utility Companies as set forth on Exhibit 1 hereto (the “**Adequate Assurance Deposit**”), into a segregated, non-interest-bearing account (the “**Adequate Assurance Account**”), within twenty days of the Petition Date. As to each Utility Company, the amount of the Adequate Assurance Deposit will be equal to the lesser of (A)(i) fifty percent of the Debtors’ estimated monthly cost of Utility Services, calculated based on the Debtors’ average expenses for such Utility Services during the twelve full months preceding the Petition Date, minus (ii) the amount of any bond or deposit held by such Utility Company, plus (iii) the amount owed to such Utility Company for prepetition Utility Services, whether or not such amount has been billed; and (B) fifty percent of the Debtors’ estimated monthly cost of Utility Services, calculated based on the Debtors’ average expenses for such Utility Services during the twelve full months preceding the Petition Date.<sup>5</sup> The Adequate Assurance Deposit will be maintained during the Chapter 11 Cases with a minimum balance equal to \$463,000 and the amount of the Adequate Assurance Deposit will remain \$463,000 throughout the Chapter 11 Cases (*i.e.*, the amount will not be recalculated), unless otherwise adjusted as provided for herein.

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<sup>5</sup> As of the Petition Date, one Utility Company, Constellation Energy Services, Inc. (“**Constellation**”) held a deposit in the amount of \$125,000 and was owed approximately \$52,710 by the Debtors. During the twelve months prior to the Petition Date, the Debtor paid Constellation an average of \$252,863 per month. Accordingly, the Adequate Assurance Deposit for Constellation is \$54,142, calculated as  $(\$252,863/2) - \$125,000 + \$52,710$ .

12. The Debtors propose that the Adequate Assurance Deposit may be adjusted and/or reduced by the Debtors to account for any of the following: (i) to the extent that the Adequate Assurance Deposit includes any amount on account of a company that the Debtors subsequently determine is not a “utility” within the meaning of section 366 of the Bankruptcy Code, (ii) an adjustment or payment made in accordance with the Delinquency Notice Procedures described below, (iii) the termination of a Utility Service by a Debtor regardless of any Additional Adequate Assurance Request (as defined below), (iv) the closure of a utility account with a Utility Company for which funds have been contributed for the Adequate Assurance Deposit, or (v) any other arrangements with respect to adequate assurance of payment reached by a Debtor with individual Utility Companies; *provided*, that, (a) with respect to a company that the Debtors subsequently determine is not a “utility” within the meaning of section 366 of the Bankruptcy Code, the Debtors may adjust and/or amend the balance of the Adequate Assurance Deposit upon fourteen days’ advance notice to such company; or, (b) with respect to the Debtors’ termination of a Utility Service or closure of a utility account with a Utility Company, the Debtors may adjust and/or amend the balance of the Adequate Assurance Deposit upon reconciliation and payment by the Debtors of such Utility Company’s final invoice in accordance with applicable nonbankruptcy law, to the extent that there are no outstanding disputes related to postpetition payments due.

13. The Debtors further propose that, to the extent the Debtors become delinquent with respect to a Utility Company’s account, such Utility Company shall be permitted to file a written notice of such delinquency (the “**Delinquency Notice**”) with the Court and serve such Delinquency Notice on: (i) Hi-Crush Inc., 1330 Post Oak Blvd, Suite 600 Houston, Texas 77056 (Attn: Mark C. Skolos (email: mskolos@hicrushinc.com)); (ii) Latham & Watkins LLP, 885 Third Avenue, New York, New York 10022 (Attn: Annemarie V. Reilly, Esq. (email:

annemarie.reilly@lw.com)) and 330 North Wabash Ave., Suite 2800, Chicago, Illinois 60611 (Attn: Asif Attarwala, Esq. (email: asif.attarwala@lw.com)); (iii) Hunton Andrews Kurth LLP, 600 Travis Street, Suite 4200 (Attn: Timothy A. (“Tad”) Davidson II, Esq. and Ashley L. Harper, Esq. (emails: taddavidson@HuntonAK.com, and ashleyharper@HuntonAK.com)); (iv) Paul, Weiss, Rifkind, Wharton & Garrison, LLP, 1285 Avenue of the Americas, New York, New York 10019 (Attn: Brian S. Hermann, Esq. and Elizabeth R. McColm, Esq. (emails: bhermann@paulweiss.com, and emccolm@paulweiss.com)); (v) Porter Hedges LLP, 1000 Main St, 36<sup>th</sup> Floor, Houston, Texas 77002 (Attn: John Higgins (email: jhiggins@porterhedges.com)); (vi) counsel to any statutory committee appointed in these cases, if any; and (vii) the United States Trustee for the Southern District of Texas (Attn: Stephen Statham and Hector Duran (emails: stephen.statham@usdoj.gov and hector.duranjr@usdoj.gov) (each, a “**Delinquency Notice Party**”). Such Delinquency Notice must (i) set forth the amount of the delinquency, (ii) set forth the location for which Utility Services are provided, and (iii) provide each of the Debtors’ account numbers with the Utility Company that have become delinquent.

14. The Debtors propose that the following procedures apply with respect to a Delinquency Notice (the “**Delinquency Notice Procedures**”): if a Delinquency Notice is properly provided as described above, and such delinquency is not cured and no Delinquency Notice Party has objected to the Delinquency Notice within ten days of its receipt thereof, the Debtors will be required to (i) remit to such Utility Company from the Adequate Assurance Deposit the amount of postpetition charges claimed as delinquent in the Delinquency Notice, and (ii) replenish the Adequate Assurance Deposit for the amount remitted to such Utility Company. If a Delinquency Notice Party objects to the Delinquency Notice, then the Debtors propose that the Court hold a



hearing to resolve the dispute and determine whether a payment should be remitted from the Adequate Assurance Deposit and, if such payment is warranted, the amount to be remitted.

15. The Debtors submit that the Adequate Assurance Deposit, in conjunction with the Debtors' ability to pay for future Utility Services in the ordinary course of business, constitutes sufficient adequate assurance to the Utility Companies. The Debtors shall maintain the Adequate Assurance Deposit as described herein until the earlier of the Court's entry of an order authorizing the return of the Adequate Assurance Deposit to the Debtors and the effective date of a plan of reorganization for the Debtors (at which time the funds comprising the Adequate Assurance Deposit shall automatically, without further order of the Court, be returned to the Debtors or reorganized Debtors, as applicable).

