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[Proposed] Reorganization Counsel
for Debtors and Debtors in Possession

Debtors' Mailing Address:
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1000 Pleasant Valley Road
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: COLOREP, INC., a California corporation, Debtor. Tax I.D. No. 94-3055023 In re: TRANSPRINT USA, INC., a Virginia corporation, Debtor. Tax I.D. No. 94-3055026	Case No. 13-bk-27689-WB Chapter 11 (Motion for Joint Administration With Case No. 13-bk-27698-WB Pending) **EMERGENCY MOTION FOR ORDER: (I) DEEMING UTILITIES ADEQUATELY ASSURED OF FUTURE PERFORMANCE; AND (II) ESTABLISHING PROCEDURES FOR DETERMINING REQUESTS FOR ADDITIONAL ASSURANCE PURSUANT TO BANKRUPTCY CODE SECTION 366; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **Hearing Date** Date: July 15, 2013 Time: 2:00 p.m. Location: Courtroom 1375 255 East Temple Street Los Angeles, CA 90012

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TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, THE DEBTORS' TWENTY LARGEST UNSECURED CREDITORS, THE DEBTORS' SECURED LENDER, OTHER CREDITORS ASSERTING A SECURITY INTEREST IN OR LIEN UPON THE DEBTORS' ASSETS, AND OTHER PARTIES IN INTEREST:

Colorep, Inc. ("**Colorep**") and Transprint USA, Inc. ("**Transprint**"), the debtors and debtors in possession in the above-captioned cases (together, the "**Debtors**"), hereby move (the "**Motion**") the Court for entry of an order, in substantially the form annexed hereto as Exhibit "1": (i) deeming the Debtors' utility service providers (as more fully described below, the "**Utilities**") adequately assured of future performance, and (ii) establishing a procedure for determining requests for additional assurance pursuant to section 366 of chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "**Bankruptcy Code**").

The Debtors request, pursuant to Local Bankruptcy Rules ("**LBR**") 2081-1(a) and 9075-1(a), that the Court schedule an interim hearing on this Motion on less than 2 court days notice, upon timely notice to the Office of the United States Trustee ("**UST**"), the Debtors' twenty largest unsecured creditors, the Debtors' secured lender, other creditors asserting a security interest in or lien upon the Debtors' assets, and other interested parties, if any (together, the "**Interested Parties**"). A copy of this Motion was served, concurrent with the filing hereof with the Court, on the Interested Parties by courier or overnight delivery.

SUMMARY OF RELIEF REQUESTED

In connection with their ongoing business operations, the Debtors obtain services from approximately thirteen (13) utility companies. Any disruption to the provision of such services would be catastrophic to the Debtors' businesses and ability to continue operations pending a sale of their assets. The Debtors, therefore, move the Court for entry of an interim order: (i) deeming the Utilities adequately assured of future performance; and (ii) establishing procedures for determining requests for additional assurances pursuant to section 366 of the Bankruptcy Code.

By this Motion, the Debtors seek the immediate entry of an interim order in the form attached hereto as Exhibit "1":

(a) prohibiting the Utilities from altering, refusing, discontinuing service to, or discriminating against, the Debtors;

(b) ordering that the Debtors' creation of a debtor in possession escrow account in favor of the Utilities in a total amount equal to an average, based upon historical payments owed to each Utility from July 1, 2012 through June 30, 2013, of two (2) weeks worth of payments to each Utility, shall provide the Utilities "adequate assurance of payment" within the meaning of Bankruptcy Code section 366; and

(c) establishing procedures for determining requests by Utilities for additional assurances.

This Motion is based on the Memorandum of Points and Authorities below, the evidence contained in the "Declaration Of Mark A. Fox In Support Of Emergency First Day Motions" (the "**Fox Declaration**") filed concurrently herewith, the record in this case, and the arguments, evidence and representations that may be presented at or prior to the hearing on this Motion.

Any response, written or oral, to the Motion may be presented at the time of the hearing on the Motion. See LBR 9075-1(a)(7).

WHEREFORE, based on the Memorandum of Points and Authorities set forth below, the Debtors respectfully request entry of an Order, in the form annexed hereto as Exhibit "1": (i) prohibiting the Utilities from altering, refusing, discontinuing service to, or discriminating against the Debtors; (ii) ordering that the Debtors' creation of a debtor in possession escrow account in favor of the Utilities in a total amount equal to an average, based upon historical payments owed to each Utility from July 1, 2012 through June 30, 2013, of two (2) weeks worth of payments to each Utility, shall provide the Utilities "adequate assurance of payment" within the meaning of Bankruptcy Code section 366; (iii) establishing procedures for determining requests by Utilities for additional assurances; (iv) authorizing the Debtors to supplement the list of Utilities listed on Exhibit "2" attached hereto ("**Utility List**") to add any subsequently discovered Utility to the Utility List and to apply the procedures established herein and approved by the Court in the entered Order to any such Utility; and (v) granting any and all further relief the Court deems to be just and proper.

Date: July 11, 2013

Respectfully submitted,

/s/ Margreta M. Morgulas
GARY E. KLAUSNER,
MARGRETA M. MORGULAS, and
KIZZY L. JARASHOW, Members of
STUTMAN, TREISTER & GLATT
PROFESSIONAL CORPORATION

[Proposed] Reorganization Counsel for Debtors and Debtors in Possession

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS[1]

A. Petition Date and Jurisdiction

On July 10, 2013 (the "**Petition Date**"), the debtors and debtors in possession in the above-captioned chapter 11 cases (the "**Debtors**") commenced these cases by filing voluntary petitions under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). Pursuant to Bankruptcy Code sections 1107(a) and 1108, the Debtors are continuing to operate their businesses and manage their financial affairs as debtors in possession. No official committee of unsecured creditors has yet been appointed in these cases.

This Court has jurisdiction over the Debtors, these chapter 11 cases and this motion pursuant to 28 U.S.C. §§ 1334 and 157(b), and venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

B. The Debtors' Business

Originally founded as a technology development company in 1989, the company that later became known as Colorep shifted its focus in 2003 to industrial printing applications. By 2005 Colorep had advanced its textile technology and had invented a patented process for dyeing and decorating fabric known as AirDye®, which is widely regarded as revolutionary because it does not result in water pollution and significantly reduces energy use, costs and time from design to market.

In 2007 Colorep began licensing AirDye® technology to manufacturers and resellers in the home interior, hospitality and apparel industries, which licensing continues to be very profitable for Colorep.

Due to the success of the AirDye® technology, in September 2009, Colorep began doing business as "AirDye Solutions."

At the end of 2007, Colorep acquired Transprint, a privately held, employee-owned company, with headquarters and manufacturing facilities in Harrisonburg, Virginia.. Transprint, a

[1] Terms not otherwise defined herein shall have the same meanings ascribed to them in the preceding Motion.

leading supplier of transfer-printing paper was a strategic and potentially lucrative acquisition for Colorep as it gave Colorep access to manufacturing capabilities, a global customer base, and a design library exceeding 15,000 unique designs.

Transprint is the wholly-owned subsidiary of Colorep. Colorep is owned by several different shareholders, with interests in 1 or more of the 5 series of preferred stock (Series A-E) and/or in Colorep's common stock.

C. Events Leading to Chapter 11 Filing

In 2011, the Debtors began experiencing significant cash flow constraints, which rendered the Debtors unable to pay ordinary course operating expenses, pay overhead, acquire necessary raw materials to meet customer demands and purchase parts and supplies required for the maintenance of their equipment and manufacturing and production facility in Virginia. As a result, the quality and availability of the Debtors' product began to decline and its key vendor and customer relationships eroded.

In or around June 2011, the Debtors entered into that certain Loan and Security Agreement (as amended, supplemented and modified, the "**Meserole Prepetition Loan Agreement**") with Meserole, LLC ("**Meserole**"). Pursuant to the Meserole Prepetition Loan Agreement, the Debtors had the ability to access up to $25 million on the terms and conditions set forth in the Meserole Prepetition Loan Agreement. In exchange, the Debtors granted Meserole a first priority secured lien on virtually all of their tangible and intangible assets.

Unfortunately, the Meserole loan did not result in the stabilization of the Debtors' operations as had been hoped. Accordingly, throughout 2012, the Debtors continued to experience cash shortages and, therefore, were unable to purchase necessary raw materials and timely produce ordered product. Further, the Debtors were unable to sustain the quality of the product they did produce as they lacked the capital necessary to improve or even perform necessary service and repairs to the equipment utilized in their production process. The Debtors' inability to timely meet demand and resolve the increasing quality control issues resulted in material cancellations and an ever-shrinking customer base.

The Debtors' working capital constraints also resulted in their inability to meet their obligations to their employees in a timely and consistent manner. This resulted in significant morale issues and ultimately in the loss of many key employees in 2012, which further diminished their capacity to fulfill customer orders and meet obligations to vendors.

By the end of 2012, the situation had worsened and the Debtors went through a number of "dark" periods during which time production halted completely and employees went unpaid.

In March 2013, the Debtors, with the consent of their primary secured lenders, hired Mark A. Fox of The Fox Group as the Chief Restructuring Officer and interim Chief Executive Officer. Since that time, the Debtors have worked to improve customer relationships and employee morale, and, most importantly, to try and resolve the operational issues faced by the Debtors.

From March through June 2013, the Debtors adjusted staffing to appropriate levels, minimized overall expenditures and eliminated expenditures that did not directly support the Debtors' production and research and development operations. Further, the Debtors have focused on rebuilding the most valuable customer and vendor relationships and on minimizing the Debtors' exposure with respect to those relationships that had historically not been profitable. Moreover, the Debtors focused on improving inventory analysis and control with an aim to improving the Debtors' ability to timely meet customer orders. Although significant cash shortages did not permit extensive business development efforts, to the extent feasible, the Debtors have worked to expand the Debtors' licensing activities to new, active markets around the globe.

Despite the significant improvements made since March 2013, it became clear in June 2013, that the Debtors could not continue to operate absent either a de-leveraging of their balance sheet or significant, additional capital infusions. When it became clear that new capital would not be available on reasonable terms, the Debtors determined that a chapter 11 process whereby the value of the Debtors' assets could be maximized through an efficient sale process was the only feasible alternative.

In connection with the stabilization of the Debtors' operations and businesses, the preparations and negotiations necessary for the anticipated Bankruptcy Code Section 363 sale of the

Debtors' assets, and the Debtors' successful emergence from chapter 11, the Debtors are seeking, in a separate application to be filed shortly with the Court to retain Executive Sounding Board Associates, Inc. ("**ESBA**") *nunc pro tunc* to the Petition Date.

D. The Utilities

In connection with their ongoing businesses, the Debtors currently obtain electricity, natural gas, water, telephone, telecommunications services, sewage, and other similar services ("**Utility Services**")[2] from thirteen (13) companies (each a "**Utility**," and collectively, the "**Utilities**"). From July 1, 2012 through June 30, 2013, the Debtors have collectively paid these Utilities an average of approximately $45,190 per month. By their nature, the Utility Services are critical to the Debtors' operations and cannot be replaced. This is particularly true as most of the Utilities provide necessary services at the Debtors' Harrisonburg, Virginia production and manufacturing facility. Accordingly, if the Utility Services were disrupted, even for a brief period, the Debtors simply could not operate, and the effect on the value of the Debtors' estates would be devastating.

Attached hereto as Exhibit "2" is a list of all of the Utilities that the Debtors believe are presently providing Utility Services. Out of an abundance of caution and in the event that the Debtors inadvertently have failed to include a Utility that currently provides Utility Services on Exhibit "2," the Debtors are seeking permission to have the relief requested herein applied with the same force and effect to any subsequently identified Utilities. If any Utility is identified after the entry of an Order granting the relief requested herein as to the Utilities on Exhibit "2," the Debtors will immediately supplement Exhibit "2" and file it with the Court and substantially concurrently therewith provide notice to any such Utility by serving it with a copy of the Motion, the Order entered by the Court on this Motion, and a copy of the supplemented Exhibit "2." The Debtors request that the procedures set forth in the proposed order granting the relief requested in this Motion, which is attached hereto as Exhibit "1" (the "**Proposed Order**"), as may be altered or amended by the Court prior to the entry thereof, also apply to determine any dispute regarding

[2] The Bankruptcy Code does not define "utility," but the Debtor believes that all of the Utilities qualify as a "utility" within the meaning of Bankruptcy Code section 366.

additional assurances that may arise with any Utility added to Exhibit "2" after the entry of the Order granting the relief requested herein with any supplemental Utility.

