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

In re:	)	**Case No. 23-90611 (DRJ)**
	)	
WESCO AIRCRAFT HOLDINGS, INC., *et al.*,	)	**Chapter 11**
	)	
Debtors.	)	**(Jointly Administered)**

MOTION AND MEMORANDUM OF GEORGIA POWER COMPANY, METROPOLITAN EDISON COMPANY AND SALT RIVER PROJECT TO: (A) VACATE, AND/OR RECONSIDER, AND/OR MODIFY ORDER (I) PROHIBITING UTILITIES FROM ALTERING, REFUSING OR DISCONTINUING SERVICE, (II) APPROVING ADEQUATE ASSURANCE OF PAYMENT TO UTILITIES AND (III) ESTABLISHING PROCEDURES TO RESOLVE REQUESTS FOR ADDITIONAL ASSURANCE; AND (B) DETERMINE ADEQUATE ASSURANCE OF PAYMENT AS TO GEORGIA POWER COMPANY, METROPOLITAN EDISON COMPANY AND SALT RIVER PROJECT
[Relates To Docket No. 118]

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

Georgia Power Company ("Georgia Power"), Metropolitan Edison Company ("Met-Ed") and Salt River Project ("SRP") (collectively, the "Utilities") hereby move this Court (the "Motion") pursuant to Rule 60 of the Federal Rules of Civil Procedure, made applicable in Bankruptcy under Federal Rules of Bankruptcy Procedure 9024, to (A) vacate and/or reconsider, and/or modify the *Order (I) Prohibiting Utilities From Altering, Refusing or Discontinuing Service, (II) Approving Adequate Assurance of Payment To Utilities and (III) Establishing*

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Procedures To Resolve Requests For Additional Assurance (the "Utility Order") (Docket No. 118), and (B) to determine adequate assurance of payment as to the Utilities pursuant to 11 U.S.C. Section 366(c). In support of their Motion, the Utilities set forth the following:

Introduction

The plain language of Section 366(c)(2) requires a Chapter 11 debtor to provide a utility with adequate assurance of payment that is satisfactory to the utility within 30 days of the petition date. If a debtor believes the amount of the utility's request pursuant to Section 366(c)(2) needs to be modified, the debtor can file a motion pursuant to Section 366(c)(3) seeking to modify the amount of the utility's request, which is to be heard after "notice and a hearing." Here, the Debtors completely ignored all of the foregoing statutory requirements, including the notice requirements of Section 366 and the Utilities' due process rights, by filing the *Debtors' Emergency Motion For Entry of An Order (I) Prohibiting Utilities From Altering, Refusing or Discontinuing Service, (II) Approving Adequate Assurance of Payment To Utilities and (III) Establishing Procedures To Resolve Requests For Additional Assurance* (the "Utility Motion") (Docket No. 11) on the June 1, 2023 petition date (the "Petition Date") and scheduling it and having it heard on an *ex parte* final basis on the same day at 1:00 p.m. Unfortunately the Debtors' blatant disregard for the substantive and notice requirements of Section 366 and the Utilities' due process rights was rewarded with the entry of the Utility Order, which the Utilities are now required to set aside by this Motion to assert its lawful rights.

The *Certificate of Service* (the "COS") (Docket No. 232) reflects that the Utilities were apparently not "served" with the (i) Utility Motion, (ii) *Notice of Virtual Hearing on First Day Motions* ("Notice of Hearing") (Docket No. 55) or (iii) *Agenda of Matters Set For Hearing on June 1, 2023 at 1:00 p.m. (Central Time)* ("Agenda") (Docket No. 92) prior to the final hearing on

the Utility Motion that took place on the Petition Date. As such, the Utilities never received proper notice and an opportunity to be heard with respect to the Utility Motion.

The Utility Order provides that the Court found that "due and proper notice of the Motion having been provided and such notice being adequate and appropriate under the circumstances; and after notice and a hearing . . ." Utility Order at page 2. As the Utilities did not receive any notice, let alone proper and timely notice, of the final hearing on the Utility Motion held at 1:00 p.m. on the Petition Date and the very same day that the Utility Motion was filed with the Court, it is respectfully difficult to ascertain how a lack of any "notice" could somehow be considered adequate and appropriate. Furthermore, nowhere in the Utility Motion is there any explanation for why "emergency relief" and a final order were required without any notice or an opportunity to be heard being provided to the Utilities.