**C. The Additional Adequate Assurance Procedures**

16. In the event that any Utility Company requests additional adequate assurance of payment pursuant to section 366(c)(2) of the Bankruptcy Code, the Debtors propose that such request be addressed pursuant to the following procedures (the "**Additional Adequate Assurance Procedures**"):

- (a) Except as provided by the Additional Adequate Assurance Procedures, the Utility Companies are forbidden to (i) alter, refuse, or discontinue services to, or discriminate against, the Debtors on account of unpaid prepetition invoices or any objections to the Debtors' Adequate Assurance Deposit or due to the commencement of the Chapter 11 Cases or (ii) require the Debtors to pay a deposit or other security in connection with the provision of postpetition Utility Services, other than the funding of the Adequate Assurance Deposit.
- (b) The Debtors will serve a copy of this Motion and the Order granting the relief requested herein on each Utility Company within seven (7) business days after entry of the Order by the Court.
- (c) The funds in the Adequate Assurance Account shall constitute adequate assurance for each Utility Company in the amounts set forth for such Utility Company in the column labeled "Adequate Assurance Deposit" on the Utility Company List.

- (d) In the event that a Utility Company asserts that the Adequate Assurance Deposit is not satisfactory adequate assurance of payment as contemplated by section 366(c)(2) of the Bankruptcy Code, that Utility Company must serve a written request (an “**Additional Adequate Assurance Request**”) for adequate assurance in addition to or in lieu of its rights in the Adequate Assurance Deposit. All Additional Adequate Assurance Requests shall be delivered by mail and email to the Delinquency Notice Parties.
- (e) Any Additional Adequate Assurance Request must (i) set forth the location(s) for which Utility Services are provided and the type of Utility Services provided, (ii) set forth the account number(s) for which Utility Services are provided, (iii) include a summary of the Debtors’ payment history relevant to the affected account(s), including any security deposit(s) or other security currently held by the requesting Utility Company, (iv) set forth why the Utility Company believes the proposed adequate assurance is not sufficient adequate assurance of future payment, (v) set forth the amount and nature of the adequate assurance of payment that would be satisfactory to the Utility Company, and (vi) provide an email address to which the Debtors may respond to the Additional Adequate Assurance Request.
- (f) Unless a Utility Company serves an Additional Adequate Assurance Request, such Utility Company shall be: (i) deemed to have received “satisfactory” adequate assurance of payment in compliance with section 366 of the Bankruptcy Code; and (ii) subject to (j) below, forbidden from discontinuing, altering, or refusing Utility Services to, or discriminating against, the Debtors on account of any unpaid prepetition charges, or requiring additional adequate assurance of payment other than the Proposed Adequate Assurance.
- (g) Upon the Debtors’ receipt of an Additional Adequate Assurance Request, the Debtors will promptly negotiate with the Utility Company to resolve the Additional Adequate Assurance Request.
- (h) Without further order of the Court, the Debtors, in consultation with the Ad Hoc Group (defined below), may resolve an Additional Adequate Assurance Request by entering into agreements granting additional adequate assurance to the requesting Utility Company if the Debtors, in their sole discretion, determine that the Additional Adequate Assurance Request is reasonable or if the parties negotiate alternative consensual provisions.
- (i) If the Debtors determine that the Additional Adequate Assurance Request is not reasonable and are not able to reach an alternative resolution with the Utility Company within fourteen (14) days after the Additional Adequate Assurance Request is made, the Debtors will request a hearing before this Court at the next omnibus hearing date, or such other date as the Debtors

and the requesting Utility Company may agree (the “**Determination Hearing**”).

- (j) Pending resolution at any such Determination Hearing, the Utility Company filing such Additional Adequate Assurance Request shall be prohibited from altering, refusing, or discontinuing Utility Services to the Debtors, or from discriminating against the Debtors with respect to the provision of Utility Services, on account of unpaid charges for prepetition services, the filing of the Chapter 11 Cases, or any objection to the adequacy of the Additional Adequate Assurance Procedures.
- (k) The Determination Hearing will be an evidentiary hearing at which the Court will determine whether the Adequate Assurance Deposit and any additional adequate assurance of payment requested by the Utility Company should be modified pursuant to section 366(c)(3) of the Bankruptcy Code.
- (l) All Utility Companies, including Utility Companies subsequently added to the Utility Company List, will be prohibited from altering, refusing, or discontinuing Utility Services to the Debtors, or from discriminating against the Debtors with respect to the provision of Utility Services, absent further order of the Court.

**D. Subsequently Identified Utility Companies**

17. The Debtors have made a good-faith effort to identify all of their Utility Companies and include them on the Utility Company List. Nevertheless, to the extent that the Debtors subsequently identify additional Utility Companies or Utility Companies that may have been inadvertently omitted from the Utility Company List, the Debtors seek authority, in their sole discretion, to amend the Utility Company List to add any Utility Company. The Debtors further reserve the right to assert that any of the entities now or hereafter listed on the Utility Company List is not a “utility” within the meaning of section 366(a) of the Bankruptcy Code. To the extent that the Debtors subsequently identify any additional Utility Companies that provide Utility Services to them, the Debtors propose to add such Utility Companies to the Utility Company List and to have the terms of any order with respect to this Motion apply to any such Utility Companies. The Debtors will serve on any of the subsequently identified Utility Companies a copy of this Motion and any order entered with respect to the Motion, along with an amended Utility Company

List that includes such Utility Company. Additionally, to the extent that the Debtors add any Utility Companies, the Debtors shall increase the amount of the Adequate Assurance Deposit by an amount equal to approximately fifty percent of the Debtors' estimated average monthly cost of Utility Services from such Utility Company over the preceding twelve months.

18. The Debtors respectfully request that, absent compliance with the Additional Adequate Assurance Procedures, the Utility Companies—including subsequently added Utility Companies—be forbidden from altering, refusing, or discontinuing service to, or discriminating against, the Debtors on account of any unpaid prepetition charges, or requiring additional adequate assurance of payment other than the proposed Adequate Assurance Deposit described herein. In addition, the Utility Companies should be prohibited from unilaterally applying any payments on account of postpetition services to any outstanding prepetition invoices or drawing upon any existing security deposit, surety bond, or other form of security to secure future payment for Utility Services.

#### **APPLICABLE AUTHORITY**

19. Congress enacted section 366 of the Bankruptcy Code to protect debtors from utility service cutoffs upon a bankruptcy filing while, at the same time, providing utility companies or providers with adequate assurance that the debtors will pay for postpetition services. *See* H.R. Rep. No. 95-595, at 350 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6306. In the context of chapter 11 cases, the statutory framework for debtor protections and adequate assurance obligations was modified by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“**BAPCPA**”) with the addition of section 366(c) of the Bankruptcy Code.

20. Under section 366(c) of the Bankruptcy Code, a utility may alter, refuse, or discontinue a utility service if a debtor has not provided satisfactory adequate assurance of payment within thirty days of its bankruptcy filing. Section 366(c) restricts the factors that a court

can consider when determining whether an adequate assurance proposal is, in fact, adequate. Specifically, in determining the amount of an adequate assurance deposit, courts may not consider (i) the absence of a security deposit before the debtor's petition date, (ii) the debtor's history of timely payments, or (iii) the availability of an administrative expense priority. *See* 11 U.S.C. § 366(c)(3)(B). Section 366(c), however, does not limit the court's ability to determine the amount of payment necessary, if any, to provide adequate assurance. Instead, section 366(c) gives courts the same discretion in determining the amount of payment necessary for adequate assurance as they previously had under prior section 366(b) of the Bankruptcy Code. *Compare* 11 U.S.C. § 366(b) (2004) (pre-BAPCPA) ("On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance."), *with* 11 U.S.C. § 366(c)(3)(A) (2005) (post-BAPCPA) ("On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance payment under paragraph (2).").

