

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

In re:	)	Chapter 11
	)	
OTB HOLDING LLC, <i>et al.</i> ,	)	Case No. 25-52415 (SMS)
	)	
	)	(Jointly Administered)
Debtors.	)	
	)	

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**OBJECTION OF CERTAIN UTILITY COMPANIES TO THE  
DEBTORS' EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL  
ORDERS (I) PROHIBITING UTILITIES FROM ALTERING, REFUSING, OR  
DISCONTINUING SERVICE ON ACCOUNT OF PREPETITION INVOICES; (II)  
DEEMING UTILITIES ADEQUATELY ASSURED OF FUTURE PERFORMANCE;  
(III) ESTABLISHING PROCEDURES FOR DETERMINING ADEQUATE  
ASSURANCE OF PAYMENT; AND (IV) GRANTING RELATED RELIEF**

Baltimore Gas and Electric Company ("BGE"), Commonwealth Edison Company ("ComEd"), PECO Energy Company ("PECO"), Entergy Arkansas, LLC ("Entergy AR"), Entergy Mississippi, LLC ("Entergy MS"), Constellation NewEnergy, Inc. ("CNE") and Constellation NewEnergy – Gas Division, LLC ("CNEG") (collectively, the "Utilities"), hereby object to the *Debtors' Emergency Motion For Entry of Interim and Final Orders (I) Prohibiting Utilities From Altering, Refusing, or Discontinuing Service on Account of Prepetition Invoices; (II) Deeming Utilities Adequately Assured of Future Performance; (III) Establishing Procedures For Determining Adequate Assurance of Payment; and (IV) Granting Related Relief* (the "Utility Motion") (Docket No. 10), and set forth the following:

**Introduction**

The Debtors' Utility Motion improperly seeks to shift the Debtors' obligations under Section 366(c)(3) of the Bankruptcy Code from modifying the amounts of the adequate assurance



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of payment requested by the Utilities under Section 366(c)(2) to setting the form and amounts of the adequate assurance of payment acceptable to the Debtors. This Court should not permit the Debtors to shift their clear statutory burden in this fashion.

Through the Utility Motion, the Debtors seek to have this Court approve their form of adequate assurance of payment, which is a bank account containing \$241,331.75 which supposedly reflects approximately two-weeks of the Debtors' estimated utility charges, minus the amount of any existing surety bonds or deposits (the "Bank Account"). As an initial matter, the Debtors' proposal that the monies contained in the Bank Account should be net of any prepetition security does not make sense because the Debtors do not know if any prepetition security will remain after the payment of prepetition charges, or if prepetition deposit amounts will remain after recoupment of prepetition deposits against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code.

The Utilities Service List attached as Exhibit "A" to the Utility Motion reflects that the Bank Account would contain the following on behalf of the Utilities: (a) BGE - \$8,420.71; (b) ComEd - \$2,825.79; (c) PECO - \$1,613.19; (d) Entergy AK - \$0; (e) Entergy MS - \$0; and (f) CNE and CNEG collectively - \$5,362.48.

The Court should reject the Debtors' proposed Bank Account because: (1) The Utilities bill the Debtors on a monthly basis and provide the Debtors with generous payment terms pursuant to applicable state law, tariffs, regulations and/or contracts, such that a segregated bank account supposedly containing two-weeks of utility charges, net of any prepetition security, that is maintained by the Debtors is not sufficient in amount or in form to provide the Utilities with adequate assurance of payment; (2) Section 366(c) of the Bankruptcy Code specifically defines the forms of adequate assurance of payment in Section 366(c)(1), none of which include a segregated

bank account; and (3) Even if this Court were to improperly consider the Bank Account as a form of adequate assurance of payment for the Utilities, this Court should reject it as an insufficient form of adequate assurance of payment for the reasons set forth in Section A.1. of this Objection.

The Utilities are seeking the following two-month cash deposits from the Debtors, which are amounts that they are authorized to obtain pursuant to applicable state law or contracts: (a) BGE - \$22,819; (b) ComEd - \$20,235; (c) PECO - \$9,570; (d) Entergy AR – 10,980; (e) Entergy MS - \$13,700; (f) CNE - \$42,659; and (g) CNEG - \$8,369. Based on all of the foregoing, this Court should deny the Utility Motion as to the Utilities because the amounts of the Utilities’ post-petition deposit requests are reasonable under the circumstances and should not be modified.