II.

ARGUMENT

A. Bankruptcy Code Section 366

Pursuant to Bankruptcy Code section 366, a utility may not alter, refuse, or discontinue services to, or discriminate against, a debtor solely on the basis of the commencement of the bankruptcy case or the debtor's failure to pay a prepetition debt. 11 U.S.C. § 366(a). Bankruptcy Code section 366 is intended to apply to entities providing electricity, natural gas, water, and/or telephone services, as well as any other entity that supplies services that cannot be readily obtained or replaced elsewhere, or which has a monopoly with respect to the services it provides a debtor, as explained by the legislative history. See H.R. Rep. No. 95-595, at 350 (1977); S. Rep. No. 95-989, at 60 (1978); see also In re Coastal Dry Dock & Repair Corp., 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986).

B. The Debtors Will Provide Adequate Assurance Of Payment By Establishing An Escrow Account On The Terms And Conditions Described Herein

Bankruptcy Code section 366(c) provides that in a chapter 11 case:

> Subject to paragraphs (3) and (4), . . . a utility . . . 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.

11 U.S.C. § 366(c)(3)(A) (emphasis added).

Bankruptcy Code section 366(c)(1) provides that "assurance of payment means a cash deposit; a letter of credit; a certificate of deposit; a surety bond; a prepayment of utility consumption; or another form of security that is mutually agreed on between the utility and the debtor or the trustee." 11 U.S.C. § 366(c)(1)(A). For purposes of Bankruptcy Code section 366(c), "an administrative expense priority shall not constitute an assurance of payment." 11 U.S.C. § 366(c)(1)(B).

Section 366(c)(3) further provides that:

> In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider –
>
> (i) the absence of security before the date of the filing of the petition;
>
> (ii) payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or
>
> (iii) the availability of an administrative expense priority.

11 U.S.C. § 366(c)(3)(B). Courts in this District have held that it is not necessary to provide a utility provider with such provider's requested form of assurance because, in Chapter 11, a "bankruptcy court may determine the [proper] form and amount of adequate assurance of payment . . . ." In re Crystal Cathedral Ministries, 454 B.R. 124, 129 (C.D. Ca. 2011) (citations omitted).

The Debtors have complied with Bankruptcy Code section 366 and have provided the Utilities with adequate assurance of payment as required. The Debtors will establish an escrow account, into which the Debtors will deposit a total amount of $22,595.00, which is equal to an average, based upon historical payments made by the Debtors to each Utility from July 1, 2012 through June 30, 2013, of two (2) weeks worth of payments to each Utility. The amounts in this account will serve as security for the Utilities during the pendency of this case and will not be accessible by the Debtors unless otherwise ordered by the Court. Bankruptcy Code section 366(c)(1)(A) expressly contemplates such an arrangement by providing that "assurance of payment" can be a cash deposit. 11 U.S.C. § 366(c)(1)(A). Further, by providing that prepayment of utility consumption may be "assurance of payment," section 366 implies that assurance in the amount of two week's utility service can be adequate. Indeed, bankruptcy courts have authorized procedures similar to those requested in this Motion in other chapter 11 cases, and have found that assurance equal to two week's utility service is adequate under circumstances such as those facing the Debtors in this case. See, e.g., In re Mondrian TTL, L.L.C., 2010 Bankr. LEXIS 6002, at *3 (Bankr. D. Ariz. May 14, 2010) (approving, as adequate assurance, a deposit equal to 50% of the Debtors' estimated monthly utility costs)**;** In re Great Atl. & Pac. Tea Co., Inc., Case No. 11-CV-1338 (CS), 2011 WL 5546954, at *5-6 (S.D.N.Y. Nov. 14, 2011) (upholding bankruptcy court ruling that a deposit equal to the average cost of two week's utility charges was "adequate assurance of payment" under

Bankruptcy Code section 366); In re Circuit City Stores, Inc., Case No. 08-35653 (KRH), 2009 WL 484553, at *2 (Bankr. E.D. Va. Jan. 14, 2009) (same).

The assurance proposed by the Debtors is substantial and represents a significant portion of the cash available during the most difficult point in any bankruptcy case. Therefore, the Debtors request entry of an order providing that the establishment by the Debtors of an escrow account in favor of the Utilities in a total amount equal to an average, based upon historical payments made by the Debtors to each Utility from July 1, 2012 through June 30, 2013, of two (2) weeks worth of payments to each Utility, shall provide the Utilities "adequate assurance of payment" within the meaning of Bankruptcy Code section 366.

C. This Court Should Establish Procedures For Utilities That Object To Its Determination Of Adequate Assurance

Bankruptcy Code section 366(c)(3) expressly provides this Court authority to adjudicate any disputes related to the adequacy of assurance provided by the Debtors. Section 366(c)(3)(A) of the Bankruptcy Code states that, "[o]n 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)." 11 U.S.C. § 366(c)(3)(A). As described above, the Debtors propose to establish a fair and reasonable process for the Court to consider whether modification of the amount of adequate assurance of payment is necessary.

More specifically, the Debtors request entry of an order approving the following procedures (the "**Objection Procedures**"):

(a) A Utility that objects to the Court's determination that the Debtors have provided adequate assurance, as delineated in the Court's Order granting the relief requested herein, must file an Objection, within fourteen (14) days from the entry of such Order, which shall be served on all affected Utilities, that sets forth (1) the location at which the Utility Services are provided, (2) the average monthly usage for the most recent twelve (12) month period, (3) the prepetition amount alleged to be due and owing, (4) the amount of any deposit

made by the Debtors prior to the Petition Date, and (5) the requested additional assurance and the alleged justification therefor;

(b) This Court shall set a hearing date within thirty (30) days of the Petition Date to consider any Objection filed pursuant to Bankruptcy Code section 366(c)(3)(A) and conforming to the requirements set forth in subsection (a) above;

(c) In the event a Utility not listed on Exhibit "2" seeks additional assurance, it must file and serve an Objection within the later of (1) fourteen (14) days after the date of entry of the Order approving the Motion, and (2) fourteen (14) days after the date that the Debtors amend Exhibit "2" to add such Utility to Exhibit "2" and provide notice thereof to the affected Utility. Such Utility shall be deemed to have been provided with adequate assurance of payment in accordance with Bankruptcy Code section 366, without the need of an additional escrow or other security, if it fails to timely object or until the entry of a further order of the Court.

Under the circumstances of this case, the Utilities will not be prejudiced by the entry of an order (1) deeming them adequately assured without the need for any additional escrow amounts, and (2) establishing the Objection Procedure to handle any objections to the proposed provision of adequate assurance of payment.

Furthermore, the relief requested in this Motion will be without prejudice to the rights of any Utility to apply on a timely basis to this Court for additional assurances of payment upon an appropriate showing. The Debtors will serve a copy of the entered order on all Utilities in order to ensure that each of them are aware of their rights to request additional assurances of payment.

A Utility that is not listed in Exhibit "2" and believes that some additional assurance is required cannot shut off its services to the Debtors until after that issue is resolved by this Court. The Debtors are complying with Bankruptcy Code section 366(c)(3) by requesting that any further modification of the adequate assurance be made within the 30-day period provided by Bankruptcy

Code section 366(c)(2), during which time the Utilities may not alter, refuse, or discontinue service. See 11 U.S.C. § 366(c)(3)(A).

Bankruptcy Code section 366 expressly contemplates the procedure proposed herein. If Utilities could simply terminate service notwithstanding a modification request made to the Court, Bankruptcy Code section 366(c)(3) would be rendered moot, which is not the intention or plain meaning of the amended statute. Moreover, if Utilities are permitted to unilaterally terminate Utility Services on the 31st day after the Petition Date because they insist on a greater deposit or some more onerous security, they could severely disrupt the Debtors' operations and jeopardize the going concern value of the Debtors. Nothing in the Bankruptcy Code prevents this Court from deeming all Utilities adequately assured while the Court performs its adjudicative function.

As soon as practicable upon the entry of the Order relating to this Motion, the Debtors will serve a copy of the Order upon each Utility listed on Exhibit "2," thereby notifying all Utilities of their rights. Furthermore, the Debtors will immediately amend Exhibit "2" to add any subsequently discovered Utility that is not presently listed on Exhibit "2" and serve the Motion and this Court's Order thereon on any such subsequently discovered Utility.

III.

CONCLUSION

WHEREFORE, based on the arguments and authorities set forth above, the Debtors respectfully request entry of an Order, in the form annexed hereto as Exhibit "1": (i) prohibiting the Utilities from altering, refusing, discontinuing service to, or discriminating against the Debtors; (ii) providing that the Debtors' creation of a debtor in possession escrow account in favor of the Utilities in a total amount of $22,595, which is equal to an average, based upon historical payments owed to each Utility from July 1, 2012 through June 30, 2013, of two (2) weeks worth of payments to all Utilities, shall provide the Utilities "adequate assurance of payment" within the meaning of Bankruptcy Code section 366; (iii) establishing procedures for determining requests by Utilities for additional assurances; (iv) authorizing the Debtors to supplement the list of Utilities listed on Exhibit "2" attached hereto to add any subsequently discovered Utility to the Utility List and to

apply the procedures established herein and approved by the Court in the entered Order to any such Utility; and (v) granting any and all further relief the Court deems to be just and proper.

Date: July 11, 2013

Respectfully submitted,

/s/ Margreta M. Morgulas
GARY E. KLAUSNER,
MARGRETA M. MORGULAS, and
KIZZY L. JARASHOW, Members of
STUTMAN, TREISTER & GLATT
PROFESSIONAL CORPORATION

[Proposed] Reorganization Counsel for Debtors and Debtors in Possession

Exhibit "1"

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: COLOREP, INC., a California corporation, Debtor. Tax I.D. No. 94-3055023 In re: TRANSPRINT USA, INC., a Virginia corporation, Debtor. Tax I.D. No. 94-3055026	Case No. 13-bk-27689-WB Chapter 11 (Motion for Joint Administration With Case No. 13-bk-27698-WB Pending) **[PROPOSED] ORDER GRANTING EMERGENCY MOTION FOR ORDER: (I) DEEMING UTILITIES ADEQUATELY ASSURED OF FUTURE PERFORMANCE; AND (II) ESTABLISHING PROCEDURES FOR DETERMINING REQUESTS FOR ADDITIONAL ASSURANCE PURSUANT TO BANKRUPTCY CODE SECTION 366** **Hearing Date** Date: July 15, 2013 Time: 2:00 p.m. Location: Courtroom 1375 255 East Temple Street Los Angeles, CA 90012

Upon review and consideration of the "Emergency Motion for Order (I) Deeming Utilities Adequately Assured of Future Performance; and (II) Establishing Procedures for

Determining Requests for Additional Assurance Pursuant to Bankruptcy Code Section 366" (the "**Motion**")[1], filed by Colorep, Inc. ("**Colorep**") and Transprint USA, Inc. ("**Transprint**"), the debtors and debtors in possession in the above-captioned cases (together, the "**Debtors**"), the accompanying "Declaration of Mark A. Fox in Support of First Day Motions," and all other pleadings and evidence submitted in connection with the Motion, the Court hereby finds that good cause exists for the relief requested in the Motion:

1. Notice was appropriate under the circumstances; and

2. Good cause exists to grant the relief requested in the Motion.

THEREFORE, IT IS ORDERED THAT:

1. The Motion is granted in its entirety.

2. The Debtors' utility service providers (the "**Utilities**") are prohibited from altering, refusing, discontinuing service to, or discriminating against the Debtors.

3. The Debtors are authorized, in the exercise of their business judgment and in their sole discretion, to create an escrow account in favor of the Utilities, in an amount equal to an average, based upon historical payments made by the Debtors to each Utility from July 1, 2012 through June 30, 2013, of two (2) weeks worth of payments to each Utility, which, without any additional deposits or other security from the Debtors, will constitute "adequate assurance of payment" to the Utilities within the meaning of Bankruptcy Code section 366.