21. As discussed above, Section 366 of the Bankruptcy Code protects a debtor against the immediate termination or alteration of utility services after the Petition Date. *See* 11 U.S.C. § 366. Section 366(c) of the Bankruptcy Code requires the debtor to provide "adequate assurance" of payment for postpetition services in a form "satisfactory" to the utility company within thirty days of the petition, or the utility company may alter, refuse, or discontinue service. 11 U.S.C. § 366(c)(2). Section 366(c)(1) of the Bankruptcy Code provides a non-exhaustive list of examples for what constitutes "assurance of payment." Although assurance of payment must be "adequate," it need not constitute an absolute guarantee of a debtor's ability to pay. *See In re Great Atl. & Pac. Tea Co.*, No. 11-CV-1338, 2011 WL 5546954, at \*5 (S.D.N.Y. Nov. 14, 2011) (finding that "[c]ourts will approve an amount that is adequate enough to insure against unreasonable risk of

nonpayment, but are not required to give the equivalent of a guaranty of payment in full”); *In re Caldor, Inc.—NY*, 199 B.R. 1, 3 (S.D.N.Y. 1996) (“Section 366(b) requires . . . ‘adequate assurance’ of payment. The statute does not require an ‘absolute guarantee of payment.’”) (citation omitted), *aff’d sub nom. Va. Elec. & Power Co. v. Caldor, Inc.—NY*, 117 F.3d 646 (2d Cir. 1997); *see also In re Tekoil & Gas Corp.*, No. 08-80270G3-11, 2008 WL 2928555, at \*2 n.1 (Bankr. S.D. Tex. July 21, 2008) (“[A] debtor may continue to pay a utility, and a utility may continue to provide service, in the absence of an injunction preventing the utility from terminating service.”) (citing *In re Viking Offshore (USA) Inc.*, No. 08-31219-H3-11, 2008 WL 782449, at \*3 n.3 (Bankr. S.D. Tex. Mar. 20, 2008)).

22. When considering whether a given assurance of payment is “adequate,” the Court should examine the totality of the circumstances to make an informed decision as to whether the Utility Company will be subject to an unreasonable risk of nonpayment. *See In re Keydata Corp.*, 12 B.R. 156, 158 (B.A.P. 1st Cir. 1981) (citing *In re Cunha*, 1 B.R. 330 (Bankr. E.D. Va. 1979)); *In re Adelpia Bus. Solutions, Inc.*, 280 B.R. 63, 82–83 (Bankr. S.D.N.Y. 2002). In determining the level of adequate assurance, however, “a bankruptcy court must focus upon the need of the utility for assurance, and . . . require that the debtor supply no more than that, since the debtor almost perforce has a conflicting need to conserve scarce financial resources.” *Va. Elec. & Power Co.*, 117 F.3d at 650 (internal quotations omitted) (citing *In re Penn Jersey Corp.*, 72 B.R. 981, 985 (Bankr. E.D. Pa. 1987)); *see also In re Penn. Cent. Transp. Co.*, 467 F.2d 100, 103–04 (3d Cir. 1972) (affirming bankruptcy court’s ruling that no utility deposits were necessary where such deposits likely would “jeopardize the continuing operation of the debtor merely to give further security to suppliers who already are reasonably protected[.]”).

23. Here, the Utility Companies are adequately assured against any risk of nonpayment for future services, especially in light of the Debtors' history of paying all utility bills on time and in the ordinary course. The Additional Adequate Assurance Deposit and the Debtors' ongoing ability to meet obligations as they come due in the ordinary course provides assurance of the Debtors' payment of their future obligations. Moreover, termination of Utility Services could result in the Debtors' inability to operate their business to the detriment of all stakeholders. *See In re Pilgrim's Pride Corp.*, No. 08-45664 (DML), 2009 WL 7313309, at \*2 (Bankr. N.D. Tex. Jan. 4, 2009) ("The consequences of an unexpected termination of utility service to [the debtors] could be catastrophic."); *In re Monroe Well Serv., Inc.*, 83 B.R. 317, 321–22 (Bankr. E.D. Pa. 1988) (noting that without utility service the debtors "would have to cease operations" and that Section 366 of the Bankruptcy Code "was intended to limit the leverage held by utility companies, not increase it.").

24. Courts are permitted to fashion reasonable procedures, such as the Adequate Assurance Procedures proposed herein, to implement the protections afforded under Section 366 of the Bankruptcy Code. *See, e.g., In re Circuit City Stores, Inc.*, No. 08-35653, 2009 WL 484553, at \*5 (Bankr. E.D. Va. Jan. 14, 2009) (stating that "[t]he plain language of § 366 of the Bankruptcy Code allows the Court to adopt the Procedures set forth in the Utility Order."). Such procedures are important because, without them, the Debtors "could be forced to address numerous requests by utility companies in an unorganized manner at a critical period in [its] efforts to reorganize." *Id.* Here, notwithstanding a determination that the Adequate Assurance Deposit constitutes sufficient adequate assurance, any rights the Utility Companies believe they have under Sections 366(b) and (c)(2) of the Bankruptcy Code are wholly preserved under the Additional Adequate Assurance Procedures. *See id.* at \*5–6. The Utility Companies still may choose, in accordance

with the Additional Adequate Assurance Procedures, to request modification of the Adequate Assurance Deposit. *See id.* at \*6. The Additional Adequate Assurance Procedures, however, avoid a haphazard and chaotic process whereby each Utility Company could make an extortionate, last-minute demand for adequate assurance that would force the Debtors to pay under the threat of losing critical Utility Services. *See id.* at \*5.

25. Further, the Court possesses the power, under Section 105(a) of the Bankruptcy Code, to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” The Additional Adequate Assurance Procedures and the Adequate Assurance Deposit are necessary and appropriate to carry out the provisions of the Bankruptcy Code, particularly Section 366 thereof. Accordingly, the Court should exercise its powers under Sections 366 and 105(a) of the Bankruptcy Code and approve both the Additional Adequate Assurance Procedures and the Adequate Assurance Deposit.

26. By making the Adequate Assurance Deposit and establishing the Additional Adequate Assurance Procedures, the Debtors seek to provide adequate assurance of payment to the Utility Companies and to implement an orderly process to determine any challenges to the adequacy of such adequate assurance. Without the Additional Adequate Assurance Procedures, the Debtors could be forced to address numerous requests by Utility Companies in an unorganized manner at a critical period in the Chapter 11 Cases. The orderly process contemplated by the Additional Adequate Assurance Procedures, therefore, is necessary for a smooth transition by the Debtors into chapter 11.