The *Procedures For Complex Chapter 11 Cases In the Southern District of Texas (Effective January 1, 2023)* (the "Complex Case Procedures") provide that final orders on motions filed pursuant to Section 366 of the Bankruptcy Code "(i) do not prejudice the right of a utility to propose alternative procedures; and (ii) provide for a hearing not later than 30 days after the petition date upon any timely filed **objection** to the adequate assurance procedures." Complex Case Procedures at ¶ 4.f. (emphasis added). The Utility Order does not provide for (i) a deadline to file an objection to the Utility Motion, including the "Adequate Assurance Procedures" set forth therein, or (ii) a hearing date within 30 days of the Petition Date to resolve any disputes between the Debtors and any utility regarding adequate assurance of payment and the Adequate Assurance Procedures.

Moreover, without providing the Utilities with notice and an opportunity to be heard, the Utility Order sets forth Adequate Assurance Procedures for utilities regarding any "Additional

Assurance Request" for adequate assurance of payment for additional or different adequate assurance of payment. Specifically, the Utility Order provides that:

A. The Additional Assurance Request must be made in writing, and contain the following information: (i) identify the location(s) for which utility services are provided, and the applicable account number(s), (ii) provide evidence that the Debtors have a direct obligation to the utility company, (iii) summarize the Debtors' payment history relevant to the affected account(s) for the past twelve months, including the outstanding and overdue amount and the amount of any security deposit(s)[1], (iv) certify that the utility company is not being paid in advance for its services; and (v) set forth the utility company's reasons for believing that the proposed adequate assurance is not sufficient adequate assurance of future payment.

B. If the Debtors and a utility provider are not able to reach an alternative resolution within 20 business days of the Debtors' receipt of an Additional Assurance Request, the Debtors will request a hearing before the Court to determine adequate assurance of payment with respect to a particular utility provider.

Respectfully, the foregoing procedure does not make sense because it does not provide for a deadline for the Debtors' to schedule an adequate assurance of payment determination hearing within 30 days of the Petition Date pursuant to the Complex Case Procedures which expressly provide that an adequate assurance determination hearing must take place within 30 days of the

1 Other than to make the Adequate Assurance Request procedure more burdensome, it is unclear why summaries of the Debtors' payment history for each account are required when the Debtors' timely payment of prepetition charges is no longer statutorily relevant under Section 366(c)(3)(B)(ii). Information on final prepetition charges are generally not available for weeks and possibly months based on applicable meter read dates and other factors. Additionally, information regarding any prepetition security held by a Utility is irrelevant because Section 366(c)(4) expressly provides that utilities can recoup prepetition deposits against prepetition debt without notice or order of the Court

Petition Date to resolve any disputes between the Debtors and a utility regarding adequate assurance of payment. Accordingly, the Utilities are filing this Motion to vacate the Utility Order which is not in accord with the express provisions of Section 366 of the Bankruptcy Code and the Complex Case Procedures, and request that this matter be set for the next available hearing date.

The Utilities are requesting the following two-month cash deposits from the Debtors as assurance of payment under Section 366(c)(2), which are the amounts that the Utilities can obtain pursuant to applicable state law: (a) Georgia Power - $57,945; (b) Met-Ed - $54,854; and (c) SRP - $35,850. For the reasons set forth herein, the Utilities request that this Court promptly vacate the Utility Order as to the Utilities and order the Debtors to immediately provide the Utilities with adequate assurance of payment in the form of cash deposits in the amounts set forth herein.

Jurisdiction and Venue

1. This Court has jurisdiction over this Motion under 28 U.S.C. § 1334(b).

2. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A).