4. A Utility that objects to this Court's determination that the Debtors have provided adequate assurance must file an Objection, within fourteen (14) days from entry of this Order, which shall be served on all affected Utilities, that sets forth (1) the location for which the Utility Services are provided, (2) the average monthly usage for the most recent twelve (12) month period, (3) the prepetition amount alleged to be due and owing, (4) the amount of any deposit made by the Debtors prior to the Petition Date, and (5) the requested additional assurance and the alleged justification therefor.

[1] All capitalized terms not explicitly defined herein shall have the same definition ascribed to them in the Motion.

5. This Court shall set a hearing date within thirty (30) days of the Petition Date to consider any Objection pursuant to Bankruptcy Code section 366(c)(3)(A).

6. In the event a Utility not listed in Exhibit "2" to the Motion seeks additional assurance, it must file and serve an Objection within the later of (1) fourteen (14) days after the date of entry of the Order approving the Motion, and (2) fourteen (14) days after the date that the Debtors amend Exhibit "2" to add such Utility and provide notice thereof to the affected Utility. Such Utility shall be deemed to have been provided with adequate assurance of payment in accordance with Bankruptcy Code section 366, without the need of an additional deposit or other security, if it fails to timely object or until an order of the Court to the contrary is entered.

7. The Debtors are authorized to supplement the list of Utilities in Exhibit "2" of the Motion to add Utilities subsequently discovered, and are authorized to apply all procedures authorized herein to the supplemental Utilities.

8. A Utility that is not listed in Exhibit "2" and believes that some additional assurance is required shall not shut off its services to the Debtors until after that issue is resolved by this Court.

###

EXHIBIT "2" - LIST OF UTILITIES

Exhibit 2

Debtors' Utility Providers

Vendor Name and Contact Information	**Account Number(s)**	**Description**
Dominion Va Power P.O. Box 26666 Richmond, VA 23261-6666 Attn: Barbara Smith Phone: 804-771-3030	2846335004	Electricity for the Harrisonburg, VA plant
Duke Energy P.O. Box 1090 Charlotte, NC 28201-1090 Phone: 800-653-5307	1481424779	Electricity for Charlotte, NC office
Columbia Gas 200 Civic Center Dr, Columbus, OH 43215 Attn: Keith Martin Phone: 717-849-0145	12986312-001	Gas Service
ACC Business 400 West Ave. Rochester, NY 14611 Attn: Ron Vanderwege Phone: 800-322-3076	00001147158	Long-distance phone service
Sprint PO Box 8077 London, KY 40742 Attn: Mildred Walker Phone: 720-420-6649	796290334	Provider of mobile phones to company personnel
Time Warner Cable P.O. Box 77169 Charlotte, NC 28271-7169 Phone: 877-892-2220	202-605184101-001	Charlotte, NC office phone service provider
Verizon South PO Box 33078 St. Petersburg, FL 33733 Phone: 800-607-6575 Attn: Bankrupty Matters 500 Technology Drive, Suite 550 Weldon Spring, MO 63304	000130729558 27Y	Harrisonburg, VA plant phone service provider

Vendor Name and Contact Information	Account Number(s)	Description
Verizon NY PO Box 15124 Albany, NY 12212-5124 Phone: 800-698-7431 Attn: Bankrupty Matters 500 Technology Drive, Suite 550 Weldon Spring, MO 63304	212x021832920218	New York City office phone provider
Verizon NY Internet PO Box 33078 St. Petersburg, FL 33733 Phone: 800-837-4066 Attn: Bankrupty Matters 500 Technology Drive, Suite 550 Weldon Spring, MO 63304	2125754763141740	New York City office internet service provider
Verizon Business P.O. Box 660794 Dallas, TX 75266-0794 Phone: 800-937-6000	Y2678495 Y2721532 Y2678665	Internet/Data Lines for all of the company's locations
City of Harrisonburg, VA 2155 Beery Rd, Harrisonburg, VA 22801-9655 Phone: 540-434-6783	3920370300-0 3920370400-0	Water and fire meter service for Harrisonburg, VA
Rockingham Co. Treasurer 20 East Gay Street, Harrisonburg, VA 22802 Phone: 540-564-3020	28600	Sewer service for Harrisonburg, VA plant
Allied Waste 1831 Avon Street Ext., Charlottesville, VA 22902 Phone: 434-295-4177	3-0410-0005880	Waste disposal service for Harrisonburg, VA plant

Exhibit "3"

In Re: MONDRIAN TTL, L.L.C., a Delaware limited liability company, Debtor, EID # 20-1473299; GRIGIO TTL, L.L.C., an Arizona limited liability company, Debtor. EID #20-5787568

Case Nos. 2:10-bk-14140-RJH and 2:10-bk-14141-, Chapter: 11, Jointly Administered

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

2010 Bankr. LEXIS 6002

May 14, 2010, Decided

SUBSEQUENT HISTORY: Application granted by *In re Mondrian TTL, L.L.C., 2010 Bankr. LEXIS 6001 (Bankr. D. Ariz., May 28, 2010)*

PRIOR HISTORY: *In re Mondrian TTL, L.L.C., 2010 Bankr. LEXIS 6000 (Bankr. D. Ariz., May 14, 2010)*

COUNSEL: [*1] For Debtors: Susan M. Freeman Arizona State Bar No. 004199, Rob Charles, Arizona State Bar No. 7359, Marvin C. Ruth - Arizona State Bar No. 024220, LEWIS AND ROCA LLP, Phoenix, Arizona.

JUDGES: RANDOLPH J. HAINES, U.S. Bankruptcy Judge.

OPINION BY: RANDOLPH J. HAINES

OPINION

Order (1) Prohibiting Utility Companies From Altering, Refusing Or Discontinuing Service (2) Authorizing Payment of Prepetition Ordinary Course Claims of Utility Companies, and Deeming Utility Companies Adequately Assured And (3) Establishing Procedures For Determining Requests For Additional Adequate Assurance

On the motion dated May 9, 2010 (the "Motion") of the above-captioned debtors and debtors-in-possession (the "Debtors") for entry of an order, under *Section 366 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532* (the "Bankruptcy Code"): (1) prohibiting utility companies from altering, refusing or discontinuing service, (2) authorizing payments of ordinary course prepetition amounts due to utility companies plus deposits in amounts equivalent to half of the previous month's average charges (or such other amount as previously agreed and funded prepetition) and deeming utility companies adequately protected, and (3) establishing [*2] procedures for determining requests for additional adequate assurance (the "Motion") [DE 7], and on the Declaration of Brian Kearney in Support of Chapter 11 Petitions and First Day Motions,

This Court finds that (i) it has jurisdiction over the matters raised in the Motion under *28 U.S.C. §§ 157* and *1334*; (ii) venue of this matter is proper under *28 U.S.C. §§ 1408* and *1409*; (iii) this matter is a core proceeding under *28 U.S.C. § 157(b)(2)*; (iv) the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; (v) adequate and proper notice of the Motion and the hearing on it has been given and no other or further notice is necessary; and (vi) good and sufficient cause exists for granting the relief requested in the Motion as set forth in this Order,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED.

2. As adequate assurance of payment, Debtors are permitted to pay the current invoiced amounts due to Utility Companies (if any), and Debtor are permitted to pay the prepetition portion of next month's invoices (if any) along with the postpetition portion when the invoices are received.

3. As further [*3] adequate assurance of payment, Debtors shall:

> a. Deposit a sum equal to 50% of Debtors' estimated monthly costs based on the first full month immediately prior to the petition date for which a bill is available for each Utility Service into an interest-bearing, segregated account within 15 business days of entry of this Order (the "Utility Deposit").
>
> b. If the Utility Service already holds a deposit (whether cash, letter of credit, certificate of deposit, surety bond, prepayment or otherwise) that is equal to or greater than the Utility Deposit, then no Utility Deposit or further adequate assurance shall be required.

4. Absent any further order of the Court, each of the Utility Companies is enjoined from altering, refusing, or discontinuing service to, or discriminating against, the Debtors solely on the basis of the commencement of these Cases or on account of any unpaid invoice for service provided prior to the Petition Date, or requiring additional adequate assurance of payment other than the adequate assurance proposed in the Motion, pending entry of the Final Order.

5. Pavlov Media, f/k/a Fusion Broadband, Inc. ("Fusion Broadband") is found to be a Utility Company as defined in the [*4] Motion, and is subject to the relief granted Debtor pursuant to this Order with regard to the Utility Companies.

PROCEDURES FOR ADDITIONAL ADEQUATE ASSURANCE

1. If a Utility Company requests additional adequate assurance within 20 days of the date of the entry of the Order, the Utility Company must serve a written request (the "Request") upon Debtor setting forth the outstanding balance for its account(s), a summary of Debtor's payment history on the account(s), and an explanation of why a deposit equal to 50% of the first full month immediately prior to the petition date for which a bill is available is not adequate assurance of payment.

2. The Request must be actually received by Debtors' counsel within 20 days of the date of the Order. Debtor shall thereafter forward the Request to all secured creditors.

3. Without further Order of the Court, Debtors may enter into an agreement granting additional adequate assurance to any Utility Company serving a timely Request, if Debtor, in its sole discretion, but subject to any existing orders regarding the Debtor's use of cash collateral, determines that the Request is reasonable.

4. If a Utility Company requests additional adequate assurance [*5] within 20 days of the date of the entry of the Order, and Debtor believes such Request is unreasonable, Debtor shall file a motion for determination of adequate assurance of payment and set such motion for hearing.

5. The Utility Company seeking adequate assurance shall be deemed to have adequate assurance of payment until the Court makes a determination at the hearing, and the Utility Company that is the subject of the unresolved Request may not alter, refuse, or discontinue services to Debtor.

ADDITIONAL RELIEF

1. The Debtors are authorized to take all actions necessary to effectuate the relief granted by this Order in accordance with the Motion.

2. Notwithstanding the possible applicability of *Bankruptcy Rules 6004*, *7062* or *9014*, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

3. Entry of this Order is without prejudice to the rights of any party in interest to file a motion for reconsideration of this Order.

4. This Court retains jurisdiction with respect to all

matters arising from or related to the implementation of this Order.

IT IS HEREBY ADJUDGED and DECREED this is SO ORDERED.

The party obtaining this order is responsible for [*6] noticing it pursuant to *Local Rule 9022-1*.

Dated: May 14, 2010

/s/ Randolph J. Haines

RANDOLPH J. HAINES

U.S. Bankruptcy Judge

Not Reported in F.Supp.2d, 2011 WL 5546954 (S.D.N.Y.), Bankr. L. Rep. P 82,104
(Cite as: 2011 WL 5546954 (S.D.N.Y.))

H

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re the GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., et al., Debtor.
Long Island Lighting Company, et al., Appellants,
v.
The Great Atlantic & Pacific Tea Company, Inc., et al., Appellees.
Jersey Central Power & Light Company, et al., Appellants,
v.
The Great Atlantic & Pacific Tea Company, Inc., et al., Appellees.
Potomac Electric Power Company, et al., Appellants,
v.
The Great Atlantic & Pacific Tea Company, Inc., et al., Appellees.
Washington Gas Light Company, Appellant,
v.
The Great Atlantic & Pacific Tea Company, Inc., et al., Appellees.

No. 11–CV–1338 (CS).
Action Nos. 11–CV–1339 (CS), 11–CV–1512 (CS), 11–CV–1513 (CS).
Nov. 14, 2011.

Elisa M. Pugliese, Cullen and Dykman LLP, Brooklyn, NY, for Appellants Long Island Lighting Company, et al.

Russell R. Johnson III, John M. Craig, Law Firm of Russell R. Johnson III, PLC, Manakin–Sabot, VA, for Appellants Long Island Lighting Company, et al., Jersey Central Power & Light Company, et al.

Thomas R. Slome, Jessica G. Berman, Meyer, Suozzi, English & Klein, P.C., Garden City, NY, for Appellants Jersey Central Power & Light Company, et al.