### **Facts**

#### **Procedural Facts**

1. On March 4, 2025 (the “Petition Date”), the Debtors commenced their cases under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) now pending with this Court. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

2. The Debtors’ Chapter 11 bankruptcy cases are being jointly administered.

#### **The Utility Motion**

3. On March 5, 2025, the Debtors filed the Utility Motion.

4. On March 7, 2025, the Court entered the *Interim Order (I) Prohibiting Utilities From Altering, Refusing, or Discontinuing Service on Account of Prepetition Invoices; (II) Deeming Utilities Adequately Assured of Future Performance; (III) Establishing Procedures For Determining Adequate Assurance of Payment; and (IV) Granting Related Relief* (the “Interim

Utility Order”)(Docket No. 51). The Interim Utility Order set an objection deadline of March 21, 2025, with a final hearing on the Utility Motion to take place on March 28, 2025 at 10:00 a.m.

5. The Debtors claim that they spend approximately \$525,212 each month for utility services. Utility Motion at ¶ 6.

6. The Debtors seek to avoid the applicable legal standards under Sections 366(c)(2) and (3) by seeking Court approval for their own form of adequate assurance of payment, which is the Bank Account containing \$241,331.75 which supposedly reflects approximately two weeks of the Debtors’ estimated utility charges, minus the amount of any existing surety bonds or deposits. Utility Motion at ¶ 15.

7. The Debtors’ proposal that the monies contained in the Bank Account should be net of prepetition security does not make sense because the Debtors do not know if any prepetition security will remain after the payment of prepetition charges, or if prepetition deposit amounts will remain after recoupment of prepetition deposits against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code.

8. The Debtors propose to “deposit” \$241,331.75 into the Bank Account, and refer to the proposed monies to be contained in the Bank Account as the “Adequate Assurance Deposits.” Utility Motion at ¶ 15. Monies contained in an escrow account controlled by a customer of a utility such as the proposed Bank Account are not recognized as a “cash deposit” provided by a customer to a utility by any public utility commission. Additionally, Section 366(c) of the Bankruptcy Code specifically defines the forms of adequate assurance of payment in Section 366(c)(1), none of which include a segregated utility bank account. Simply put, the Debtors are not proposing to provide any of the Utilities with cash deposits as adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy Code.

9. The proposed Bank Account is not acceptable to the Utilities and should not be considered relevant by this Court because Sections 366(c)(2) and (3) do not allow the Debtors to establish the form or amounts 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).

10. The Debtors propose that monies contained in the Bank Account on behalf of a utility will be returned to the Debtors, without further order of the Court, on the earlier of (i) reconciliation and payment by the Debtor of a utility's final invoice, (ii) the closing of a sale of all or substantially all of the Debtors' assets, and (iii) the effective date of any Chapter 11 plan. Utility Motion at ¶ 20. As the Utilities bill the Debtors in arrears, and the Utilities would likely provide post-petition utility goods/services to the Debtors through a sale closing date or the effective date of any plan, any monies contained in the Bank Account should not be returned to the Debtors until the Debtors confirm that they have paid in full all of their post-petition utility expenses owed to the Utilities.

11. Although not requested in the Utility Motion, the Interim Utility Order provides that any payments authorized to be made pursuant to the Utility Order shall be subject to and in accordance with any orders authorizing the Debtors' use of any approved post-petition financing facility, use of cash collateral, and any budget in connection therewith. Utility Order at ¶ 19. It is not clear if the Debtors and the secured lenders are trying to subordinate all of the post-petition payments made to the Utilities to the secured lenders' liens. At a minimum, all post-petition payments made by the Debtors to the Utilities should not be subordinated to the lenders' liens or subject to subsequent disgorgement by the secured lenders. If the Debtors want the Utilities to provide post-petition utility goods/services, then any and all post-petition payments made to the

Utilities should be free and clear of any and all liens. Otherwise, all of the relief sought in the Utility Motion is effectively nothing more than a subterfuge.<sup>1</sup>

12. The Utility Motion does not address why the Bank Account would be funded at supposedly two-weeks of utility charges, less any prepetition security held by a utility, for the Utilities when the Debtors know that the Utilities are required by applicable state laws, regulations, tariffs and/or contracts to bill the Debtors monthly and in arrears.<sup>2</sup> Moreover, the Debtors presumably want the Utilities to continue to bill them monthly and provide them with the same generous payment terms that they received prepetition. Accordingly, if the Bank Account is relevant, which the Utilities dispute, the Debtors need to explain: (A) why they are only proposing that the Bank Account would contain supposed two-week amounts for BGE, ComEd, PECO and CNE and nothing for Entergy AR and Entergy MS; (B) how such insufficient amounts for BGE, ComEd PECO and CNE and \$0 for Entergy AR and Entergy MS could even begin to constitute adequate assurance of payment for the Utilities' monthly bills; and (C) why the proposed amounts to be contained in the Bank Account would be net of any prepetition security.