27. The relief requested herein does not undermine the rights of the Utility Companies under the Bankruptcy Code. The Debtors anticipate having sufficient liquidity from operations and cash on hand to honor their postpetition obligations to the Utility Companies in the ordinary



course of business. In addition, the Debtors propose to make the Adequate Assurance Deposit to further bolster the Utility Companies' assurance of payment. The Adequate Assurance Deposit is one of the acceptable forms of adequate protection set forth in sections 366(b) and 366(c)(1) of the Bankruptcy Code. Accordingly, the Debtors are not seeking to bypass the limits on forms of security imposed by the Bankruptcy Code. The Debtors further propose to protect the Utility Companies by establishing the Additional Adequate Assurance Procedures. Under these procedures, the Utility Companies may exercise their rights under section 366(c)(2) in a centralized fashion that ensures that requests can be addressed in a timely manner by the Debtors and their counsel without the submission of piecemeal, varied requests to the Court. Finally, whatever rights the Utility Companies have under section 366(c)(3) would be preserved.

28. The Debtors maintain that the relief requested herein strikes a fair balance between the rights of Utility Companies and the Debtors' rights under the Bankruptcy Code and need to continue to receive the Utility Services upon which their businesses depend.

#### **EMERGENCY CONSIDERATION**

29. Pursuant to Bankruptcy Local Rule 9013-1(i), the Debtors respectfully request emergency consideration of this Motion pursuant to Bankruptcy Rule 6003, which empowers a court to grant relief within the first twenty-one (21) days after the commencement of a chapter 11 case "to the extent that relief is necessary to avoid immediate and irreparable harm." The Debtors believe an immediate and orderly transition into chapter 11 is critical to the viability of their operations and the success of the Chapter 11 Cases. As discussed in detail above and in the First Day Declaration, immediate and irreparable harm would result if the relief requested herein is not granted. Failure to receive the applicable relief during the first twenty-one (21) days of the Chapter 11 Cases may result in the disruption of Utility Services to the Debtors, which could hinder the Debtor's ability to operate. In addition, without approval of the streamlined Additional Adequate

Assurance Procedures, the Debtors' management and advisors may be forced to dedicate significant time to addressing requests from individual Utility Companies during a critical juncture in these Chapter 11 Cases. Accordingly, the Debtors submit that they have satisfied the "immediate and irreparable harm" standard of Bankruptcy Rule 6003 as well as the requirements of Bankruptcy Local Rule 9013-1(i) and, therefore, respectfully request that the Court approve the relief requested in this Motion on an emergency basis.

### **BANKRUPTCY RULE 6004 SHOULD BE WAIVED**

30. To the extent that any aspect of the relief sought herein constitutes a use of property under section 363(b) of the Bankruptcy Code, the Debtors request a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay under Bankruptcy Rule 6004(h). As described above, the relief that the Debtors request in this Motion is immediately necessary in order for the Debtors to be able to continue to operate their businesses and preserve the value of their estates. The Debtors respectfully request that the Court waive the notice requirements imposed by Bankruptcy Rule 6004(a) and the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

### **RESERVATION OF RIGHTS**

31. Nothing contained herein is or should be construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors' properties; (ii) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute an allowed claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party

subject to the proposed Order once entered. Nothing contained in the Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

### NOTICE

32. Notice of this Motion will be given to: (i) the United States Trustee for the Southern District of Texas; (ii) the parties included on the Debtors' consolidated list of the holders of the 30 largest unsecured claims against the Debtors; (iii) Simpson, Thacher & Bartlett LLP as counsel to the agent for the Debtors' prepetition and postpetition secured asset-based revolving credit facility; (iv) U.S. Bank National Association as indenture trustee for the Debtors' prepetition notes; (v) counsel to that certain ad hoc group of holders of prepetition senior notes (the "**Ad Hoc Group**") (a) Paul, Weiss, Rifkind, Wharton & Garrison LLP and (b) Porter Hedges LLP; (vi) Shipman & Goodwin LLP as counsel to the agent under the Debtors' postpetition term loan facility; (vii) the United States Attorney's Office for the Southern District of Texas; (viii) the Utility Companies; (ix) the Internal Revenue Service; (x) the Securities and Exchange Commission; (xi) the state attorneys general for states in which the Debtors conduct business; and (xii) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no other or further notice is required or needed under the circumstances.

33. A copy of this Motion is available on (i) the Court's website: [www.txs.uscourts.gov](http://www.txs.uscourts.gov), and (ii) the website maintained by the Debtors' proposed Claims and Noticing Agent, Kurtzman Carson Consultants LLC, at [www.kccllc.net/hicrush](http://www.kccllc.net/hicrush).

*[Remainder of page intentionally left blank]*

**WHEREFORE**, the Debtors respectfully request that the Court enter the proposed Order, substantially in the form attached hereto, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Signed: July 12, 2020  
Houston, Texas

Respectfully Submitted,

/s/ Timothy A. ("Tad") Davidson II  
Timothy A. ("Tad") Davidson II (Texas Bar No. 24012503)  
Ashley L. Harper (Texas Bar No. 24065272)  
**HUNTON ANDREWS KURTH LLP**  
600 Travis Street, Suite 4200  
Houston, Texas 77002  
Tel: 713-220-4200  
Fax: 713-220-4285  
Email: TadDavidson@HuntonAK.com  
AshleyHarper@HuntonAK.com

-and-

George A. Davis (*pro hac vice* admission pending)  
Keith A. Simon (*pro hac vice* admission pending)  
David A. Hammerman (*pro hac vice* admission pending)  
Annemarie V. Reilly (*pro hac vice* admission pending)  
Hugh K. Murtagh (*pro hac vice* admission pending)  
**LATHAM & WATKINS LLP**  
885 Third Avenue  
New York, New York 10022  
Tel: 212-906-1200  
Fax: 212-751-4864  
Email: george.davis@lw.com  
keith.simon@lw.com  
david.hammerman@lw.com  
annemarie.reilly@lw.com  
hugh.murtagh@lw.com

*Proposed Counsel for the Debtors and Debtors in Possession*

**CERTIFICATE OF SERVICE**

I certify that on July 12, 2020, a true and correct copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas on those parties registered to receive electronic notices.

/s/ Timothy A. ("Tad") Davidson II

Timothy A. ("Tad") Davidson II

**EXHIBIT 1**

**Utility Company List**

### Utility Companies

The Utility Companies known and identified by the Debtors to date are listed below.

While the Debtors have used their best efforts to list all of their Utility Companies below, it is possible that certain Utility Companies may have been inadvertently omitted from this list. Accordingly, the Debtors reserve the right, under the terms and conditions set forth in the Motion and the Order, and without further order of the Court, to amend this Exhibit 1 to add any Utility Companies that were omitted therefrom and to apply the relief requested to all such entities.