William Douglas White, McCarthy & White, PLLC, McLean, VA, for Appellants Potomac Electric Power Company, et al., Washington Gas Light Company.

Andrew M. Genser, Kirkland & Ellis LLP, New York, NY, for Appellees The Great Atlantic & Pacific Tea Company, Inc., et al.

OPINION AND ORDER

SEIBEL, District Judge.

***1** Before the Court are four consolidated appeals by various utility companies ("Appellants") that provided utility services to Debtors in the underlying bankruptcy action.[FN1] They filed their respective appeals from the Bankruptcy Court's Order Determining Adequate Assurance of Payment for Future Utility Services ("Final Order"),[FN2] after which this Court consolidated the appeals on May 12, 2011 under docket number 11–CV–1338, (11–CV–1338, Doc. 13).[FN3]

FN1. The four appeals that are now consolidated under 11–CV–1338 are *Long Island Lighting Co., et al. v. The Great Atlantic & Pacific Tea Co., Inc., et al.*, 11–CV–01338; *Jersey Central Power & Light Co., et al. v. The Great Atlantic & Pacific Tea Co., Inc., et al.*, 11–CV–01339; *Potomac Elec. Power Co., et al. v. The Great Atlantic & Pacific Tea Co., Inc.*, 11–CV–01512; and *Washington Gas Light Co. v. The Great Atlantic & Pacific Tea Co., Inc., et al.*, 11–CV01513.

FN2. "Final Order" refers to the Bankruptcy Court's Order Determining Adequate Assurance of Payment for Future Utility Services. (Bankr.Doc. 503.) "Bankr.Doc." refers to documents filed in the Bankruptcy Court for the Southern District of New York under docket number 10–B–24549.

FN3. The same law firm filed largely identical briefs for appellants setting forth the same arguments in 11–CV–1338 and 11–CV–1339. Likewise, another law firm took the same course in 11–CV–1512 and 11–CV–1513. Accordingly, unless otherwise stated, for purposes of this opinion the Court will only use and cite to documents filed in the 11–CV–1339 and 11–CV–1513 actions, as they were the later-filed briefs by each firm. Furthermore, where necessary, the Court will refer to a case by its docket number.

For the reasons stated herein, the Bankruptcy Court's Final Order is AFFIRMED.

I. BACKGROUND

The bankruptcy case of The Great Atlantic & Pacific Tea Company, Inc. and certain of its affiliates ("Appellees") commenced on December 12, 2010, when Appellees filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. (Bankr.Doc. 1.) On the same day, Appellees filed a motion ("Utility Motion") seeking entry of an order from the Bankruptcy Court "determining adequate assurance of payment for future utility services and prohibiting utility providers from altering or discontinuing service on account of outstanding prepetition invoices and establishing procedures for determining adequate assurance of payment for future utility services" pursuant 11 U.S.C. § 366. (*See* Bankr.Doc. 11 ¶ 19). Appellees proposed to deposit $7.45 million, representing two weeks of utility service provided by all of Appellees' utility providers, into a segregated, interest-bearing bank account ("Adequate Assurance Account") as adequate assurance of payment of such services. (*Id.* ¶ 12.) Additionally, Appellees sought approval of certain procedures ("Adequate Assurance Procedures") governing the adequate assurance payment and requests for additional assurances. (*Id.* ¶ 14(a)-(j).)

On December 23, 2010, certain utility companies FN4 filed an objection to the Utility Motion, claiming that (1) Appellees' offer of adequate assurances was not satisfactory, and that a deposit covering two months—rather than two weeks as Appellees had proposed—was suitable; (2) Appellees failed to identify who would hold the segregated bank account, how utility providers could access the money, and what would happen to the money in the account if Appellees defaulted on their post-petition financing; (3) a segregated bank account was not a recognized form of adequate assurance under Section 366(c)(1)(A); and (4) applicable tariffs and state laws govern the pre- and post-petition relationship between the Appellants and Appellees and, thus, such tariffs should govern the adequate assurance analysis. (*See generally* Bankr.Doc. 170.) On December 23, 2010, additional utility companies FN5 sought to join in the objection on the same grounds. (*See* Bankr.Doc. 174.) On January 4, 2011, more utility companies FN6 objected to the Utility Motion on the same grounds and added additional arguments. (*See* Bankr.Doc. 336.) FN7 In response, Appellees filed an Omnibus Reply in Support of Their Utility Motion, restating why the adequate assurances and the proposed procedures were appropriate. (*See* Bankr.Doc. 436.)

FN4. The utilities included Jersey Central Power & Light Company, Toledo Edison Company, New York State Electric and Gas Corporation, PECO Energy Company, Inc., Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., The Connecticut Light and Power Company, Yankee Gas Services Company, Public Service Electric Gas Company, and Baltimore Gas and Electric Company ("1339 Appellants").

FN5. These additional utility companies included Long Island Lighting Company d/b/a LIPA, Keyspan Gas East Corporation d/b/a National Grid, and The Brooklyn Union Gas Company d/b/a National Grid N.Y. ("Pre–Consolidated 1338 Appellants").

FN6. Potomac Electric Power Company,

Delmarva Power, and Atlantic City Electric ("1512 Appellants") filed the January 4, 2011 objection.

FN7. Washington Gas Light Company ("1513 Appellant"), which filed its appeal in 11–CV–1513, was among the utility companies that did not file an objection below.

***2** United States Bankruptcy Judge Robert Drain heard oral argument on January 10, 2011 ("Final Hearing"). In the Final Order, dated January 12, 2011, he granted the Utility Motion and directed Appellees to make a cash deposit of $7.45 million, representing two weeks of utility services, in "a newly-created, segregated, interest-bearing bank escrow account" as adequate assurance. (Final Order ¶ 3.) [FN8] The court made its decision "[i]n the light of all of the relevant facts and circumstances and based on the Court's assessment of the degree of risk of nonpayment given the Debtors' cash flow from operations, cash on hand and proceeds from the DIP Facility, the Adequate Assurance Deposit and the Cash Deposits ...." (*Id.* ¶ 5.) [FN9]

FN8. In the Final Order, Judge Drain required that Appellees fund an agreed-upon amount equal to a two-week cash deposit to the respective utilities that objected to the Utility Motion. (Final Order ¶ 16.) In turn, the amount held in the Adequate Assurance Account was correspondingly reduced by such amount. (*Id.* ¶ 3.)

FN9. "DIP Facility"—"DIP" presumably standing for Debtor in Possession—refers to Debtor's facility for post-petition financing. (*See* Bankr.Doc. 479.)

Appellants timely filed various Notices of Appeal of the Final Order with the Bankruptcy Court, (*see* Bankr.Docs. 625, 627, 651, 743), and then filed briefs in four separate actions in this Court. [FN10] On April 21, 2011, Appellees filed a Motion to Consolidate Appeals, (11–CV–1338, Doc. 10), to which the Pre–Consolidated 1338 Appellants filed an objection on May 4, 2011, (11–CV–1338, Doc. 12). This Court granted Appellees' motion on May 12, 2011, and consolidated the four cases under 11–CV–1338. (*See* 11–CV–1338, Doc. 13.)

FN10. 11–CV–1338 (Doc. 4) ("Pre–Consolidated 1338 Appellants' Br."); 11–CV–1339 (Doc. 6) ("1339 Appellants' Br."); 11–CV–1512 (Doc. 5) ("1512 Appellants' Br."); 11–CV–1513 (Doc. 7) ("1513 Appellant's Br.").

Simultaneously, but before the cases were consolidated, the Pre–Consolidated 1338 Appellants and 1139 Appellants filed motions to expedite consideration of this appeal on the basis that their claims would likely evade review on mootness grounds, as has happened to similar claims in the past, if and when Appellees no longer required utility services because they closed their operations, sold substantially all of their assets, or emerged from bankruptcy through a plan of reorganization. (11–CV–1338, Doc. 11 at 4–5; 11–CV–1139, Doc. 14 at 4–5.) This Court denied these requests on May 18, 2011 on the basis that there were no motions pending in the Bankruptcy Court that threatened mootness, rendering expedited review of the appeals unwarranted. (*See* 11–CV–1338, Doc. 15 at 3–4.)

On June 13, 2011, the 1512 Appellants and 1513 Appellant moved to expedite consideration of their appeals, (11–CV–1338, Doc. 17), a motion the 1339 Appellants later joined on July 1, 2011, (11–CV–1338, Doc. 22). The Appellants sought expedited review for the same reasons as had the Pre–Consolidated 1338 Appellants and 1339 Appellants, but argued that the conditions previously lacking—namely, motions pending in the Bankruptcy Court—were now present because the Bankruptcy Court had entered orders approving the sale of some of Appellees' store locations in Maryland, and by mid-July 2011 all of Appellees' Maryland stores would be sold off. (11–CV–1338, Doc. 17 ¶ 5; 11–CV–1338, Doc. 22 ¶¶ 5, 6, 9–16.) Because I

am addressing all of Appellants' arguments on appeal in this opinion, the Motions to Expedite are moot.

II. DISCUSSION

A. *Standard of Review*

This Court has jurisdiction to hear appeals from decisions of a bankruptcy court pursuant to 28 U.S.C. § 158(a), which provides in pertinent part that "[t]he district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees ...; [and,] with leave of the court, from other interlocutory orders and decrees ... of bankruptcy judges." 28 U.S.C. § 158(a). A district court reviews a bankruptcy court's findings of fact for clear error and reviews its legal conclusions *de novo. Overbaugh v. Household Bank, N.A. (In re Overbaugh),* 559 F.3d 125, 129 (2d Cir.2009); *see* Fed. R. Bankr.P. 8013 (district court may "affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree," and "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous").

B. *Statutory Directives of 366(c)(3)*

***3** Appellants first argue that the Bankruptcy Court failed to follow various statutory directives set forth in 11 U.S.C. § 366 in reaching its adequate assurance decision. Namely, Appellants argue that (1) utility companies are the only parties that may make the initial request of adequate assurances and that it is then the debtor's burden to show that the demand is unreasonable and subject to modification, (1339 Appellants' Br. 14–16; 1513 Appellant's Br. 4–5); (2) the Bankruptcy Court did not apply the correct burden of proof in determining what constituted adequate assurance, (1339 Appellants' Br. 16–17; 1513 Appellant's Br. 4–5); (3) the Bankruptcy Court failed to adhere to state law tariff procedures regarding cash deposits in determining the proper amount of adequate assurance payment, (1339 Appellants' Br. 16–17; 1513 Appellant's Br. 6); and (4) Section 366(c)(1)(A) does not provide for the type of account in which the adequate assurance payments funds were ordered to be held, (1512 Appellants' Br. 6–7; 1513 Appellant's Br. 5–6). The Court addresses each of these challenges in turn below.

1. *Legal Standard Under Section 366*

The parties have highlighted the split of authority on the meaning of Section 366(c) after its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Section 366 limits a utility company's authority to "alter, refuse, or discontinue service to, or discriminate against" a debtor that has filed for bankruptcy, except as permitted by subsections (b) and (c) of the statute. 11 U.S.C. § 366(a). The statute provides, in relevant part:

> (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).
>
> (B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider—
>
> > (i) the absence of security before the date of the filing of the petition;
> >
> > (ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or
> >
> > (iii) the availability of an administrative expense priority.
>
> 11 U.S.C. § 366(c)(2)-(3)(B)(iii).

One interpretation of Section 366(c), set forth by Appellants, (*see* 1339 Appellants' Br. 14–15; 1513 Appellant's Br. 4), is that a Chapter 11 debtor seeking protection from the Bankruptcy Code against loss of utility service is obligated in the first instance to provide the assurance of payment in the amount and form demanded by the utility provider. In the event that the debtor seeks to modify the amount, it may seek relief from the bankruptcy court, but only after providing the demanded amount to the utility provider. *See In re Lucre, Inc.*, 333 B.R. 151, 154 (Bankr.W.D.Mich.2005) (debtor has no recourse to request court order modifying assurance of payment demanded by utility until debtor first pays what utility demands); *see also In re Crystal Cathedral Ministries*, 454 B.R. 124, 128–29 (C.D.Cal.2011) (discussing this interpretation of Section 366(c)).[FN11] The other interpretation, set forth by Appellees, (*see* 1339 Appellees' Br. 9–12; 1513 Appellees' Br. 11–14),[FN12] provides a debtor 30 days after petitioning to either (1) under Section 366(c)(2), reach an agreement with its utility provider as to adequate assurance of payment; or (2) under Section 366(c)(3), obtain a court order determining what qualifies as adequate assurance of payment. *See Bedford Town Condo. v. Wash. Suburban Sanitary Comm'n (In re Bedford Town Condo.)*, 427 B.R. 380, 383 (Bankr.D.Md.2010) ("[N]either § 366(c)(2) nor (3)(A) require a debtor to pay the adequate assurance demanded by a utility before the Court can modify that amount."); *see also In re Crystal Cathedral Ministries*, 454 B.R. at 129–30 (collecting cases).