3. Venue of this Motion is proper in this district pursuant to 28 U.S.C. § 1409.

Facts

Procedural Facts

4. On June 1, 2023 (the "Petition Date"), the Debtors commenced their cases under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") that are now pending with this Court. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

5. The Debtors' Chapter 11 bankruptcy cases are being jointly administered.

The Utility Motion

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

7. Rule 9014 of the Federal Rules of Bankruptcy Procedure provides that "reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." In addition, as the Utilities are corporations or state-regulated entities, Rule 7004(b)(3) requires service to be served "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . . ."

8. The COS reflects that the Utilities were not properly or timely "served" with the Utility Motion, Notice of Hearing or Agenda. As such, the Utilities never received notice and an opportunity to be heard with respect to the Utility Motion at the final hearing on the Utility Motion that took place at 1:00 p.m. on the Petition Date – the very same day that the Utility Motion was filed.

9. The Utility Order provides that the Court found that due and proper notice of the Motion having been provided and such notice being adequate and appropriate under the circumstances; and after notice and a hearing . . ." Utility Order at page 2. As set forth herein, nothing was appropriate regarding the Debtors' lack of any notice to the Utilities regarding the Utility Motion and the final hearing on the Utility Motion that took place on the first day of the case.

10. The Utility Order also provides that the Court "determined that the legal and factual bases set forth in the Motion and in the record establish just cause for entry of this Order." Utility Order at page 2. Respectfully, the Utilities are not aware of the factual or legal bases for the findings that: (i) holding a hearing on no notice to the Utilities was appropriate, or (ii) just cause

was established at the *ex parte* final hearing on the first day of the case (and the very day that the Utility Motion was filed) that justified the relief granted in the Utility Order.

11. Because the Utilities were not served with the Utility Motion and the Debtors never attempted to contact the Utilities regarding their adequate assurance requests prior to the filing of the Utility Motion, the Utilities had no opportunity to respond to the Utility Motion or otherwise be heard at the *ex parte* final hearing on the Utility Motion that took place on the Petition Date, despite the fact that Section 366(c)(3) (presuming this was the statutory basis for the relief sought by the Debtors) expressly requires that there be "notice and a hearing" to the Utilities.

12. In the Utility Motion, the Debtors improperly sought 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 a bank account containing $245,024 that supposedly reflects approximately two weeks of the Debtors' utility charges, minus the amount of existing utility deposits (the "Bank Account"). Utility Motion at ¶ 11. 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.

13. Exhibit "B" to the Utility Motion reflects that the Debtors' propose that the Bank Account will contain the following amounts on behalf of the Utilities: (a) Georgia Power - $12,130; (b) Met-Ed - $10,233; and (c) SRP - $4,711.

14. The Debtors refer to the 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 Bank Account is 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.

15. The Debtors claim that "[i]n general, the Debtors have a consistent history of paying their Utility Companies on time." 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.

16. The Bank Account is an unacceptable form of adequate assurance of payment for the Utilities and should not have been considered relevant by this Court because Sections 366(c)(2) and (3) do not allow the Debtors to establish the form or amount of adequate assurance of payment. Under Sections 366(c)(2) and (3), this Court and the Debtors are limited to modifying, if at all, the amounts of the security sought by the Utilities under Section 366(c)(2).

17. The Utility Motion did 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 Debtors contended that the Bank Account, and their "ability to pay for post-petition service in the ordinary course of business through access to existing cash collateral, access to new debtor-in-possession financing, and revenue generated through

operations," allegedly constitutes sufficient adequate assurance of future payment to the Debtors' utility providers. Utility Motion at ¶ 16.

The Utility Order

18. Following the *ex parte* final hearing on the Utility Motion that took place on the Petition Date at 1:00 p.m., the same day that the Utility Motion was filed and the first day of the case, the Court entered the Utility Order on the Petition Date.

19. The Utility Order granted the Debtors' proposed form of adequate assurance of payment in the form of the Bank Account.

20. As set forth in the Introduction to this Motion, the procedures established on an *ex parte* basis are not appropriate or in accord with the provisions of Section 366 of the Bankruptcy Code. Hence, the Utilities are filing this Motion to Vacate the Adequate Assurance Procedures as to the Utilities and the *ex parte* holding in paragraph 2 of the Utility Order that the Bank Account and the Adequate Assurance Procedures constitute adequate assurance of payment. It is unclear how such a holding could have been reached without providing the Utilities with notice and an opportunity to be heard on the matter as required by applicable law.