In addition, the Debtors reserve the right to argue that any entity now or hereafter listed on this Exhibit 1 is not a “utility” within the meaning of section 366(a) of the Bankruptcy Code.

| Utility Company            | Type of Service Provided    | Mailing Address   | Approximate Monthly Average | Adequate Assurance Deposit <sup>1</sup> |
|----------------------------|-----------------------------|---|-----------------------------|---|
| Advanced Disposal          | Waste Removal and Recycling | 2626 Mondovi Road<br>Eau Claire, WI 54701                               | \$5,344                     | \$2,672                                 |
| Alliant Energy Corporation | Electric                    | 4902 North Biltmore Lane<br>Madison, WI 53718                           | \$139                       | \$70                                    |
| American Electric Power    | Electric                    | 1 Riverside Plaza<br>Columbus, OH 43215                                 | \$5,118                     | \$2,559                                 |
| AT&T                       | Telecommunications          | c/o Bankruptcy<br>4331 Communications Dr<br>Floor 4W<br>Dallas TX 75211 | \$18,866                    | \$9,433                                 |
| Atlantic Broadband         | Network                     | 2 Batterymarch Park<br>Suite 205<br>Quincy, MA 02169                    | \$49                        | \$25                                    |
| Basin Disposal Inc.        | Waste Removal               | 3205 Kermit Hwy<br>Odessa, TX 79764                                     | \$628                       | \$314                                   |
| Borough of Wellsboro       | Water and Sewer             | 14 Crafton Street<br>Wellsboro, PA 16901                                | \$25                        | \$13                                    |
| CenturyLink, Inc.          | Telecommunications          | 100 CenturyLink Drive<br>Monroe, LA 71203                               | \$1,265                     | \$633                                   |
| City of Big Spring         | Water and Sewer             | 501 Runnels Street<br>Big Spring, TX 79720                              | \$186                       | \$93                                    |

<sup>1</sup> Adequate assurance for each Utility Company reflects the lesser of (A)(i) fifty percent of the Debtors’ estimated monthly cost of Utility Services, calculated based on the Debtors’ average expenses for such Utility Services during the twelve full months preceding the Petition Date, minus (ii) the amount of any bond or deposit held by such Utility Company, plus (iii) the amount owed to such Utility Company for prepetition Utility Services, whether or not such amount has been billed; and (B) fifty percent of the Debtors’ estimated monthly cost of Utility Services, calculated based on the Debtors’ average expenses for such Utility Services during the twelve full months preceding the Petition Date.

| <b>Utility Company</b>              | <b>Type of Service Provided</b> | <b>Mailing Address</b>   | <b>Approximate Monthly Average</b> | <b>Adequate Assurance Deposit<sup>1</sup></b> |
|-------------------------------------|---------------------------------|--|------------------------------------|---|
| City of Whitehall                   | Water, Sewer & Trash            | 36295 Main Street<br>Whitehall, WI 54773                         | \$3,498                            | \$1,749                                       |
| Columbia Gas                        | Electric                        | Revenue Recovery<br>P.O. Box 117<br>Columbus, OH 43216           | \$78                               | \$39  |
| Comcast Corporation                 | Network                         | 500 Gravers Road<br>Suite 3000<br>Plymouth Meeting, PA<br>19462  | \$698                              | \$349   |
| Constellation Energy Services, Inc. | Electric                        | 100 Constellation Way<br>Suite 600C<br>Baltimore, MD 21202       | \$252,863                          | \$54,142 <sup>2</sup>                         |
| Cox Business Services, LLC          | Network                         | 1550 West Deer Valley Road<br>Phoenix, AZ 85027                  | \$268                              | \$134   |
| Delcom Inc.                         | Network                         | 1208 Meadowbrook Dr.<br>Pecos, TX 79772                          | \$383                              | \$192   |
| Delmar Township                     | Water and Sewer                 | 610 N. Lawton Road<br>Wellsboro, PA 16901                        | \$26                               | \$13  |
| Eau Claire Energy Cooperative       | Electric                        | 8214 US-12<br>Fall Creek, WI 54742                               | \$2,830                            | \$1,415                                       |
| Engie Resources                     | Electric                        | 1990 Post Oak Boulevard,<br>Suite 1900<br>Houston, TX 77056-3831 | \$845                              | \$423   |
| Entergy Corporation                 | Electric                        | 639 Loyola Ave<br>New Orleans, LA 70113                          | \$125                              | \$63  |
| Frontier Communications Corporation | Network and Telecommunications  | 401 Meritt 7<br>Norwalk, CT 06851                                | \$450                              | \$225   |
| Georges Creek Municipal Authority   | Water and Sewer                 | 730 Weaver Mill Rd<br>Smithfield, PA 15478                       | \$32                               | \$16  |
| Infrastructure Networks Inc.        | Network                         | 5051 Westheimer Rd Ste.<br>1700<br>Houston, TX 77056             | \$2,077                            | \$1,039                                       |

<sup>2</sup> As of the Petition Date, Constellation held a deposit in the amount of \$125,000 and was owed approximately \$52,710 by the Debtors. During the twelve months prior to the Petition Date, the Debtor paid Constellation an average of \$252,863 per month. Accordingly, the Adequate Assurance Deposit for Constellation is \$54,142, calculated as  $(\$252,863/2) - \$125,000 + \$52,710$ .



| <b>Utility Company</b>                           | <b>Type of Service Provided</b>   | <b>Mailing Address</b>                                    | <b>Approximate Monthly Average</b> | <b>Adequate Assurance Deposit<sup>1</sup></b> |
|--|-----------------------------------|---|------------------------------------|---|
| JAB Wireless, Inc.<br>DBA Rise<br>Broadband      | Network                           | 400 Inverness Parkway<br>Suite 330<br>Englewood, CO 80112 | \$111                              | \$56  |
| JC Sanitation LLC                                | Waste Removal                     | 334 Livingood Hollow Rd<br>McClellandtown, PA<br>15458    | \$15                               | \$8   |
| Level 3 Financing<br>Inc.                        | Network and<br>Telecommunications | 1025 Eldorado Blvd<br>Broomfield, CO 80021                | \$7,404                            | \$3,702                                       |
| Midwest Natural<br>Gas Inc.                      | Natural Gas                       | 23389 Whitehall Rd<br>Independence, WI 54747              | \$8,872                            | \$4,436                                       |
| Modern Disposal<br>Systems                       | Waste Removal                     | 200 Hemstock Dr<br>Sparta, WI 54656                       | \$476                              | \$238   |
| North Fayette<br>County Municipal<br>Authority   | Water, Sewer &<br>Trash           | 1634 University Dr<br>Dunbar, PA 15431                    | \$37                               | \$19  |
| Northern Tier<br>Solid Waste<br>Authority        | Waste Removal                     | 540 Old Bloss Rd<br>Blossburg, PA 16912                   | \$83                               | \$42  |
| Oakdale Electric<br>Cooperative                  | Electric                          | 489 N Oakwood Street<br>Tomah, WI 54660                   | \$177,053                          | \$88,527                                      |
| Ohio Edison -<br>Minerva                         | Electric                          | 1910 W Market Street<br>Akron, OH 44313                   | \$324                              | \$162   |
| Reliant Energy                                   | Electric                          | 1000 Main St<br>Houston, TX 77002                         | \$166,898                          | \$83,449                                      |
| Republic Waste<br>Services of Texas,<br>LTD      | Waste Removal and<br>Recycling    | 1450 East Cleveland<br>Street<br>Hutchins, TX 75141       | \$1,834                            | \$917   |
| Ring Central Inc.                                | Telecommunications                | 20 Davis Drive<br>Belmont, CA 94002                       | \$1,706                            | \$853   |
| Riverland Energy<br>Cooperative                  | Electric                          | 1472 WI-35<br>Onalaska, WI 54650                          | \$443                              | \$222   |
| Summer Energy<br>LLC                             | Electric                          | 5847 San Felipe St #3700<br>Houston, TX 77057             | \$229                              | \$115   |
| Taylor Garbage<br>Service, Inc.                  | Waste Removal and<br>Recycling    | 3104 Old Vestal Road<br>Vestal, NY 13850                  | \$51                               | \$26  |
| Telplex<br>Communications                        | Telecommunications                | 16830 Ventura Blvd<br>Encino, CA 91436                    | \$136                              | \$68  |
| Tri-County<br>Communications<br>Cooperative Inc. | Telecommunications                | 23669 Washington Street<br>Independence, WI 54747         | \$5,084                            | \$2,542                                       |