FN11. The 1339 Appellants also cite *In re Viking Offshore (USA) Inc.*, No. 08–CV–31219, 2008 WL 782449 (Bankr.S.D.Tex. Mar.20, 2008), but the court there expressly declined to "reach the question of whether, if Debtors had proposed adequate assurance in one of the forms identified in Section 366(c)(1)(A) from the inception of the case, the court could immediately modify the amount necessary to provide adequate assurance as of the inception of the case pursuant to Section 366(c)(3)(A)." *Id.* at *3.

FN12. "1339 Appellees' Br." refers to Appellees' Brief filed in 11–CV–1139, (Doc. 8). "1513 Appellees' Br." refers to Appellees' Brief filed in 11–CV–1513, (Doc. 8).

***4** Appellees have noted that "a number of courts" have rejected the first interpretation "as contrary to the clear language of the statute and underlying policy of section 366." (1339 Appellees' Br. 10; 1513 Appellees' Br. 10–11.) I join those courts. Section 366(c) does not intimate that only the utility provider in the first instance is afforded the opportunity to set the form and amount of adequate assurance. The statute also does not contemplate that Section 366(c)(3)(A) comes into play only after the utility provider has made a demand for assurances, the debtor has met such demand, and the debtor files a motion for modification. Rather, the plain reading of the statute is that a utility provider has the right to receive adequate assurance of payment that it deems satisfactory within 30 days of the filing of a bankruptcy petition. If the parties disagree about what should constitute adequate assurance, a "party in interest"—either the debtor or utility provider—may request that the court modify the amount that the utility provider deems to be satisfactory. Reading the statute in this manner comes closer to what other courts have held "best balances the protections afforded debtors and utility providers by provid[ing] substantial protection to a utility while at the same time providing an avenue of relief for debtors, who believe a utility's request is unreasonable or unworkable." *In re Crystal Cathedral Ministries*, 454 B.R. at 130 (alteration in original) (internal quotation marks omitted).

As Judge Drain found below, (Final Hr'g Tr. 157:22–158:4),[FN13] and other courts have stated before, the interpretation that Appellants seek is "unworkable ... [and] could lead to absurd results," *In re Circuit City Stores, Inc.*, No. 08–35653, 2009

WL 484553, at *3 (Bankr.E.D.Va. Jan.14, 2009); *see Bedford Town Condo.*, 427 B.R. at 385 ("[A] number of courts have rejected the ruling in *Lucre*, concluding that its view of the statutory language would lead to absurd results.... The Court respectfully declines to follow *Lucre.*"); *In re Beach House Prop., LLC*, No. 08–11761, 2008 WL 961498, at *1 (Bankr.S.D.Fla. Apr.8, 2008) ("An interpretation of § 366 that precludes court intervention unless a debtor posts whatever amount is demanded could lead to absurd results and cannot be what Congress intended. Instead, the Court finds that it has the authority to determine the form and amount of adequate assurance if the parties cannot reach [an] agreement ...."). It would either potentially place a debtor in a position where it would lose the Section 366 protections based on a utility provider's action or inaction, or it would hamstring the authority of courts to set the amount of adequate assurance in the event that the parties could not reach an agreement on the matter. Accordingly, the Bankruptcy Court did not err in its reading of Section 366(c).

FN13. "Final Hr'g Tr." refers to the transcript of the Final Hearing held by Judge Drain on January 10, 2011. (11–CV–1512, Doc. 2, Ex. A.)

2. *Burden of Proof Under Section 366*

Appellants also claim that by interpreting Section 366 in the manner in which it did, the Bankruptcy Court did not apply the correct burden of proof because, according to Appellants, the debtor must come forward with evidence to show why a modification should be made to the adequate assurance payment a utility provider deems satisfactory. (1339 Appellants' Br. 15–17; 1513 Appellants' Br. 4–5 .) Appellants are correct that the debtor has the burden of proof on the issue of adequate assurance of payment. *See In re Stagecoach Enters., Inc.*, 1 B.R. 732, 734 (Bankr.M.D.Fla.1979); 17–CM27 *Collier on Bankruptcy* § 27.01[2] (16th ed.2011). In this case, however, Appellees did come forward in their Utility Motion, (*see* Utility Motion ¶¶ 24–25, 28–29), and at the Final Hearing, (*see* Final Hr'g Tr. 130:15–132:24), with reasons why a deposit equal to two weeks of utility service was adequate. They set forth facts specifically affecting their case, (*see* Utility Motion ¶ 25), and cited to courts within this district that had "regularly approved similar adequate assurance deposits and procedures in other chapter 11 cases filed after BAPCPA became effective," (*id.* ¶ 29). The Bankruptcy Court did not reverse the burden, but rather received from Appellees facts and arguments in the Utility Motion and at the Final Hearing that were sufficient to carry the burden. Accordingly, there was no legal error or clear factual error below.

3. *Two–Week Cash Deposit in Escrow as Adequate Assurance*

i. *Amount of Payment*

***5** Next, Appellants dispute that the amount deposited into the Adequate Assurance Account was sufficient, and argue that a deposit covering two months, rather than two weeks, was proper. Appellants provide two arguments in this regard: first, state law tariffs set forth procedures for utility companies to obtain cash deposits and, therefore, the tariffs govern the adequate assurance analysis; and second, the Bankruptcy Court considered facts not in evidence and disregarded facts in evidence in reaching its decision. (*See* 1339 Appellants' Br. 17–20; 1513 Appellant's Br. 5.)

As an initial matter, bankruptcy courts have historically been afforded reasonable discretion in determining what constitutes adequate assurance of payment for continuing utility services. *In re Adelphia Bus. Solutions, Inc.*, 280 B.R. 63, 81 (Bankr.S.D.N.Y.2002). The court must engage in a fact-driven analysis in order to balance the utility provider's need to be free from unreasonable risk of nonpayment and the debtor's scarce financial resources during bankruptcy. *Id.* at 82. Courts 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. *Id.* at 80; *see In re Crystal Cathedral Ministries*, 454 B.R. at 131; *In re Circuit City Stores*, 2009 WL 484553, at *4; *Steinebach v. Tucson Elec. Power Co. (In re Steinebach)*, 303 B.R. 634, 641 (Bankr.D.Ariz.2004).

As to Appellants' first argument—that "public utility tariffs have specifically set forth the procedures for obtaining cash deposits, maintaining those deposits, paying interest on the deposits, providing notice to customers and accounting to customers concerning their cash deposits," and therefore govern what qualifies as adequate assurance, (1513 Appellant's Br. 6; *see* 1339 Appellants' Br. 18–19)—there is ample authority to the contrary. *See, e.g.*, *Steinebach*, 303 B.R. at 644 ("[T]he determination of what constitutes adequate assurance is a federal bankruptcy law question. While the state regulatory scheme may inform that determination, state law does not control.") (internal citation omitted); *In re Adelphia Bus. Solutions*, 280 B.R. at 80 ("[B]ankruptcy courts are not bound by local or state tariff regulations."); *Begley v. Phila. Elec. Co. (In re Begley)*, 41 B.R. 402, 406 (E.D.Pa.1984) ("[A] state regulation prescribing a particular security deposit does not bind the bankruptcy court."), *aff'd*, 760 F.2d 46 (3d Cir.1985). Appellants have cited no bankruptcy or district court opinion—and the Court is aware of none—that holds otherwise.[FN14] In the absence of conflicting authority, the Court finds that the Bankruptcy Court was correct in rejecting Appellants' evidence and arguments concerning the governing authority of such state tariffs on the amount of the cash deposit.

FN14. Appellants cite *In re RobMac, Inc.*, 8 B.R. 1, 3–4 (Bankr.N.D.Ga.1979), and *In re Stagecoach Enters.*, 1 B.R. at 735–36, for the proposition that "courts have found that the billing exposure created by Tariffs is sufficient to justify two month deposit requests." (1339 Appellants' Br. 19.) Those cases hardly support the proposition that tariffs govern what constitutes adequate assurance. While those courts ultimately found that two-month deposits were justified under the facts of the cases, both courts stated that the tariffs were not controlling and that they gave them little weight. *See In re RobMac*, 8 B.R. at 3–4; *In re Stagecoach Enters.*, 1 B.R. at 735–36 .

As to Appellants' second argument—that Judge Drain did not properly weigh the evidence—I find this argument fails as well, especially because I am to give deference to the Bankruptcy Court's findings of fact and set them aside only for clear error. The Bankruptcy Court considered several factors in coming to its conclusion that a two-week cash deposit was sufficient. First, the court considered Appellees' post-petition finances, including "cash flow from operations, cash on hand and proceeds from the DIP Facility," (Final Order ¶ 5), and recognized that Appellees had access to more credit to pay utility fees than it had had pre-petition, (*see* Final Hr'g Tr. 154:17–18, 165:19–168:4).[FN15] Second, the court looked at the burden that an additional deposit would impose on Appellees as reorganizing debtors, and found that it did not seem sensible to require Appellees to "put[ ] up cash that it could otherwise be using to run its business just to sit there." (*Id.* at 142:25–143:2.) Third, the court heard evidence that the account holding the cash deposit was created for the sole benefit of protecting utility providers, which further reduced the risk that utility providers would provide post-petition services without compensation. (*See id.* at 136:14–16.) Fourth, the court noted that it would change the provision in the Adequate Assurance Procedures to allow utility providers to come back to the court to ask for additional assurances if they foresaw changes in the circumstances of the case. (*See id* . at 141:4–10, 142:22–24.) Finally, it appeared to the court that the utility providers were seeking assurances that were more than necessary; rather, as Judge Drain found below, "[t]hey want[ed] an absolute—they want[ed] the maximum that they would be out." (*Id* . at 142:3–4).

FN15. Appellants argue that because Appellees did not offer the DIP Facility into evidence, the Bankruptcy Court could not consider it in reaching its decision, but they have not cited any authority for such a proposition. (1339 Appellants Br. 18.) In any event, before the Bankruptcy Court at the Final Hearing was the DIP Facility that had already been approved on an interim basis, (Bankr.Doc. 43), and general discussion and information about the DIP Facility, cash flow, and cash on hand, (*see, e.g.*, Final Hr'g Tr. 131:18–23, 144:23–145:2; Decl. of Frederic F. Brace ¶ 14 (Bankr.Doc. 7); DIP Facility Motion 4–5 (Bankr.Doc. 19)). Moreover, the Bankruptcy Court approved the DIP Facility prior to entering its Final Order on adequate assurances. (*See* Bankr.Doc. 479.)

***6** On review of the record, and notwithstanding Appellants' evidence and arguments that a two-month deposit was more appropriate, I cannot say that the Bankruptcy Court's findings of fact were clearly erroneous. Appellants' arguments regarding their billing cycle were reasonable, but the Bankruptcy Court had the discretion to choose among reasonable proposals. The court weighed the evidence and did not clearly err in determining that, in light of the low risk of default given the DIP Facility, the utility providers were adequately assured payment through the cash deposit.[FN16]

FN16. The Court also finds that just as Appellants were required to fund a two-week cash deposit into the Adequate Assurance Account by the Bankruptcy Court's directive in its Final Order, (Final Order ¶ 16 ("The Debtors shall fund")), they, too, would be required to fund additional money upon the delivery of a Carve Out Notice as defined under the DIP Order, (*id.* ¶ 17 ("the Debtors shall fund")). The Court does not agree with Appellants that paragraphs 20–21 of the Final Order render paragraphs 17–18 "illusory," especially considering that the Bankruptcy Court directly stated at the Final Hearing that it was adding a provision to the Final Order enabling a utility to come back to court and ask for additional assurances. (Final Hr'g Tr. 141:4–10, 142:22–24.)

ii. ***Type of Payment Under Section 366(c)(1)(A)***

Appellants also argue that the Bankruptcy Court committed reversible error by finding that "a newly-created, segregated, interest-bearing bank escrow account," (Final Order ¶ 3), qualified as an adequate assurance of payment, when such accounts are not expressly set forth as a form of payment in Section 366(c) (1)(A) and the account was held by someone other than the utility, (1512 Appellants' Br. 6–7; 1513 Appellant's Br. 5–6).[FN17]

FN17. The 1513 Appellant did not object below and thus waived this argument.

