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d/b/a Rackspace Hosting

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
ATARI, INC., <i>et al.</i> ,	)	Case No. 13-10176 (JMP)
Debtors.	)	(Jointly Administered)

**MOTION OF RACKSPACE HOSTING FOR RECONSIDERATION, PURSUANT TO RULE 9023 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, OF ORDER (I) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING OR DISCONTINUING SERVICES TO, OR DISCRIMINATING AGAINST THE DEBTORS ON ACCOUNT OF PREPETITION INVOICES AND (II) DETERMINING THAT THE UTILITY COMPANIES ARE ADEQUATELY ASSURED OF POSTPETITION PAYMENT**

Rackspace US, Inc., d/b/a Rackspace Hosting (“Rackspace”), hereby moves the Court, pursuant to Federal Rule of Bankruptcy Procedure 9023 to Reconsider the Order Entered on January 24, 2013 (D.I. 32) (the “Order”) granting the Motion of the Debtors for an Order (I) Prohibiting Utility Companies from Altering, Refusing or Discontinuing

Services To, or Discriminating Against the Debtors on Account of Prepetition Invoices and (II) Determining that the Utility Companies are Adequately Assured of Postpetition Payment (the “Motion”) and in support thereof respectfully states as follows:

**JURISDICTION**

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

**BACKGROUND**

2. On June 20, 2012, Rackspace entered into a Hosting Services Agreement (the “Agreement”) with Atari, Inc. (the “Debtor”). Under the Agreement, Rackspace agreed to provide the Debtor with video game hosting services (the “Services”). In exchange for the services, the Debtor agreed to pay Rackspace \$17,120.08 per month.

3. The Agreement had an initial term of twelve (12) months.

4. The Debtor defaulted under the Agreement by failing to make its monthly payment for the Services rendered by Rackspace in October 2012. Thereafter, the Debtor failed to pay Rackspace for the Services rendered in November 2012, December 2012 and January 2013.

5. On January 21, 2013 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On the Petition Date, the Debtor also filed the Motion. As of the Petition Date, the Debtor owed Rackspace approximately \$120,000 for the Services provided.

6. On January 24, 2013, the Court conducted a hearing on the Motion, following which the Court entered the Order. The Order provides, among other things,

that: (i) Rackspace is a “utility” as that term is used in Section 366 of the Bankruptcy Code; (ii) Rackspace is prohibited from discontinuing service to the Debtor; (iii) the requirements of Section 366(c)(2) were met by the Debtor providing Rackspace with a deposit equal to \$20,000 (the “Adequate Assurance Deposit”); (iv) to the extent Rackspace accepted the Adequate Assurance Deposit it could not seek further adequate assurance from the Debtor and (v) that Rackspace cannot discontinue the Services.

### **RELIEF REQUESTED**

7. Pursuant to Federal Rule of Bankruptcy Procedure 9023, Rackspace respectfully requests the Court reconsider the Order to the extent the Order contains a conclusion that Rackspace is a “utility.” Rackspace is not a “utility” as that term is used in Section 366 of the Bankruptcy Code and therefore should not be bound by the Order.

### **ARGUMENT AND AUTHORITY**

8. Section 366 of the Bankruptcy Code provides that in a chapter 11 case, *a utility* may alter, refuse, or discontinue utility service, if during the thirty (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. *See* 11 USC. § 366(c)(2) (emphasis added).

#### **A. Rackspace is Not a Utility According to the Ordinary Use of the Term**

9. Neither section 366 nor any other provision of the Bankruptcy Code defines the term “utility,” therefore, the court should look to its ordinary meaning. *See, e.g., One Stop Realtour Place, Inc. v. Allegiance Telecom, Inc. (In re One Stop Realtour Place, Inc.)*, 268 B.R. 430, 435 (Bankr. E.D. Pa. 2001).

10. A “utility” is, among other things, “a company that performs a public service; subject to government regulation.” *See* dictionary.net, <http://www.dictionary.net/utility> (last visited Sep. 26, 2011) (same); *see also* Black’s Law Dictionary 1544 (7th ed. 1999) (defining a “utility” as “a business enterprise that performs essential public service and that is subject to government regulation”). Applying the ordinary meaning of the word utility, Rackspace is not a utility provider because its services are not provided for the benefit of the public, and are not subject to extensive regulation by the federal government.

**B. The Legislative History of Section 366 Supports the Conclusion that Rackspace is Not a Utility**

11. In addition to the plain meaning of the word “utility,” the legislative history of Section 366 supports the conclusion that Rackspace is not a utility.

12. The legislative history of Section 366 indicates that the section was “intended to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so the debtor cannot easily obtain services from another utility.” House Report No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Session, p. 350 (1977), U.S. Code Cong. & Admin. News, 1978, pp. 5787, 6306.

13. Rackspace does not have any special position with respect to the Debtor and regrettably does not have a monopoly on the Services.

**NOTICE**

14. Notice of this Motion has been provided as required pursuant to the Order Establishing Notice and Service Procedures [Docket No. 38] entered by the Court on January 25, 2013.

**NO PRIOR REQUEST**

15. No prior motion for the relief requested herein has been made to this or any other court.

**CONCLUSION**

16. As set forth above, Rackspace is not a utility as contemplated by Section 366 of the Bankruptcy Code. As such, Rackspace respectfully requests the Court reconsider the Order and determine that (i) Rackspace is not a Utility Company and (ii) Rackspace is not bound by the Order.

Dated: February 7, 2013

Respectfully submitted,

/s/ Michelle McMahon

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing *Motion Of Rackspace Hosting For Reconsideration, Pursuant To Rule 9023 Of The Federal Rules Of Bankruptcy Procedure, Of Order (i) Prohibiting Utility Companies From Altering, Refusing Or Discontinuing Services To, Or Discriminating Against The Debtors On Account Of Prepetition Invoices And (ii) Determining That The Utility Companies Are Adequately Assured Of Postpetition Payment* was served by first class United States mail or email pursuant to the Order Establishing Notice and Service Procedures [Docket No. 38] on the parties listed on the Master Service List maintained by BMC Group as of February 7, 2013.

Dated: February 7, 2013  
New York, New York

/s/ Michelle McMahan  
Michelle McMahan