21. Although not requested in the Utility Motion, Paragraph 3 of the Utility Order provides that "[a]ny bonds, security deposits or other security that were in place as of the Petition Date shall remain in place and shall continue to be held by the applicable Utility Companies, except (a) upon further order of the Court or (b) as agreed by the Debtors pursuant to the Adequate Assurance procedures." As Section 366(c)(4) of the Bankruptcy Code expressly provides that utilities can offset prepetition cash deposits against prepetition debt without notice or court order and utilities holding prepetition surety bonds can make demands upon those instruments to satisfy unpaid, prepetition charges, it is not clear why the Debtors believe they can enjoin the Utilities

from exercising their rights under Section 366(c)(4) pursuant to Paragraph 3 of the Utility Order. Furthermore, if the Debtors truly require this improper injunctive relief they should have actually requested it in a proper pleading in accordance with the requirements of Rules 7001 and 7065 of the Federal Rules of Bankruptcy Procedure. Accordingly, this improper injunctive relief should be vacated by this Court because it was not requested in the Utility Motion or in a pleading that complies with Rules 7001 and 7065 of the Federal Rules of Bankruptcy Procedure.

22. The Utility Order provides that any balance remaining in the Bank Account on the effective date of the Debtors' Chapter 11 plan shall be returned to the Debtors on such date. Utility Order at ¶ 4.j. As the Utilities bill the Debtors in arrears, and the Utilities would likely provide post-petition utility goods/services to the Debtors through the effective date of a plan, 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.

23. Although not requested in the Utility Motion, the Utility Order provides that any payment to be made, or any authorization contained thereunder, shall be subject to and consistent with the terms and conditions contained in any orders entered by the Court approving post-petition financing, any budgets, and authorizing the use of cash collateral. Utility Order at ¶ 11. It is not clear if the Debtors and the secured lenders are trying to subordinate all of the post-petition payments made to 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 nothing more than a subterfuge.

The Debtors' Financing Motion

24. On the Petition Date, the Debtors filed the *Debtors' Emergency Motion For Entry of Interim and Final Orders (I) Authorizing the Debtors To (A) Obtain Postpetition Financing, and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Claims, (III) Granting Adequate Protection To Prepetition Secured Parties, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* (the "Financing Motion") (Docket No. 84).

25. Through the Financing Motion, the Debtors seek approval of $300 million of DIP financing, with immediate access of up to $110 million through the issuance of DIP Notes upon entry of the Interim Financing Order (defined below). Financing Motion at ¶ 5.

26. The DIP Note Purchase Agreement contains the following milestones: (i) no later than 10 business days after the Petition Date – Court entry of preliminary stay of the Financing Litigation; (ii) no later than 90 calendar days after the Petition Date – Court entry of a stay of the Financing Litigation on a final basis; (iii) no later than 90 calendar days after the Petition Date – Debtors shall have filed an Acceptable Plan; (iv) no later than 30 days after the filing of an Acceptable Plan – entry of an order approving the disclosure statement; (v) no later than 10 days after entry of the Disclosure Statement Order – Debtors shall have commenced solicitation of an Acceptable Plan; (vi) no later than 180 days after the Petition Date – entry of an order confirming an Acceptable Plan; and (vii) no later than 15 days after entry of the Confirmation Order – the effective date for an Acceptable Plan shall have occurred. Financing Motion at pages 11-12.

27. On June 2, 2023, the Court entered the *Interim Order (I) Authorizing the Debtors To (A) Obtain Postpetition Financing, and (B) Use Cash Collateral; (II) Granting Liens and Providing Superpriority Administrative Expense Claims; (III) Granting Adequate Protection To*

the Prepetition Secured Parties; (IV) Modifying the Automatic Stay; and (V) Granting Related Relief (the "Interim Financing Order") (Docket No. 139).

28. The Interim Financing Order approved a carve-out for the payment of fees of the Debtors' professionals incurred prior to a Trigger Notice, plus an additional $5 million following delivery of a Trigger Notice (the "Carve-Out"). Interim Financing Order at pages 30-31.