As an initial matter, the Bankruptcy Court ordered cash deposits with the utility for the objecting Appellants, (*see* Final Order ¶ 16), which provided adequate assurance of payment as to them under Section 366(c). In any event, this Court does not find error in the form of payment that Judge Drain approved in this case. Under Section 366(c), "the term 'assurance of payment' means—(i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a prepayment of utility consumption; or (v) another form of security that is mutually agreed on between the utility and the debtor or trustee." 11 U.S.C. § 366(c)(1)(A). Courts interpreting this language have found segregated, interest-bearing accounts, much like the one in this case, to be "the equivalent of a letter of credit," *In re Circuit City Stores*, 2009 WL 484553, at *4, or a "cash deposit," *In re Crystal Cathedral Ministries*, 454 B.R. at 130, and thus an "assurance of payment" under Section 366(c)(1)(A).

In fact, the *Crystal Cathedral Ministries* court recently addressed this issue,[FN18] and held that it could not "find that the Bankruptcy Court's determ-

ination that the segregated bank account is a 'cash deposit' runs afoul of the plain meaning of the statutory language." 454 B.R. at 130. The district court reasoned that the statute does not define the term "cash deposit," and that the account consisted of money segregated solely for the benefit of the debtor's utilities. *Id.* As to the adequacy of the deposit, the court rejected the argument that the account was not adequate simply because it was held by someone other than the utility provider, and the utility providers had not persuasively argued that they needed to control the money. *Id.* at 131–32.

> FN18. The parties did not have the benefit of the Central District of California's discussion, *see In re Crystal Cathedral Ministries,* 454 B.R. at 130–32, when they argued their motions before Judge Drain and filed their briefs in this Court on appeal.

I find the *Crystal Cathedral Ministries* court's reasoning instructive and persuasive. At the Final Hearing, Judge Drain heard arguments from the parties concerning whether the Adequate Assurance Account was a cash deposit within the meaning of the Bankruptcy Code. In response to Appellants' argument that "[i]t's not a cash deposit we're holding. It's not cash that we have," Judge Drain responded, "[i]t's in escrow. The escrow says, you know, present the escrow, say we're drawing on it because of our bill." (Final Hr'g Tr. 135:2–3, 135:8–10.) Conversely, when Appellees' counsel suggested that the Adequate Assurance Account was akin to a letter of credit, which is expressly provided as an assurance of payment under Section 366(c)(1)(A), Judge Drain agreed, stating "effectively you're getting a letter of credit except ... they're probably not paying a letter of credit fee." (Final Hr'g Tr. 137:13–15.) The Bankruptcy Court reasonably found that the Adequate Assurance Account was a cash deposit or akin to a letter of credit within the meaning of the Bankruptcy Code, and that there was no persuasive reason why the utility providers, rather than an escrow agent, needed to control it. I do not find error in the legal conclusion that the Adequate Assurance Account is an "assurance of payment" within the meaning of Section 366(c)(1)(A), nor any clear error in the factual conclusion that the utility providers were adequately assured of payment.

C. *Consideration of Absence of Pre-petition Security Held by Appellants*

***7** Appellants cite to the Final Hearing transcript in arguing that Judge Drain, in violation of Section 366(c)(3)(B)(i), considered pre-petition security in his determination of whether the $7.45 million was adequate assurance. (*See* 1339 Appellants' Br. 13–14; 1513 Appellant's Br. 3.) On my reading of the transcript, however, it appears that Judge Drain referred to the lack of pre-petition security only to contrast Appellants' current situation—in which Appellees had cash from the DIP Facility to stay current on their obligations—and Appellants' pre-petition position, where Appellants did not have any security in the event that Appellees failed to pay their utility bills. In other words, Judge Drain took into account the presence of present and future security, not the absence of past security, in evaluating the risk of non-payment. In fact, at the Final Hearing, counsel for the 1339 Appellants reminded Judge Drain that "the statute very clearly says whether or not [Appellants] had prepetition security is no longer relevant," to which Judge Drain responded, "I know but the point is adequate assurance of future payment and I just—I'm having a hard time seeing why a couple of weeks doesn't—you know, particularly since I am going to change the provision of [the] order that says that this is your only shot at it." (Final Hr'g Tr. 141:1–8.) The Final Order further reinforces the view that Judge Drain considered present and future security, not past security, because he determined that a two-week cash deposit was appropriate given "all of the relevant facts and circumstances and based on the Court's assessment of the degree of risk of nonpayment given the [Appellees'] cash flow from operations, cash on hand and proceeds from the DIP facility." (Final Order ¶ 5.) I accordingly do not find that Judge Drain committed re-

versible error by considering the absence of security before the date of the filing of the petition.

D. *Procedural Arguments*

i. ***Bridge Order Extending the Section 366 Statutory Period***

Appellants also contend that the Bankruptcy Court erred by extending the 30–day statutory time period under Section 366. (1512 Appellants' Br. 7–8; 1513 Appellant's Br. 8–10.) Bankruptcy Rule 9006(b) limits a bankruptcy court's ability to extend statutory time periods in certain situations. *See* Fed. R. Bankr.P. 9006(b). But otherwise, except under certain enumerated sections of the Code, *see id.* 9006(b)(2), "the court for cause shown may at any time in its discretion" order that a time period be enlarged, *id.* 9006(b)(1). Section 366 is not specified under Rule 9006(b)(2) as a section for which enlargement is not permitted. *See id.* 9006(b)(2). Accordingly, a court may enlarge the 30–day and 20–day protective time periods under Sections 366(c)(2) and 366(b),[FN19] respectively, if a party can show good cause.

> FN19. Section 366(b) provides that a utility "may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief [entered by the bankruptcy court], furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date." 11 U.S.C. § 366(b).

In this case, Appellees filed an *Ex Parte* Motion for Entry of an *Ex Parte* Order Extending Section 366 of the Bankruptcy Code Pending the Debtors' Next Omnibus Hearing. (Bankr.Doc. 272.) In the Motion, Appellees stated that preserving utility services on an uninterrupted basis was essential to their ongoing operations and, in turn, their successful reorganization. (*Id.* ¶ 10.) As such, and because the Final Hearing authorizing the relief sought in the Utility Motion would be held more than 20 days after the bankruptcy was commenced, Appellees requested that the Bankruptcy Court extend the Section 366(b) protective period. (*Id.* ¶ 9.) Appellees also noted that although the Utility Motion would be heard on the 29th day of the 30–day–period under Section 366(c)(2), they sought such relief "out of an abundance of caution." (*Id.* ¶ 9 n. 2.) This Court finds that Appellees demonstrated good cause for enlargement of the Section 366 statutory period under the facts of this case, especially considering that the Final Hearing at such a late date might have made it impossible for Appellees to comply with Section 366. Accordingly, I find that the Bankruptcy Court did not err in so holding, as it was moving the parties towards an order setting adequate assurances in the case only days later.

ii. ***Adversary Proceedings and Contested Matters***

***8** Appellants next argue that the Bankruptcy Court's determination on adequate assurances was, in effect, an injunction, because Appellants could not alter, refuse, or discontinue utility service. (*See* 1512 Appellants' Br. 9–11; 1513 Appellant's Br. 8–10.) Because Appellants believe an injunction was imposed, they argue that Appellees had to bring their Utility Motion by way of an adversary proceeding under Federal Rule of Bankruptcy Procedure 7001(7). (*See* 1512 Appellants' Br. 9–11; 1513 Appellant's Br. 8–10.) In the alternative, Appellants claim that even if not an injunction, a motion for relief under Section 366 is a "contested matter," and thus is subject to the service requirements of Federal Rules of Bankruptcy Procedure 9014 and 7004. (*See* 1512 Appellants' Br. 9–11; 1513 Appellant's Br. 8–10.)

1. *Adversary Proceeding*

At the Final Hearing, the Bankruptcy Court heard arguments on whether Appellants were under an injunction. Appellants' counsel stated that paragraphs 2 and 11 of the proposed Final Order "are clearly injunctions." (Final Hr'g Tr. 158:23–24.; *see, e.g.*, Final Order ¶ 2 ("Absent compliance with the procedures set forth in the Motion and this Order, the Debtors' utility providers ... are prohibited

from altering, refusing or discontinuing service on account of any unpaid prepetition charges ....")). Judge Drain disagreed and equated Section 366(c)(3)(A) to the automatic stay under 11 U.S.C. § 362, which is an automatic statutory injunction that generally halts actions by creditors to collect debts from a debtor who has declared bankruptcy. (*See* Final Hr'g Tr. 158:25–159:1–6.) The court also cited to Collier's, which states that "[i]f a utility is found to have violated section 366, the consequences are similar to those which occur after a violation of section 362(a)." 3 *Collier on Bankruptcy* § 366.06; *see* Final Hr'g Tr. 159:2–6. Accordingly, it appears that Section 366 carries with it a statutory injunction, but not an injunction that requires the filing of an adversary proceeding.

Indeed, the cases to which Appellants cite are inapposite because although they state the black-letter law—that a party must file an adversary proceeding to obtain an injunction—they do so generally and outside the Section 366 context. *See In re Goldberg*, 221 B.R. 907, 909 (Bankr.M.D.Fla.1998) ; *In re Smith*, 142 B.R. 348, 349 (Bankr.W.D.Mo.1992); *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting (In re Kham & Nate's Shoes No. 2, Inc.)*, 97 B.R. 420, 428 (Bankr.N.D.Ill.1989); *In re Ennis*, 50 B.R. 119, 122 (Bankr.Nev.1985); *In re Entz*, 44 B.R. 483, 485 (Bankr.Ariz.1984). To the extent that the cases Appellants cite relate to Section 366, they do so only in regard to debtors defaulting on utility bills post-petition, an issue not present in this case. *See MFS Telecom, Inc. v. Motorola, Inc. (In re Conxus Commc'ns, Inc.)*, 262 B.R. 893, 899 (D.Del.2001) (Bankruptcy Court erred in utilizing Section 105 of the Bankruptcy Code when it issued injunction precluding utilities from taking action under Section 366 after debtor defaulted post-petition); *In re Best Prods. Co.*, 203 B.R. 51, 54 (Bankr.E.D.Va.1996) (court cannot enjoin a utility from pursuing state law rights in the event of a default under Section 366 without an injunction). In sum, although Section 366 may impose a form of injunctive relief on Appellants, it does so only statutorily, which does not require the filing of an adversary proceeding under 7001(7).

2. *Contested Matter*

***9** Federal Rule of Bankruptcy Procedure 9014 governs a "contested matter," which is a term that the Rules do not define, but that the Advisory Committee's Note states is the litigation to resolve "an actual dispute, other than an adversary proceeding." Fed. R. Bankr.P. 9014 advisory committee's note. Because, as stated above, this was not an adversary proceeding, it must have been a contested matter.