| <b>Utility Company</b>         | <b>Type of Service Provided</b> | <b>Mailing Address</b>   | <b>Approximate Monthly Average</b> | <b>Adequate Assurance Deposit<sup>1</sup></b> |
|--------------------------------|---------------------------------|--|------------------------------------|---|
| TXU Energy Retail Company, LLC | Electric                        | 6555 Sierra Dr<br>Irving, TX 75039   | \$4,707                            | \$2,354                                       |
| Union Wireless                 | Telecommunications              | 850 North Highway 414<br>Mountain View, WY<br>82939  | \$300                              | \$150   |
| Verizon Wireless               | Telecommunications              | Bankruptcy Administration<br>500 Technology Drive<br>Suite 550<br>Weldon Spring, MO<br>63304 | \$14,311                           | \$7,156                                       |
| Village of Mingo Junction      | Water and Sewer                 | 501 Commercial Street<br>Mingo Junction, OH<br>43938   | \$114                              | \$57  |
| Waste Management, Inc.         | Waste Removal and Recycling     | 1001 Fannin Street<br>Houston, TX 77002  | \$1,240                            | \$620   |
| We Energies                    | Natural Gas                     | 231 W. Michigan Street<br>Milwaukee, WI 53203  | \$42,608                           | \$21,304                                      |
| Wellsboro Electric Company     | Electric                        | 33 Austin Street<br>Wellsboro, PA 16901  | \$1,960                            | \$980   |
| West Penn Power                | Electric                        | 800 Cabin Hill Dr<br>Greensburg, PA 15601  | \$2,604                            | \$1,302                                       |
| West Tex Disposal              | Waste Removal and Recycling     | 3045 N Winston Ave<br>Odessa, TX 79764   | \$6,736                            | \$3,368                                       |
| West Texas Gas, Inc.           | Natural Gas                     | 211 N. Colorado<br>Midland, TX 79701   | \$134,252                          | \$67,126                                      |
| Xcel Energy                    | Electric                        | 414 Nicollet Mall<br>Minneapolis, MN 55401   | \$194,270                          | \$97,135                                      |
| <b>Total</b>                   |                                 |  | <b>\$1,069,651</b>                 | <b>\$462,545</b>                              |

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

|   |   |                         |
|---|---|-------------------------|
|   | X |                         |
| In re:                                      | : | Chapter 11              |
|   | : |                         |
| HI-CRUSH INC., <i>et al.</i> , <sup>1</sup> | : | Case No. 20-33495 (DRJ) |
|   | : |                         |
| Debtors.                                    | : | (Jointly Administered)  |
|   | : |                         |
|   | X |                         |

**ORDER (I) PROHIBITING UTILITY  
COMPANIES FROM ALTERING OR DISCONTINUING  
SERVICE ON ACCOUNT OF PREPETITION INVOICES,  
(II) APPROVING DEPOSIT AS ADEQUATE ASSURANCE OF PAYMENT,  
AND (III) ESTABLISHING PROCEDURES FOR RESOLVING REQUESTS  
BY UTILITY COMPANIES FOR ADDITIONAL ASSURANCE OF PAYMENT**

[Relates to Motion at Docket No. \_\_\_\_ ]

Upon the motion (the “**Motion**”)<sup>2</sup> of the Debtors for entry of an Order under sections 105(a) and 366 of the Bankruptcy Code, (i) prohibiting the Debtors’ Utility Companies from altering, refusing, or discontinuing service to, or discriminating against, the Debtors, (ii) approving an adequate assurance deposit as adequate assurance of postpetition payment to the Utility Companies, and (iii) establishing procedures for resolving any subsequent requests by the Utility Companies for additional adequate assurance of payment; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §1334; and the

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<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Hi-Crush Inc. (0530), OnCore Processing LLC (9403), Hi-Crush Augusta LLC (0668), Hi-Crush Whitehall LLC (5562), PDQ Properties LLC (9169), Hi-Crush Wyeville Operating LLC (5797), D & I Silica, LLC (9957), Hi-Crush Blair LLC (7094), Hi-Crush LMS LLC, Hi-Crush Investments Inc. (6547), Hi-Crush Permian Sand LLC, Hi-Crush Proppants LLC (0770), Hi-Crush PODS LLC, Hi-Crush Canada Inc. (9195), Hi-Crush Holdings LLC, Hi-Crush Services LLC (6206), BulkTracer Holdings LLC (4085), Pronghorn Logistics Holdings, LLC (5223), FB Industries USA Inc. (8208), PropDispatch LLC, Pronghorn Logistics, LLC (4547), and FB Logistics, LLC (8641). The Debtors’ address is 1330 Post Oak Blvd, Suite 600, Houston, Texas 77056.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States Constitution; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and all objections, if any, to entry of this Order having been withdrawn, resolved, or overruled; and upon the record herein; and after due deliberation thereon; and the Court having determined that there is good and sufficient cause for the relief granted in the Order, it is hereby

**ORDERED THAT:**

1. Absent further order of this Court, the Utility Companies, including any subsequently added Utility Companies, are hereby prohibited from altering, refusing, discontinuing service to, or discriminating against, the Debtors on account of unpaid prepetition invoices or due to the commencement of the Chapter 11 Cases, and from requiring the Debtors to pay a deposit or other security in connection with the provision of postpetition Utility Services, other than in accordance with the Additional Adequate Assurance Procedures contained herein. The Utility Companies are also prohibited from drawing upon any existing security deposit, surety bond, or other form of security to secure future payment for Utility Services.