29. Although not attached to the Interim Financing Order, attached to the proposed Interim Financing Order is a 13-week cash flow forecast through the week ending August 26, 2023 (the "Budget"). The Budget does not include a 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

30. On June 5, 2023, the Debtors filed the *Debtors' Emergency Motion For Entry of Interim and Final Orders (I) Authorizing the Payment of Prepetition Claims of Critical Vendors and Foreign Claimants, (II) Authorizing the Payment of Outstanding Orders, and (III) Granting Related Relief* (the "Critical Vendor Motion")(Docket No. 3).

31. On the Petition Date, the Court entered the *Final Order (I) Authorizing the Payment of Prepetition Claims of Critical Vendors and Foreign Claimants, (II) Authorizing the Payment of Outstanding Orders, and (III) Granting Related Relief* (the "Critical Vendor Order")(Docket No. 128). The Critical Vendor Order authorized the Debtors to pay supposed critical vendor claims and foreign claims in an aggregate amount not to exceed $165 million. Critical Vendor Order at ¶ 1.

32. The Debtors' claim in Paragraph 9 of the Utility Motion that the Debtors "cannot operate their businesses without the services that the Utility Companies provide."

However, the Critical Vendor Motion does not reflect that the Debtors sought Court authority to pay prepetition utility charges.

Facts Regarding the Utilities

33. 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.

34. 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.

35. 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:

Georgia Power: https://www.georgiapower.com/business/prices-rates/business-tariffs.cshtml

Met-Ed:
https://www.firstenergycorp.com/content/customer/customer_choice/pennsylvania/pennsylvania_tariffs.html

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

36. 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:

Utility	**No. of Accounts**	**Estimated Prepet. Debt**	**Deposit Request**
Georgia Power	1	To be supplemented	$52,740 (2-month)
Met-Ed	1	$38,511.79	$52,854 (2-month)
SRP	1	$6,391.42	$35,850 (2-month)

37. Met-Ed held a prepetition deposit in the amount of $29,520 that it recouped against the prepetition debt owing to Met-Ed from the Debtors pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition deposit amount remains after recoupment.

38. SRP held a prepetition deposit in the amount of $28,080 that it recouped against the prepetition debt owing to SRP 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 SRP post-petition deposit request.

Discussion

A. THE UTILITY ORDER SHOULD BE VACATED AS TO THE UTILITIES BECAUSE IT WAS ENTERED IN VIOLATION OF THE UTILITIES' DUE PROCESS RIGHTS AND THE UTILITY MOTION WAS NOT PROPERLY SERVED ON THE UTILITIES.

The relief sought by the Debtors in the Utility Motion was in violation of the Utilities' due process rights, Rules 7004(b)(3) and 9014 of the Federal Rules of Bankruptcy Procedure and Section 366(c) of the Bankruptcy Code.

1. The Utility Motion Was Not Properly Served In Accordance With Rules 7004(b)(3) And 9014 Of The Federal Rules Of Bankruptcy Procedure.

Bankruptcy Rules 7004 and 9014 require that service of a motion upon a corporation be made by mail to the attention of an officer, a managing or general agent or to any other agent authorized by appointment or by law. Specifically, Rule 4(b)(3) of the Federal Rules of Civil Procedure, made applicable by Bankruptcy Rule 7004, provides for service of process by mail on a corporation as follows:

> Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is on authorized by appointment to receive service and the statute so requires, by also mailing a copy to the defendant.

Courts have held that the notice requirements set forth in Fed. R. Civ. P. 4(b)(3) are to be strictly adhered to and that service of process must be addressed to a specific officer, managing or general agent. *See In re Golden Books Family Entertainment, Inc.*, 269 B.R. 300, 305 (D. Del. 2001) (holding that notices addressed to the "Asst. Controller" were deficient because "they failed to address any of the copies of the notice to a person of authority or to a person authorized to accept service"); *see also In re Schoon*, 153 B.R. 48 (Bankr. N.D. Cal. 1993) (holding that notices addressed to "Attn: President" did not constitute valid service upon an officer and "makes a joke

of the requirement that an officer be served"); *Addison v. Gibson Equipment Co., Inc. (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453 (Bankr. E.D. Va. 1995) (holding that because "nationwide service of process by first class mail was a rare privilege," notice addressed to "President or Corporate Officer" was improper because no individual was named).