Appellants are correct that "before a federal court may exercise personal jurisdiction over a [party], the procedural requirement of service ... must be satisfied. These due process requirements apply in motion proceedings (i.e., contested proceedings) under Bankruptcy Rule 9014(b) ...." *Solow v. Kalikow (In re Kalikow)*, 602 F.3d 82, 92 (2d Cir.2010) (first and second alterations in original) (internal citations omitted). In a contested matter, the notice of hearing is treated like a summons and the motion is treated like a complaint, and Rule 9014 requires "reasonable notice" be given to accord with due process. *Id.* at 92. Debtors and creditors have the constitutional right to be heard on their claims, but only the *complete* denial of an opportunity to be heard is reversible. *In re Bartle*, 560 F.3d 724, 730 (7th Cir.2009); *cf. In re Taylor*, No. 97–CV–5967, 1997 WL 642559, at *2 (S.D.N.Y. Oct.16, 1997) (harmless error where one party gave notice on shorter time frame than Rules contemplated and other party still had opportunity to be heard). Rule 9005 states that Federal Rule of Civil Procedure 61 applies to bankruptcy proceedings, and Rule 61, in turn, instructs courts to disregard any error that has not affected the substantial rights of a party. *See* Fed. R. Bankr.P. 9005 (citing Fed.R.Civ.P. 61).

Here, Appellees failed to follow the service requirements of Bankruptcy Rule 7004, which required them to send a copy of the notice of hearing and motion by first class mail to the attention of an officer, managing or general agent, or any other

agent authorized by appointment or by law of each of their utility providers. *See* Fed. R. Bankr.P. 7004(b)(3). This Court condones neither Appellees' failure to follow the Rule 7004 procedures that are firmly in place to safeguard the constitutional rights of parties in bankruptcy, nor their argument that they had too many utility providers for whom they had to obtain proper contact information in order to comply with 7004. (*See* 1512 Appellees' Br. 21–22; FN20 1513 Appellees' Br. 22.) Despite failing to receive proper notice under the Rules, however, Appellants, except for the 1513 Appellant that did not object below, availed themselves of the opportunity to be heard by way of their motions to the Bankruptcy Court objecting to Appellees' Utility Motion. Appellants do not argue that they lacked actual notice or an opportunity to be heard, nor do they advance any other respect in which they were prejudiced by the method of service employed. As such, the Bankruptcy Court's failure to require proper service of process in this case was harmless and did not affect Appellants' substantial rights.

FN20. "1512 Appellees' Br." refers to Appellees' Brief filed in 11–CV–1512, (Doc. 7).

III. CONCLUSION

***10** For the foregoing reasons, the Final Order of the United States Bankruptcy Court, dated January 12, 2011, is hereby AFFIRMED. The Clerk of the Court is respectfully directed to docket this decision in and close all four cases, (Case Nos. 11–CV–1338, 11–CV–1339, 11–CV–1512, 11–CV–1513), and to terminate all pending motions in those cases.

SO ORDERED.

S.D.N.Y.,2011.
In re Great Atlantic & Pacific Tea Co., Inc.
Not Reported in F.Supp.2d, 2011 WL 5546954 (S.D.N.Y.), Bankr. L. Rep. P 82,104

END OF DOCUMENT

Not Reported in B.R., 2009 WL 484553 (Bkrtcy.E.D.Va.), 61 Collier Bankr.Cas.2d 496
(Cite as: 2009 WL 484553 (Bkrtcy.E.D.Va.))

H

United States Bankruptcy Court, E.D. Virginia, Richmond Division.
In re CIRCUIT CITY STORES, INC., et al., Debtors.

No. 08–35653.
Jan. 14, 2009.

West KeySummary**Bankruptcy 51 2481**

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(E) Protection of Utility Service
51k2481 k. In General; Adequate Assurance or Protection. Most Cited Cases

Chapter 11 debtors proposed a means to provide an amount of adequate assurance to creditors, utility companies, entitled to assurance of payment, and, therefore, would receive approval of the creation of a segregated bank account containing blocked funds in the amount of $5,000,000 to be administered in accordance with procedures set forth in utility order. The procedures set forth in the utility order served to streamline the reorganization process and did not adversely impair the rights of any creditor. Moreover, the utility order was designed to avoid a haphazard and chaotic process whereby each utility could make extortionate, last-minute demands for adequate assurance which the debtors would be pressured to pay under the threat of losing critical utility service. 11 U.S.C.A. § 366.

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MEMORANDUM OPINION

KEVIN R. HUENNEKENS, United States Bankruptcy Judge.

***1** The Debtors, Circuit City Stores, Inc., *et al.*,[FN1] filed these bankruptcy cases under Chapter 11 of the Bankruptcy Code on November 10, 2008 (the "Petition Date"). On November 12, 2008, the Court entered an Interim Order under Bankruptcy Code Sections 105(A), 363, and 366, and Bankruptcy Rule 6003(I) Approving Debtors' Adequate Assurance of Payment, (II) Establishing Procedures for Resolving Requests by Utility Companies for Additional Assurance of Payment, (III) Scheduling a Hearing with Respect to Contested Adequate Assurance of Payment Requests, and (IV) Authorizing Debtors to Pay Claims of a Third Party Vendor (the "Interim Utility Order"). Hearing on the Motion of the Debtors for entry of the Interim Utility Order (the "Motion") was conducted on November 10, 2008 (the "Hearing"), as part of the Debtors' first day motions.[FN2] Utility companies that appeared at the Hearing and that objected to the Motion were excluded, or carved out, of the Interim Utility Order [docket entry # 117].[FN3] The Court required that notice of the entry of the Interim Utility Order be given to all of the Debtors' utility companies and set a hearing for December 5, 2008,[FN4] to consider the objections of any utility company to the entry of the Interim Utility Order.

In accordance with the Procedures set forth in the Interim Utility Order, numerous objections were filed by utility companies. At the December 5, 2008 hearing, Debtors' counsel represented to the Court that all objections except the objection of Accent Energy had been resolved [docket entry # 757]. The Court continued Accent Energy's objection to its next omnibus hearing date on December 22, 2008.[FN5] The Court entered a corrected order on December 9, 2008 (the "Corrected Order") [docket entry # 832]. At the December 22, 2008 hearing, Debtors' counsel advised the Court that all of the objections to the Motion had been resolved, including the objection of Accent Energy. The Court instructed Debtors' counsel to submit an order to that

effect [docket entry # 1205].[FN6]

All of the objections that were filed by utility companies to the Motion were resolved consensually. Potomac Electric Power Company, Delmarva Power & Light Company, Atlantic City Electric Company, Florida Power & Light Company, Central Maine Power Company, Baltimore Gas & Electric Company, and Alabama Power Company (hereinafter collectively the "Appealing Utilities") never filed an objection with the Court, either to the Interim Utility Order or to the Corrected Order. Nonetheless, the Appealing Utilities have noted appeals to the Court's Interim Utility Order and Corrected Order.[FN7] This memorandum opinion supplements the bases for the Court's ruling as announced from the bench at the conclusion of the Hearing approving the Motion and sets forth the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure in support of the Interim Utility Order and the Corrected Order (together the "Utility Order").[FN8]

***2** The Court has subject-matter jurisdiction of this contested matter pursuant to 28 U.S.C. §§ 157 and 1334 and the general order of reference from the United States District Court for the Eastern District of Virginia dated August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O). Venue is appropriate in this Court pursuant to 28 U.S.C. § 1409.

Circuit City is a specialty retailer of consumer electronics. It operates electronics stores nationwide that sell, among other things, televisions, home theater systems, computers, camcorders, furniture, software, imaging and telecommunications products, and other audio and video electronics. As of the Petition Date, Circuit City was operating approximately 712 retail stores and 9 outlet stores throughout the United States and Puerto Rico. Circuit City employs approximately 39,600 employees in its stores, its corporate headquarters and its distribution centers. Circuit City maintains an international presence through its wholly owned subsidiary InterTAN which operates with separate officers, directors and employees in Canada under the trade name "The Source By Circuit City." InterTAN's operations consist of 770 retail stores and dealer outlets in Alberta, British Columbia, Manitoba, Newfoundland, Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan, and the Yukon.

In connection with the operation of the Debtors' business, Circuit City receives utility service from various utility companies, including providers of water, gas, electricity, telephone, and sewer service, covering a number of utility accounts at various locations. The services provided by the utility companies are essential to the continued operations of the Debtors.

In relevant part, the Debtors' Motion asked the Court to approve four types of relief. First, the Debtors requested the Court to approve the creation of a segregated account at Bank of America, N.A. ("Bank of America") containing blocked funds in the amount of $5,000,000 (the "Blocked Account").[FN9] The Blocked Account is to be administered in accordance with procedures set forth in the Utility Order as a means of providing utility companies with "adequate assurance of payment" under 11 U.S.C. §§ 366(b) and 366(c)(1)(A).[FN10] Second, the Debtors requested the Court to find that all utility companies entitled to assurance of payment under section 366 of the Bankruptcy Code be deemed to have received adequate assurance of payment pursuant to section 366(b) of the Bankruptcy Code unless the Utility Company filed an objection. Third, the Debtors requested the Court to establish "Additional Adequate Assurance Procedures"[FN11] as the method for resolving disputes that might arise with particular utility companies regarding the adequacy or the form of the Debtors' proposed payment assurance. Finally, the Debtors wanted the Court to schedule a hearing, to be held on a date before the thirtieth day after the Petition Date, to resolve any disputed adequate assurance requests.

***3** While the Court does not have the benefit of

an objection filed by the Appealing Utilities that sets forth the underlying grounds for their appeal, the Court assumes that the appeals are premised upon an interpretation of § 366 of the Bankruptcy Code that concludes that a bankruptcy court may not determine the appropriate amount of adequate assurance until the debtor has first paid whatever amount the utility has demanded. *See In re Lucre,* 333 B.R. 151 (Bankr.W.D.Mich.2005) (holding that a debtor has no recourse to request a court order modifying the assurance of payment demanded by the utility until the debtor first pays what the utility demands). Such an interpretation of § 366 is simply unworkable. It could lead to absurd results. For example, a utility may simply fail to respond to a debtor's offer of adequate assurance, or it may choose to respond on the thirtieth day. In either event, the result would be calamitous for a debtor in the throes of bankruptcy. The calamity is compounded for a debtor with thousands of utility accounts. FN12 Congress cannot have intended to place in peril the entire reorganization process by prohibiting courts from fashioning reasonable procedures to implement the protections afforded under § 366 of the Bankruptcy Code. *See In re Syroco, Inc.,* 374 B.R. 60 (Bankr.D.P.R.2007).

The policy underlying § 366 is to protect debtors from utility service cutoffs upon the filing of a bankruptcy case, while at the same time providing utility companies with adequate assurance that the debtor will pay for postpetition services. *See* H.R.Rep. No. 95–595, at 350 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6306. Subsection (a) of § 366 sets forth the basic rule that utilities are prohibited from altering, refusing or disconnecting utility service to a debtor upon commencement of a bankruptcy case.

Bankruptcy Code § 366(a) provides:

> *Except as provided in subsections (b) and (c)* of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

11 U.S.C. § 366(a) (emphasis added). This proscription against terminating utility service is subject to two exceptions—the exception contained in subsection (b) and the exception contained in subsection (c).

The first exception, § 366(b), provides that:

> Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. 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 of payment.

***4** 11 U.S.C. § 366(b).

Under § 366(b), a debtor must furnish what it considers to be adequate assurance of payment within twenty days after the petition date in the form of a deposit or other security for postpetition service. A debtor need not provide utility companies an absolute guarantee of payment. *See In re Adelphia Bus. Solutions, Inc.,* 280 B.R. 63, 80 (Bankr.S.D.N.Y.2002) ("In determining adequate assurance, a bankruptcy court is not required to give a utility company the equivalent of a guaranty of payment, but must only determine that the utility is not subject to an unreasonable risk of nonpayment for postpetition services."). In this case, the Debtors propose to provide utility companies with the funds in the Blocked Account to provide them with adequate assurance of payment. FN13 The Blocked Account is the equivalent of a letter of credit. Accordingly, it constitutes an assurance of payment consistent with the requirements of Bankruptcy Code section 366(b). FN14

The second exception, which was enacted as part of the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA"), is found in subsection (c) of § 366. Pursuant to § 366(c)(2), a utility company may discontinue service in a Chapter 11 case if it does not receive "during the 30–day period beginning on the date of the filing of the petition ... adequate assurance of payment for utility service that is *satisfactory* to the utility." 11 U.S.C. § 366(c)(2) (emphasis added). Conceivably, under § 366(c)(2), the Debtors could receive a demand from a utility company at the end of such thirty-day period and be compelled to accede to the demand immediately or face termination of critical utility services. On the other hand, the Debtors could receive no demand at all and nonetheless be subject to the same fate. In order to avoid such a drastic result and impose order on an otherwise disorganized and haphazard process, the Debtors' Motion asked the Court to enter the Utility Order in order to establish Procedures that would efficiently implement the provisions of § 366.