13. The Utility Motion does not address why this Court should consider modifying, if at all, the amounts of the Utilities' adequate assurance requests pursuant to Section 366(c)(2). Rather, without providing any specifics, the Utility Motion merely states that the Bank Account, prepetition security and the Debtors' supposed ability to pay for future utility services in the ordinary course of business, constitutes sufficient adequate assurance of payment for the Debtors' utility providers. Utility Motion at ¶ 17.

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<sup>1</sup> Indeed, that the Utilities should not be subordinated to the Debtors' secured lenders should not be a novel concept, especially when taking into consideration that the uninterrupted supply of utility services to the Debtors directly benefits the secured lenders by protecting their collateral.

<sup>2</sup> As explained in more detail below, in practical terms, the Utilities are exposed for at least two months of service to the Debtors before they could terminate for non-payment.

**The Debtors' Financing Motion**

14. On March 5, 2025, the Debtors filed the *Debtors' Emergency Motion For Interim and Final Orders (I) Authorizing the Debtors To Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection; (III) Authorizing Use of Cash Collateral; (IV) Modifying the Automatic Stay; (V) Scheduling a Final Hearing; and (VI) Granting Related Relief* (the “Financing Motion”) (Docket No. 17).

15. Through the Financing Motion, the Debtors are seeking authorization to incur senior secured post-petition obligations on a superpriority basis in the form of a senior secured superpriority delayed multiple-draw term loan facility (the “DIP Facility”) in the aggregate principal amount of \$14 million, comprised of (i) upon entry of the Interim Financing Order (defined below), \$11.5 million, including \$7.5 million of new money DIP Loans, and (ii) upon entry of a Final Financing Order, an additional \$2.5 million of new money DIP Loans. Financing Motion at ¶ 3.A.

16. Through the Financing Motion, the Debtors seek the approval of a carve-out for payments to the Debtors' professionals incurred prior to the delivery of a Carve-Out Trigger Notice, plus an additional \$100,000 after the delivery of a Carve-Out Trigger Notice. Financing Motion at page 13.

17. The Debtors have the following milestones: (i) no later than 30 days after the Petition Date – entry of Final DIP Order; (ii) no later than 30 days after the Petition Date – entry of order approving the Bid Procedures Motion (defined below); (iii) no later than 66 days after the Petition Date – entry of an order approving the sale of all or substantially all of the assets (the “Sale Order”); and (iv) no later than 15 days after entry of the Sale Order – consummation of the

Sale Transaction for all of the Debtors' assets to the DIP Lender. Financing Motion at page 14.

18. On March 7, 2025, the Court entered the *Interim Order (I) Authorizing the Debtors To Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection; (III) Authorizing Use of Cash Collateral; (IV) Modifying the Automatic Stay; (V) Scheduling a Final Hearing; and (VI) Granting Related Relief* (the "Interim Financing Order")(Docket No. 50).

19. The Interim Financing Order approved the Carve-Out. Interim Financing Order at pages 28-32.

20. Attached as Exhibit "1" to the Interim Financing Order in a 13-week budget through the week ending May 20, 2025 (collectively, the "Budget"). Although the Budget includes a line-item for "Adequate Assurance Deposit," 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**

21. On May 5, 2025, the Debtors filed the *Debtors' Emergency Motion For Entry of Interim and Final Orders (I) Authorizing (A) the Debtors To Pay Certain Prepetition Claims of Trade Claimants and (B) Procedures Related Thereto, and (II) Granting Related Relief* (the "Critical Vendor Motion")(Docket No. 13). Through the Critical Vendor Motion, the Debtors sought authority to pay Critical Vendor Claims in an amount not to exceed \$2,000,000 on an interim basis and \$2,661,000 on a final basis. Critical Vendor Motion at ¶ 5.