Adequate and timely notice of the filing of a suit is an essential element of our judicial system. As held by the Supreme Court of the United States and reiterated by Judge McKelvie in *Golden Books*, "due process of law in any proceeding which is to be accorded finality [requires] notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Rule 4(b)(3) operates to assure that a corporate defendant is placed on actual notice of a suit filed against it and strict compliance with this notice requirement in turn serves to protect its due process rights as well as assure that bankruptcy matters proceed expeditiously. *Pittman Mechanical*, 180 B.R. at 457.

The Utilities are corporations or state-regulated entities. Therefore, Rule 7004(b)(3) requires service to be served "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . . ." In addition to the Rule 7004(b)(3) requirements, Rule 9014 of the Federal Rules of Bankruptcy Procedure provides that "reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." The COS reflects that the Utilities were not properly or timely "served" with the Utility Motion. As such, the Utilities never received notice and an opportunity to be heard with respect to the Utility Motion. Based on the foregoing, the Utility Order should be vacated as to the Utilities because the Utility Motion was not properly served on the Utilities pursuant to

Rules 7004(b)(3) and 9014 of the Federal Rules of Bankruptcy Procedure for a final hearing on the Utility Motion that took place on the Petition Date, the first day of the case and the same day that the Utility Motion was filed.

2. Section 366 Of The Bankruptcy Code

With respect to Section 366(c) of the Bankruptcy Code, it specifically requires that a motion under Section 366(c)(3)(A) be determined after notice and a hearing. Moreover, the Complex Case Procedures provide that final orders on motions filed pursuant to Section 366 of the Bankruptcy Code "(i) do not prejudice the right of a utility to proposed alternative procedures; and (ii) provide for a hearing not later than 30 days after the petition date upon any timely filed **objection** to the adequate assurance procedures." Complex Case Procedures at ¶ 4.f. (emphasis added). Here, the Utility Order failed to provide an objection deadline or a hearing date no later than 30 days after the petition date. Accordingly, based on all of the foregoing, it is clear that the Utilities did not receive any, let alone reasonable, notice of the June 1, 2023 final hearing on the Utility Motion that took place at 1:00 p.m. on the same day that the Utility Motion was filed, thereby depriving the Utilities of the opportunity to prepare for and participate at a hearing that resulted in the entry of the final Utility Order that very same day. Therefore, this Court should vacate the Utility Order as to the Utilities and permit the Utilities to be heard on the issues raised in the Utility Motion and in this Motion.

B. THE UTILITY ORDER SHOULD BE VACATED AS TO THE UTILITIES BECAUSE THE RELIEF PROVIDED IS NOT IN ACCORD WITH SECTION 366(c) OF THE BANKRUPTCY CODE.

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 U.S. Supreme Court, "[i]t is well-established that 'when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (*quoting Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.,* 530 U.S. 1, 6, 120 S.Ct., 1942, 147 L.Ed. 2d 1 (2000)). *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, 597 (6th Cir. 1997) ("Statutes . . . must be read in a 'straightforward' and 'commonsense' manner."). A plain reading of Section 366(c)(2) makes clear that a debtor is required to provide adequate assurance of payment satisfactory to its utilities on or within thirty (30) days of the filing of the petition. 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 actually setting the form and amount of the adequate assurance of payment acceptable to the Debtors. Accordingly, this Court should not reward the Debtors for their failure to comply with the requirements of Section 366(c) and should vacate the Utility Order as to the Utilities. *See In re Viking Offshore (USA), Inc.*, 2008 WL 782449 at *3 (Bankr. S.D. Tex. Mar. 20, 2008) ("The relief requested by Debtors would reverse the burden, by making an advance determination that the proposed assurance was adequate. . . . the court lacks the power to reverse the statutory framework for provision of adequate assurance of payment."); s*ee also In re Pilgrim's Pride Corporation*, Case No. 08-45664 (DML)(Docket No. 447), Bankr.