Prior to the enactment of BAPCPA, courts had the discretion under § 366 to determine the amount, if any, of adequate assurance payments or collateral required to a utility company. *See Va. Elec. & Power Co. v. Caldor, Inc.-NY,* 117 F.3d 646, 650–51 (2d Cir .1997). Section 366(c)(3) uses language almost identical as that employed in § 366(b) in allowing courts to modify the amount of adequate assurance.[FN15] It follows that courts retain similar discretion even after the enactment of BAPCPA. Congress is presumed to be aware of the state of the law when it amends a statute, and the legislative decision to retain the almost identical language evidences Congressional intent to maintain the state of the law post-amendment. *See Lorillard v. Pons,* 434 U.S. 575, 580–581, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) ("So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

***5** Furthermore, the plain language of § 366 of the Bankruptcy Code allows the Court to adopt the Procedures set forth in the Utility Order. The statute does not prohibit a court from making a determination about the adequacy of an assurance payment until only after a payment "satisfactory to the utility" has been received from the debtor under § 366(c)(2). The first clause of § 366(c)(2) clearly renders the entire section subject to the court's authority outlined in § 366(c)(3).[FN16] *See* 11 U.S.C. § 366(c)(2); *see also* 3 *Collier on Bankruptcy* ¶ 366.03[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.2008) (stating § 366(c)(2) means that the debtor must "pay what the utility demands, unless the court orders otherwise.").[FN17]

Section 366(c)(3)(A) provides that "[o]n 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)." Assurance of payment is defined in § 366(c)(1), and upon a request for a hearing under § 366(c)(3)(A), the court must determine whether the assurance of payment is adequate, operating within the restrictions outlined in § 366(c)(3)(B). In sum, the court is authorized to modify the assurance of payment pursuant to § 366(c)(3)(A) after notice and a hearing, and a debtor is not required to first pay a demand that is unilaterally satisfactory to the utility company.

The Court set December 5, 2008, as the hearing date for all objections and disputes concerning the Interim Utility Order. The Court required utility companies to make a request for additional adequate assurance on or before five business days before the December 5, 2008 hearing. In the event that such a request was made, the Debtors were required to advise the requesting utility company three business days prior to the December 5, 2008 hearing whether the additional adequate assurance request was acceptable. If it was unacceptable, then the Debtors had the opportunity to contest such additional adequate assurance request under § 366(c)(3)(A) at the December 5, 2008 hearing.

Thus, under the Procedures, the Debtors have the opportunity to seek an order from the Court modifying any additional adequate assurance request without first having to satisfy the demands of the utility company and without facing the prospect of termination of utility services prior to a hearing on the additional adequate assurance request.

With regard to the Debtors' rights under the Code, these Procedures provide an orderly process to determine the amount of assurance of payment that is adequate under § 366 in order to prevent cutoff of utility service. Without such Procedures, the Debtors could be forced to address numerous requests by utility companies in an unorganized manner at a critical period in their efforts to reorganize. This will protect the Debtors and their stakeholders from an attempt by a utility company to delay a request until the last minute in an attempt to force the Debtors to agree to its request or face cessation of essential services. The orderly process contemplated by these Procedures is necessary for the Debtors' smooth transition into Chapter 11, and it will ensure that all parties act in good faith by establishing a fair process that has been reviewed by the Court.

***6** With regard to the utility companies' rights under the Code, these Procedures do not undermine the rights of the utility companies to receive adequate assurance of payment. Creation of the Blocked Account is the equivalent of a letter of credit, and as such it is an acceptable form of adequate protection as set forth in §§ 366(b) and (c)(1). The Utility Order provides that, notwithstanding the Court's determination on an interim basis that the adequate assurance proposed by the Debtors constitutes sufficient adequate assurance under § 366(b), utility companies may still request modification of such adequate assurance upon notice and a hearing, as permitted by § 366(b). Utility companies, including the Appealing Utilities, may also exercise their rights under § 366(c)(2), in accordance with the Procedures established by the Court.[FN18] Therefore, the rights of all parties are balanced through the imposition of these Procedures, which are a practical manifestation of the policy goal embodied in § 366.

This Court and other courts within this district have entered orders establishing similar procedures for the implementation of § 366 of the Bankruptcy Code in large Chapter 11 cases subsequent to the enactment of BAPCPA. *See, e.g., In re Movie Gallery, Inc., et al.,* Case No. 07–33849 (Bankr.E.D.Va. Nov. 17, 2007); *In re Storehouse, Inc.,* Case No. 06–11144 (Bankr.E.D.Va. Oct. 23, 2006); *In re Rowe Furniture, Inc.,* Case No. 06–11143 (Bankr.E.D.Va. Oct. 23, 2006); *In re The Rowe Cos.,* Case No. 06–11142 (Bankr.E.D.Va. Oct. 23, 2006).

The Court finds that the Debtors complied with § 366 of the Bankruptcy Code by proposing a means to provide an amount of adequate assurance in a motion filed at the start of the case. The Court concludes that it has the authority to enter a scheduling order setting forth an objection deadline and hearing date that allows for any dispute to be resolved prior to the 30–day deadline set forth in § 366(c)(2). As long as the Debtors provide the adequate assurance ordered by the Court by the thirtieth day, the Debtors will have complied with § 366 and the utility companies may not discontinue service. Under such circumstances it is appropriate for the Court to extend the injunction against disruption of utility service set forth in § 366(a) of the Bankruptcy Code beyond the thirtieth day after the Petition Date. *See In re Syroco, Inc.,* 374 B.R. 60 (Bankr.D.P.R.2007) ("A contrary interpretation would make it impossible for the [debtor] to satisfy Section 366 prior to the termination of the injunction period, when a utility company maintains silence."). The Procedures set forth in the Utility Order serve to streamline the reorganization process and do not adversely impair the rights of any utility company. The Utility Order is designed to avoid a haphazard and chaotic process whereby each utility could make extortionate, last-minute demands for adequate assurance which the Debtors would be

pressured to pay under the threat of losing critical utility service.

***7** Accordingly, the Court approved the Debtors' Motion, and entered the Corrected Order on December 9, 2008.

FN1. The Debtors are Circuit City Stores, Inc., Circuit City Stores West Coast, Inc., InterTAN, Inc., Ventoux International, Inc., Circuit City Purchasing Company, LLC, CC Aviation, LLC, CC Distribution Company of Virginia, Inc., Circuit City Properties, LLC, Kinzer Technology, LLC, Abbott Advertising Agency, Inc., Patapsco Designs, Inc., Sky Venture Corp., Prahs, Inc.(n/a), XSStuff, LLC, Mayland MN, LLC, Courchevel, LLC, Orbyx Electronics, LLC, and Circuit City Stores PR, LLC. The Court entered an order on November 10, 2008, granting the Debtors' motion for joint administration of these bankruptcy cases.

FN2. There is often a flurry of activity during the first days of a large, complex Chapter 11 bankruptcy case. Courts are called upon to consider motions of the debtor at the commencement of the case to aid in the organization and administration of the debtor's estate and to facilitate the smooth transition into Chapter 11.

FN3. At the November 10, 2008 hearing, the Court approved the Motion only on an interim basis to afford all parties in interest, including all utility companies, an opportunity to object after proper notice. *See* Fed. R. Bankr.P. 6003.

FN4. This date was selected because it afforded sufficient time (i) for service of the Interim Utility Order, (ii) for consideration of the relief requested therein and (iii) for filing of any objections thereto and was less than thirty days after the Petition Date.

FN5. The Court entered an administrative procedures order pursuant to one of the Debtors' first day motions that, among other things, established dates for upcoming hearings in the case to afford counsel, many of whom are out of state, the ability to schedule their appearances in the case.

FN6. As of the date of this Memorandum Opinion, neither the order including Accent Energy in the list of carve-outs nor an amended Exhibit A has been docketed. The most recent list of utilities covered by the Adequate Assurance Procedures was filed on December 10, 2008 [docket entry # 848].

FN7. Florida Power & Light Company, Potomac Electric Power Company, Delmarva Power & Light Company, Atlantic City Electric Company, Alabama Power Company, and Central Maine Power Company noticed their appeal of the Interim Utility Order on November 24, 2008 [docket entry # 355]. Next, Baltimore Gas & Electric noticed its appeal of the Interim Utility Order on December 5, 2008 [docket entry # 727]. Finally, on December 19, 2008, Florida Power & Light Company, Potomac Electric Power Company, Delmarva Power & Light Company, Atlantic City Electric Company, Central Maine Power Company, Alabama Power Company and Baltimore Gas & Electric Company noticed their appeal of the Corrected Utility Order [docket entry # 1129].

FN8. Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See* Fed. R. Bankr.P. 7052.

FN9. This amount is equal to the charges incurred by all of the Debtors for approximately two weeks of utility service from all of its utility companies.

FN10. The Debtors established the Blocked Account by permitting Bank of America to block their available borrowing in an amount equal to $5,000,000 and by segregating those funds in a separate account to be administered in accordance with the Utility Order. The Blocked Account will serve as a cash security deposit to provide adequate assurance of payment for utility services provided to the Debtors after the Petition Date. The Blocked Account may be drawn down by a utility company in a manner that is substantially similar to a letter of credit. In the event the Debtors fail to timely pay for postpetition utility services, a utility company is permitted to submit a payment request to Bank of America in the amount of the unpaid charges for the postpetition services rounded up to the nearest $100. Bank of America has no obligation to investigate the bona fides of the payment request. All rights as between the Debtors and the utility companies are reserved.

FN11. The procedures established in the Utility Order (collectively, the "Procedures") include initial procedures for a utility to request payment (the "Adequate Assurance Procedures"), and also procedures to resolve disputes regarding the Adequate Assurance Procedures (the "Additional Adequate Assurance Procedures").

FN12. The list of utility companies providing service to the Debtors that shall be bound by the Procedures spans 55 pages. *See* Am. Ex. A to the Utility Order [docket entry # 848].

FN13. In a Chapter 11 case filed after BAPCPA, 11 U.S.C. § 366(c)(1)(A) defines the term "assurance of payment" to include a cash deposit, a letter of credit, or "another form of security that is mutually agreed on between the utility and the debtor."

FN14. The Debtors maintain that the borrowings available under the postpetition credit facility approved by this Court pursuant to one of the Debtors' first day motions are sufficient adequate assurance of payment. However, in a Chapter 11 case, § 366(c)(1)(B) does not permit the Court to consider an administrative claim alone as adequate assurance of payment. When the administrative claim is considered in the context of (i) the Blocked Account, (ii) the Debtors' payment history and (iii) the immediate access these utility companies have to this Court for relief in the event of a default, it is clear that the assurance of payment the utility companies have been provided is adequate. Furthermore, the Appealing Utilities never objected to the amount or method of the assurance of payment they were offered by the Debtors. The Court notes that there were numerous objections filed and that each was resolved consensually.

FN15. Compare

> .... 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 of payment.
>
> § 366(b), with
>
> 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).
>
> § 366(c)(3)(A)

FN16. Section 366(c)(2) provides:

> 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.
>
> § 366(c)(2).

FN17. Further, § 105(d) provides that the Court may issue orders prescribing limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically.

FN18. Even after the deadline established by the Court in the Utility Order, utility companies will only be deemed to have received adequate assurance under Bankruptcy Code § 366(c)(2), which includes the 30–day deadline. Thus, this determination is subject to further review pursuant to the right of utility companies, or any party in interest, after notice and a hearing, to seek a modification of the proposed adequate assurance in accordance with Bankruptcy Code §§ 366(b) and 366(c)(3), as applicable.

Bkrtcy.E.D.Va.,2009.
In re Circuit City Stores, Inc.
Not Reported in B.R., 2009 WL 484553 (Bkrtcy.E.D.Va.), 61 Collier Bankr.Cas.2d 496

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