22. On March 7, 2024, the Court entered the *Interim Order (I) Authorizing the Debtors To Pay Certain Prepetition Claims of Trade Claimants and (B) Procedures Related Thereto, and*



(II) *Granting Related Relief* (the “Interim Critical Vendor Order”) (Docket No. 85). The Interim Critical Vendor Order authorized the Debtors to pay Critical Vendor Claims in an aggregate amount not to exceed \$2,000,000 on an interim basis. Interim Critical Vendor Order at ¶ 3.

23. The Debtors’ claim in Paragraph 5 of the Utility Motion that “[u]tility services are essential to the Debtors’ ability to sustain their operations while these chapter 11 cases are pending.” However, the Critical Vendor Motion does not reflect that the Debtors sought Court authority to pay prepetition utility charges.

### **The Bid Procedures Motion**

24. On March 7, 2025, the Debtors filed the *Debtors’ Motion For Entry of An Order Pursuant To 11 U.S.C. §§ 105, 363 and 365 (I) Authorizing and Scheduling an Auction at Which Debtors Will Solicit the Highest or Best Bid For the Sale of Substantially All of the Debtors’ Assets, (II) Approving Bidding Procedures Related To Conduct of Auction, (III) Approving Bid Protections, (IV) Approving the Form and Manner of Notices of (A) Proposed Sale of the Debtors’ Assets, the Auction and the Sale Hearing, and (B) Proposed Assumption and Assignment of Executory Contracts and Leases, (V) Approving the Sale of the Assets To the Party Submitting the Highest or Best Bid, and (VI) Granting Related Relief* (the “Bid Procedures Motion”) (Docket No. 62).

25. On March 7, 2025, the Debtors entered into an Asset Purchase Agreement with OTB Hospitality, LLC (the “Stalking Horse Bidder”) for the sale of the Purchased Assets to the Stalking Horse Bidder. Bid Procedures Motion at ¶ 11.

### **Facts Regarding CNE**

26. CNE provides electricity and related services to the Debtors pursuant to a Master Retail Electricity Supply Agreement and related Transaction Confirmations (collectively, the

“Electricity Agreement”) that set forth the terms and conditions concerning CNE’s provision of electricity and related services to the Debtors. CNE has continued to provide the Debtors with electricity and related services pursuant to the Electricity Agreement since the Petition Date.

27. Pursuant to the Electricity Agreement, the Debtors receive approximately one month of electricity and related services before CNE issues a bill. Once a bill is issued, the Debtors have approximately 20 days to pay the bill. Accordingly, the Debtors could receive at least two months of electricity and related services before CNE could terminate the Electricity Agreement after a post-petition payment default.

28. The estimated prepetition debt owed to CNE is not less than \$30,885.66. CNE is requesting a two-month cash deposit of \$42,659 as adequate assurance of payment from the Debtors, which is an amount it can obtain from the Debtors pursuant to the terms and conditions of the Electricity Agreement.

#### **Facts Regarding CNEG**

29. CNEG provides natural gas and related services to the Debtors pursuant to Debtors pursuant to a Base Contract for Sale and Purchase of Natural Gas (NAESB) and related Transaction Confirmations (collectively, the “Gas Agreement”) that set forth the terms and conditions concerning CNEG’s provision of natural gas and related services to the Debtors. CNEG has continued to provide the Debtors with natural gas and related services pursuant to the Gas Agreement since the Petition Date.

30. Pursuant to the Gas Agreement, the Debtors receive approximately one month of natural gas and related services before CNEG issues a bill. Once a bill is issued, the Debtors have approximately 10 days to pay the applicable bill. Accordingly, the Debtors could receive more than two months of natural gas and related services before CNEG could terminate the Gas

Agreement after a post-petition payment default.

31. The estimated prepetition debt owed to CNEG is not less than \$14,039.11. CNEG is requesting a two-month cash deposit of \$8,369 as adequate assurance of payment from the Debtors, which is an amount it can obtain from the Debtors pursuant to the terms and conditions of the Gas Agreement.

**Facts Regarding the Utilities Other Than CNE and CNEG**

32. 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.

33. 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 15 to 21 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 their 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.