2. The Debtors are authorized to cause the Adequate Assurance Deposit to be held in the Adequate Assurance Account during the pendency of these Chapter 11 Cases, subject to and consistent with the terms of any DIP Order (as defined herein). For the purposes of this Order, the Adequate Assurance Deposit shall be the sum of the individual adequate assurance amounts for the Utility Companies. As to each Utility Company, the amount will be equal to the lesser of (A)(i) fifty percent of the Debtors' estimated monthly cost of Utility Services, calculated based on the

Debtors' average expenses for such Utility Services during the twelve full months preceding the Petition Date, minus (ii) the amount of any bond or deposit held by such Utility Company, plus (iii) the amount owed to such Utility Company for prepetition Utility Services, whether or not such amount has been billed; and (B) fifty percent of the Debtors' estimated monthly cost of Utility Services, calculated based on the Debtors' average expenses for such Utility Services during the twelve full months preceding the Petition Date.

3. The Debtors shall deposit the Adequate Assurance Deposit in an amount equal to that listed on Exhibit 1 attached to the Motion for each Utility Company listed therein within twenty (20) days after the Petition Date, consistent with the terms and conditions of any DIP Order.

4. The balance of the Adequate Assurance Deposit may be adjusted or reduced by the Debtors without further order, to account for any of the following: (i) to the extent that the Adequate Assurance Deposit includes any amount on account of a company that the Debtors subsequently determine is not a "utility" within the meaning of section 366 of the Bankruptcy Code, (ii) an adjustment or payment made in accordance with the Delinquency Notice Procedures described in Paragraphs 6 and 7 below, (iii) the termination of a Utility Service by a Debtor regardless of any Additional Adequate Assurance Request (as defined below), (iv) the closure of a utility account with a Utility Company for which funds have been contributed for the Adequate Assurance Deposit, or (v) any other arrangements with respect to adequate assurance of payment reached by a Debtor with individual Utility Companies; *provided*, that, (a) with respect to a company that the Debtors subsequently determine is not a "utility" within the meaning of section 366 of the Bankruptcy Code, the Debtors may adjust and/or amend the balance of the Adequate Assurance Deposit upon fourteen days' advance notice to such company; and, (b) with respect to the Debtors' termination of a Utility Service or closure of a utility account with a Utility Company,

the Debtors may adjust and/or amend the balance of the Adequate Assurance Deposit upon reconciliation and payment by the Debtors of such Utility Company's final invoice in accordance with applicable nonbankruptcy law, to the extent that there are no outstanding disputes related to postpetition payments due.

5. The Debtors shall maintain the Adequate Assurance Deposit until the earlier of the Court's entry of an order authorizing the return of the Adequate Assurance Deposit to the Debtors and the effective date of a plan of reorganization for the Debtors (at which time the funds comprising the Adequate Assurance Deposit shall automatically, without further order of the Court, be returned to the Debtors or reorganized Debtors, as applicable).

6. To the extent the Debtors become delinquent with respect to a Utility Company's account, such Utility Company shall be permitted to file a written notice of such delinquency (the "**Delinquency Notice**") with the Court and serve such Delinquency Notice on: (i) Hi-Crush Inc., 1330 Post Oak Blvd, Suite 600 Houston, Texas 77056 (Attn: Mark C. Skolos (email: mskolos@hicrushinc.com)); (ii) Latham & Watkins LLP, 885 Third Avenue, New York, New York 10022 (Attn: Annemarie V. Reilly, Esq. (email: annemarie.reilly@lw.com)) and 330 North Wabash Ave., Suite 2800, Chicago, Illinois 60611 (Attn: Asif Attarwala, Esq. (email: asif.attarwala@lw.com)); (iii) Hunton Andrews Kurth LLP, 600 Travis Street, Suite 4200 (Attn: Timothy A. Davidson II, Esq. and Ashley L. Harper, Esq. (emails: TadDavidson@HuntonAK.com, and AshleyHarper@HuntonAK.com)); (iv) Paul, Weiss, Rifkind, Wharton & Garrison, LLP, 1285 Avenue of the Americas, New York, New York 10019 (Attn: Brian S. Hermann, Esq. and Elizabeth R. McColm, Esq. (emails: bhermann@paulweiss.com, and emccolm@paulweiss.com)); (v) Porter Hedges LLP, 1000 Main St, 36<sup>th</sup> Floor, Houston, Texas 77002 (Attn: John Higgins (email: jhiggins@porterhedges.com)); (vi) counsel to any statutory

committee appointed in these cases, if any; and (vii) the United States Trustee for the Southern District of Texas (Attn: Stephen Statham and Hector Duran (emails: stephen.statham@usdoj.gov and hector.duranjr@usdoj.gov) (each, a “**Delinquency Notice Party**”). Such Delinquency Notice must (i) set forth the amount of the delinquency, (ii) set forth the location for which Utility Services are provided, and (iii) provide each of the Debtors’ account numbers with the Utility Company that have become delinquent.

7. If a Delinquency Notice is properly provided as described above and such delinquency is not cured and no Delinquency Notice Party has objected to the Delinquency Notice within ten days of the receipt thereof, the Debtors shall (a) remit to such Utility Company from the Adequate Assurance Deposit the amount of postpetition charges claimed as delinquent in the Delinquency Notice and (b) cause the Adequate Assurance Deposit to be replenished for the amount remitted to such Utility Company. If a Delinquency Notice Party objects to the Delinquency Notice, the Court shall hold a hearing to resolve the dispute and determine whether a payment should be remitted from the Adequate Assurance Deposit and, if such payment is warranted, how much shall be remitted.

8. The following procedures (the “**Additional Adequate Assurance Procedures**”) are hereby approved with respect to all Utility Companies, including all subsequently added Utility Companies:

- (a) Except as provided by the Additional Adequate Assurance Procedures, the Utility Companies are forbidden to (i) alter, refuse, or discontinue services to, or discriminate against, the Debtors on account of unpaid prepetition invoices or any objections to the Debtors’ Adequate Assurance Deposit, or due to the commencement of the Chapter 11 Cases or (ii) require the Debtors to pay a deposit or other security in connection with the provision of postpetition Utility Services, other than the funding of the Adequate Assurance Deposit.