N.D. Tex., *Memorandum Order* entered on January 5, 2009 (denying debtors' motion seeking to establish adequate assurance of payment).

1. The Debtors' Proposed Bank Account Is Not Relevant And Is Unsatisfactory Because It Does Not Provide The Utilities With Adequate Assurance of Payment.

This Court should not have considered 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, the Bank Account is an improper and otherwise unreliable form of adequate assurance of future payment for the following reasons:

i. Unlike the statutorily 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.

ii. To access the Bank Account, the Utilities may 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.

iii. It is underfunded from the outset because the Utilities issue monthly bills in arrears and by the time a default notice is issued, the Debtors will have used approximately 60 days of commodity or service.

iv. The Debtors should not close the Bank Account before all post-petition utility charges are paid in full.

Accordingly, the Court should not have approved 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 Debtors Have Not Set Forth Any Basis For Modifying the Utilities' Requested Deposits.

In the Utility Motion, the Debtors failed 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 did 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 vacate the Utility Order as to the Utilities and require the Debtors to comply with the plain requirements of Section 366(c) with respect to the Utilities.

C. 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 or regulations. Based on the foregoing state-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, 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 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 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, less any prepetition security. 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 and foreign claims of up to $165 million, 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 $5 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.

Request for Hearing

The Utilities requests that this Motion be heard at the next available hearing date in these bankruptcy cases to remedy the violations of their due process and Section 366 rights.

WHEREFORE, the Utilities respectfully requests that this Court enter an order:

i. Vacating the Utility Order as to the Utilities;

ii. Denying the Utility Motion as to the Utilities;

iii. Awarding the Utilities the post-petition adequate assurance of payment deposits they have requested from the Debtors herein;

iv. Awarding such other and further relief as the Court deems just and appropriate; and

v. Scheduling a prompt hearing on this Motion.

Dated: June 21, 2023

/s/ Weldon L. Moore, III

Weldon L. Moore III, Esq. (TX 14380500)
Sussman & Moore, LLP
2911 Turtle Creek Blvd., Suite 1100
Dallas, Texas 75219
Telephone: (214) 378-8270
Facsimile: (214) 378-8290
E-mail: wmoore@csmlaw.net

and

Russell R. Johnson III, Esq.
Virginia State Bar No. 31468
John M. Craig
Virginia State Bar No. 32977
Law Firm of Russell R. Johnson III, PLC
2258 Wheatlands Drive
Manakin-Sabot, Virginia 23103
Telephone: (804) 749-8861
Email: russell@russelljohnsonlawfirm.com,
john@russelljohnsonlawfirm.com

Co-Counsel for Georgia Power Company, Metropolitan Edison Company and Salt River Project

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2023, a true and correct copy of the foregoing *Motion* was served via the Court's CM/ECF electronic notification system on all parties requesting same, and via email to the parties listed below.

Kelli S. Norfleet
Charles A. Beckham, Jr.
Martha Wyrick
HAYNES AND BOONE, LLP
1221 McKinney Street, Suite 4000
Houston, Texas 77010
Email: Kelli.Norfleet@HaynesBoone.com, Charles.Beckham@HaynesBoone.com, Martha.Wyrick@HaynesBoone.com
Debtors' Counsel

Dennis F. Dunne
Samuel A. Khalil
Benjamin M. Schak
MILBANK LLP
55 Hudson Yards
New York, New York 10001
Email: DDunne@Milbank.com, SKhalil@Milbank.com, BSchak@Milbank.com
Debtors' Counsel

Andrew Jimenez
U.S. Department of Justice
United States Trustee Program
606 North Carancahua Street, Suite 1107
Corpus Cristi, Texas 78401
Email: andrew.jimenez@usdoj.gov

Jayson B. Ruff
Office of the United States Trustee
515 Rusk Street, Suite 3516
Houston, Texas 77002
Email: jayson.b.ruff@usdoj.gov

/s/ Weldon L. Moore, III
Weldon L. Moore, III