34. 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 their tariffs and/or state laws, regulations and/or ordinances are as follows:

BGE:

Electric –

<https://www.bge.com/MyAccount/MyBillUsage/Pages/ElectricServiceRatesTariffs.aspx>

Gas –

<https://www.bge.com/MyAccount/MyBillUsage/Pages/GasServiceRatesTariffs.aspx>

ComEd:

Tariffs: <https://www.comed.com/customer-service/rates-pricing/rates-information/Pages/current-rates.aspx>

Regulations: <http://www.ilga.gov/commission/jcar/admincode/083/08300280sections.html>

PECO:

Electric: <https://www.peco.com/SiteCollectionDocuments/CurrentElecTariff.pdf>

Gas: <https://www.peco.com/SiteCollectionDocuments/CurrentGasTariff.pdf>

Entergy AK:

[https://www.entergy-arkansas.com/your\\_business/business\\_tariffs/](https://www.entergy-arkansas.com/your_business/business_tariffs/)

Entergy MS: [https://www.entergy-mississippi.com/your\\_business/business\\_tariffs/](https://www.entergy-mississippi.com/your_business/business_tariffs/)

35. 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:

<b><u>Utility</u></b>	<b><u>No. of Accts.</u></b>	<b><u>Estimated Prepetition Debt</u></b>	<b><u>Deposit Request</u></b>
BGE	2	\$29,218.92	\$33,819 (2-month)
ComEd	2	\$1,733.88	\$20,235 (2-month)
PECO	2	\$6,841.04	\$9,570 (2-month)
Entergy AR	2	\$6,337.23	\$10,980 (2-month)
Entergy MS	1	\$2,884.59	\$13,700 (2-month)

36. Entergy AR held prepetition cash deposits totaling \$26,070 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the Entergy AR post-petition deposit request.

37. Entergy MS held a prepetition cash deposit in the amount of \$11,660 that it

recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the Entergy MS post-petition deposit request.

### **Discussion**

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

Sections 366(c)(2) and (3) of the Bankruptcy Code provide:

(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility;

(3)(A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

As stated by the Supreme Court of the United States, “[i]t is well-established that ‘when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’” *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct., 1942, 147 L. Ed. 2d 1 (2000)). See also *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, 597 (6th Cir. 1997) (“Statutes . . . must be read in a ‘straightforward’ and ‘commonsense’ manner.”). A plain reading of Section 366(c)(2) makes clear that a debtor is required to provide adequate assurance of payment satisfactory to its utilities on or within thirty (30) days of the filing of the petition. *In re Lucre*, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005). If a debtor believes the **amount** of the utility’s request needs to be modified, then the debtor can file a motion under Section 366(c)(3) requesting the court to modify the **amount** of the utility’s request under Section 366(c)(2).

In this case, the Debtors filed the Utility Motion to improperly shift the focus of their

obligations under Section 366(c)(3) from modifying the amount of the adequate assurance of payment requested under Section 366(c)(2) to setting the form and the amount of the adequate assurance of payment acceptable to the Debtors. Accordingly, this Court should not reward the Debtors for their failure to comply with the requirements of Section 366(c) and should deny the Utility Motion as to the Utilities.

**1. The Debtors' Proposed Bank Account Is Not Relevant, And Even If It Is Considered, It Is Unsatisfactory Because It Does Not Provide the Utilities With Adequate Assurance of Payment.**

This Court should not even consider the Bank Account as a form of adequate assurance of payment because: (1) It is not relevant because Section 366(c)(3) provides that a debtor can only modify “the amount of an assurance of payment under paragraph (2)”;

and (2) The Bank Account is not even a form of adequate assurance of payment recognized by Section 366(c)(1)(A). Moreover, even if the Court were to consider the Bank Account, the Bank Account is an improper and otherwise unreliable form of adequate assurance of future payment for the following reasons:

1. Unlike the statutory approved forms of adequate assurance of payment, the Bank Account is not something held by the Utilities. Accordingly, the Utilities have no control over how long the Bank Account will remain in place.
2. To access the Bank Account, the Utilities would have to incur the expense to draft, file and serve a default pleading with the Court and possibly litigate the demand if the Debtors refuse to honor a disbursement request.
3. It is underfunded from the outset because the Utilities issue monthly bills and by the time a default notice is issued the Debtors will have received approximately 60 days of commodity or service.
4. The Debtors may close the Bank Account before all post-petition utility charges are paid in full.
5. The Bank Account would contain \$0 for Entergy AR and Entergy MS.

Accordingly, the Court should not approve the Bank Account as adequate assurance as to the Utilities because the Bank Account is: (a) not the **form** of adequate assurance requested

by the Utilities; (b) not a form recognized by Section 366(c)(1)(A); and (c) an otherwise unreliable form of adequate assurance.