- (b) The Debtors will serve a copy of the Motion and this Order granting the relief requested herein on each Utility Company within seven (7) business days after entry of this Order by the Court.
- (c) The funds in the Adequate Assurance Account shall constitute adequate assurance for each Utility Company in the amounts set forth for such Utility Company in the column labeled “Adequate Assurance Deposit” on the Utility Company List.
- (d) In the event that a Utility Company asserts that the Adequate Assurance Deposit is not satisfactory adequate assurance of payment as contemplated by section 366(c)(2) of the Bankruptcy Code, that Utility Company must serve a written request (an “**Additional Adequate Assurance Request**”) for adequate assurance in addition to or in lieu of its rights in the Adequate Assurance Deposit. All Additional Adequate Assurance Requests shall be delivered by mail and email to the Delinquency Notice Parties.
- (e) Any Additional Adequate Assurance Request must (i) set forth the location(s) for which Utility Services are provided and the type of Utility Services provided, (ii) set forth the account number(s) for which Utility Services are provided, (iii) include a summary of the Debtors’ payment history relevant to the affected account(s), including any security deposit(s) or other security currently held by the requesting Utility Company, (iv) set forth why the Utility Company believes the proposed adequate assurance is not sufficient adequate assurance of future payment, (v) set forth the amount and nature of the adequate assurance of payment that would be satisfactory to the Utility Company, and (vi) provide an email address to which the Debtors may respond to the Additional Adequate Assurance Request.
- (f) Unless a Utility Company serves an Additional Adequate Assurance Request, such Utility Company shall be: (i) deemed to have received “satisfactory” adequate assurance of payment in compliance with section 366 of the Bankruptcy Code; and (ii) subject to (j) below, forbidden from discontinuing, altering, or refusing Utility Services to, or discriminating against, the Debtors on account of any unpaid prepetition charges, or requiring additional adequate assurance of payment other than the Proposed Adequate Assurance.
- (g) Upon the Debtors’ receipt of an Additional Adequate Assurance Request, the Debtors will promptly negotiate with the Utility Company to resolve the Additional Adequate Assurance Request.
- (h) Without further order of the Court, the Debtors, in consultation with the Ad Hoc Group, may resolve an Additional Adequate Assurance Request by entering into agreements granting additional adequate assurance to the requesting Utility Company if the Debtors, in their sole discretion,



determine that the Additional Adequate Assurance Request is reasonable or if the parties negotiate alternative consensual provisions.

- (i) If the Debtors determine that the Additional Adequate Assurance Request is not reasonable and are not able to reach an alternative resolution with the Utility Company within fourteen (14) days after the Additional Adequate Assurance Request is made, the Debtors will request a hearing before this Court at the next omnibus hearing date, or such other date as the Debtors and the requesting Utility Company may agree (the “**Determination Hearing**”).
- (j) Pending resolution at any such Determination Hearing, the Utility Company filing such Additional Adequate Assurance Request shall be prohibited from altering, refusing, or discontinuing Utility Services to the Debtors, or from discriminating against the Debtors with respect to the provision of Utility Services, on account of unpaid charges for prepetition services, the filing of the Chapter 11 Cases, or any objection to the adequacy of the Additional Adequate Assurance Procedures.
- (k) The Determination Hearing will be an evidentiary hearing at which the Court will determine whether the Adequate Assurance Deposit and any additional adequate assurance of payment requested by the Utility Company should be modified pursuant to section 366(c)(3) of the Bankruptcy Code.
- (l) All Utility Companies, including Utility Companies subsequently added to the Utility Company List, will be prohibited from altering, refusing or discontinuing Utility Services to the Debtors, or from discriminating against the Debtors with respect to the provision of Utility Services, absent further order of this Court.

9. The Utility Companies are prohibited from requiring additional adequate assurance of payment other than pursuant to the Adequate Assurance Procedures, provided, however, that nothing herein shall prejudice the right of a Utility Company to propose alternative procedures by filing a motion and after notice and hearing.

10. The Debtors are authorized, in their sole discretion, to amend the Utility Company List to add any Utility Company, and this Order shall apply in all respects to any such Utility Company that is subsequently added to the Utility Company List. For those Utility Companies that are subsequently added to the Utility Company List, the Debtors shall, within two business days of filing a supplement to the Utility Company List identifying any such additional Utility

Company, serve a copy of the Motion and this Order on such Utility Company, along with an amended the Utility Company List that includes such Utility Company. The Debtors shall increase the amount of the Adequate Assurance Deposit in the event an additional Utility Company is added to the Utility Company List by an amount equal to fifty percent of the estimated average monthly cost of such Utility Services based on historical averages over the preceding twelve months.

11. The Debtors may amend the Utility Company List to delete a Utility Company, or may seek to terminate a Utility Company, only if the Debtors have provided fourteen days' advance notice to such Utility Company, and have not received any objection from such Utility Company. If an objection is received, the Debtors shall request a hearing before this Court at the next omnibus hearing date, or such other date that the Debtors and the Utility Company may agree. The Debtors shall not deduct from the Adequate Assurance Deposit the amount set aside for any Utility Company that the Debtors seek to terminate or delete from the Utility Company List unless and until the fourteen-day notice period has passed and the Debtors have not received any objection to termination or deletion from such Utility Company, or until any such objection has been resolved consensually or by order of the Court.

12. The Debtors are authorized, but not directed, to pay on a timely basis in accordance with their prepetition practices, all undisputed invoices in respect of postpetition Utility Services rendered by the Utility Companies to the Debtors. The Utility Companies are hereby prohibited from unilaterally applying any such postpetition payments to any amounts due on account of prepetition Utility Services, including, without limitation, any penalties or interest.

13. The Additional Adequate Assurance Procedures, the Adequate Assurance Deposit, and the Debtors' ability to pay for future Utility Services in the ordinary course of business

constitute adequate assurance of future payment to the Utility Companies to satisfy the requirements of section 366 of the Bankruptcy Code.

14. The Debtors shall administer the Adequate Assurance Deposit Account in accordance with the terms of this Order.

15. Nothing contained herein constitutes a finding that any entity is or is not a Utility Company hereunder or a “utility” under section 366 of the Bankruptcy Code, whether or not such entity is listed on the Utility Company List.

16. Nothing in the Motion or this Order, or the Debtors’ payment of any claims pursuant to this Order, shall be construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors’ properties; (ii) a waiver of the Debtors’ rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute an allowed claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors’ rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to this Order. Nothing contained in this Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

17. Notwithstanding anything to the contrary contained herein, (i) any payment made, or to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtors under any order approving a postpetition financing facility or any order regarding the use of cash collateral approved by this Court in these Chapter 11 Cases (collectively, the “**DIP Orders**”), and (ii) to the extent there is any inconsistency between the terms of the DIP Orders and any action taken or proposed to be taken hereunder, the terms of the DIP Orders shall control.

For the avoidance of doubt, the Debtors are not authorized to make any payments pursuant to this Order except as permitted by the Budget (as defined in the DIP Orders).

18. The requirements of Bankruptcy Rule 6003(b) have been satisfied.

19. Notice of the Motion is adequate under Bankruptcy Rule 6004(a).

20. Notwithstanding Bankruptcy Rule 6004(h), to the extent applicable, this Order shall be effective and enforceable immediately upon entry hereof.

21. The Debtors are hereby authorized to take such actions and to execute such documents as may be necessary to implement the relief granted by this Order.

22. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Signed: \_\_\_\_\_, 2020

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DAVID R. JONES  
UNITED STATES BANKRUPTCY JUDGE