**2. The Utility Motion Should Be Denied As To the Utilities Because the Debtors Have Not Set Forth Any Basis For Modifying the Utilities' Requested Deposits.**

In the Utility Motion, the Debtors fail to address why this Court should modify the amounts of the Utilities' requests for adequate assurance of payment. Under Section 366(c)(3), the Debtors have the burden of proof as to whether the amounts of the Utilities' adequate assurance of payment requests should be modified. *See In re Stagecoach Enterprises, Inc.*, 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979) (holding that the debtor, as the petitioning party at a Section 366 hearing, bears the burden of proof). However, the Debtors do not provide the Court with any evidence or factually supported documentation to explain why the amounts of the Utilities' adequate assurance requests should be modified. Accordingly, the Court should deny the relief requested by Debtors in the Utility Motion and require the Debtors to comply with the plain requirements of Section 366(c) with respect to the Utilities.

**B. THE COURT SHOULD ORDER THE DEBTORS TO PROVIDE THE ADEQUATE ASSURANCE OF PAYMENT REQUESTED BY THE UTILITIES PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE.**

Section 366(c) was amended to overturn decisions such as *Virginia Electric and Power Company v. Caldor, Inc.*, 117 F.3d 646 (2d Cir. 1997), holding that an administrative expense, without more, could constitute adequate assurance of payment in certain cases. Section 366(c)(1)(A) specifically defines the forms that assurance of payment may take as follows:

- (i) a cash deposit;
- (ii) a letter of credit;
- (iii) a certificate of deposit;
- (iv) a surety bond;
- (v) a prepayment of utility consumption; or

(vi) another form of security that is mutually agreed upon between the utility and the debtor or the trustee.

Section 366 of the Bankruptcy Code was enacted to balance a debtor's need for utility services from a provider that holds a monopoly on such services, with the need of the utility to ensure for itself and its rate-paying customers that it receives payment for providing these essential services. *See In re Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990). The deposit or other security "should bear a reasonable relationship to expected or anticipated utility consumption by a debtor." *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986). In making such a determination, it is appropriate for the Court to consider "the length of time necessary for the utility to effect termination once one billing cycle is missed." *In re Begley*, 760 F.2d 46, 49 (3d Cir. 1985).

The Utilities bill the Debtors on a monthly basis for the charges already incurred by the Debtors in the prior month. They then provide the Debtors with 10 to 21 days to pay the bill, the timing of which is set forth in applicable state laws, tariffs, regulations or contracts. Based on the foregoing state-mandated, or contract-mandated, billing cycles, the minimum period of time the Debtors could receive service from the Utilities before termination of service for non-payment of post-petition bills is approximately two (2) months. Moreover, even if the Debtors timely pay their post-petition utility bills, the Utilities still have potential exposure of approximately 60 days or more based on their billing cycles. Furthermore, the forms and amounts of the Utilities' adequate assurance requests are the forms and amounts that the applicable public service commission, which is a neutral third-party entity, or contracts, permit the Utilities to request from their customers. The Utilities are not taking the position that the cash deposits that they are entitled to obtain under applicable state law or contract are binding on this Court, but instead are introducing those forms



and amounts as evidence of the forms and amounts that the applicable regulatory entity or contract permit the Utilities to request from their customers.

In contrast, the Debtors failed to address in the Utility Motion why this Court should modify, if at all, the amounts of the Utilities' adequate assurance of payment requests, which is the Debtors' statutory burden. Instead, the Debtors merely asked this Court to approve the Bank Account supposedly containing approximately two-weeks of the Debtors' utility charges, less any prepetition security held by a utility company. 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 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 Vendor Claims in the amount of up to \$2,000,000 on an interim basis and \$2,661,000 on a final basis, and (ii) the post-petition bills/expenses of Debtors' counsel are paid, even in the event of a post-petition default on the use of cash collateral, by obtaining a \$100,000 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 that they have requested herein.

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

1. Denying the Utility Motion as to the Utilities;
2. Awarding the Utilities the post-petition adequate assurance of payments pursuant to Section 366 in the amount and form satisfactory to the Utilities, which is the form and amount requested herein; and
3. Providing such other and further relief as the Court deems just and appropriate.

Respectfully submitted, this 19<sup>th</sup> day of March, 2025.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 19, 2025, a true and correct copy of the foregoing *Objection* was served via the Court's CM/ECF electronic notification system on all parties requesting same, and via email to the parties listed below.

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