

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

In re:)	Chapter 11
)	
DAN RIVER INC., et al.)	Case Nos. 04-10990 through 04-10993
)	Jointly Administered
)	
Debtors.)	Judge Drake
<hr/>)	

**MOTION OF DEBTORS PURSUANT TO SECTIONS 105(a) AND
366 FOR ORDER DETERMINING THAT UTILITY COMPANIES
ARE ADEQUATELY ASSURED OF FUTURE PAYMENT**

Dan River Inc. and its debtor affiliates (the “Debtors”), pursuant to Sections 105(a) and 366 of the Bankruptcy Code, file this motion, respectfully showing the Court as follows:

Jurisdiction

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

Background to the Bankruptcy Case

2. On March 31, 2004 (the “Petition Date”), the Debtors filed voluntary petitions for relief under the Bankruptcy Code. The Debtors are authorized to operate their businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. The United States Trustee appointed an official committee of unsecured creditors on April 12, 2004.

The Utility Companies

3. In connection with the operation of their businesses, the Debtors obtain electricity, natural gas, telephone, water, communications and/or other similar services from various utility companies. Generally, the Debtors have an excellent payment history with respect

to their utility services and there are few, if any, defaults or arrearages with respect to their undisputed utility service invoices other than those caused by the commencement of these Chapter 11 cases.

4. The Debtors' businesses require that the utility services continue uninterrupted. Any interruption in such essential services will cause irreparable harm to the Debtors' ability to conduct their businesses in an orderly and efficient manner.

The Utility Order

5. On April 1, 2004, this Court entered its Order (A) Deeming Utilities Adequately Assured of Payment, (B) Prohibiting Utilities from Altering, Refusing, or Discontinuing Services, and (C) Establishing Procedures for Resolving Requests for Additional Assurance (the "Utility Order"). A copy of the Utility Order is attached as Exhibit "A."

6. Pursuant to the Utility Order, the Utility Companies, as defined therein, had until April 21, 2004 to make requests for additional adequate assurance. As of May 28, 2004, fifteen entities have submitted requests for additional assurance, including requests for post-petition deposits totaling approximately \$2.55 million (the "Deposit Demands"). A list of the Utility Companies subject to this motion (the "Requesting Utilities") and a summary of their corresponding Deposit Demands is attached as Exhibit "B."

Relief Requested

7. By this motion, the Debtors respectfully request that the Court determine the Requesting Utilities to be adequately assured of future payment pursuant to the following payment assurance measures (the "Payment Safeguards"):

- Any undisputed charge for utility services furnished by a Requesting Utility to the Debtors following the Petition Date shall constitute an administrative expense of the Debtors' Chapter 11 cases in accordance with Sections 503(b) and 507(a)(1) of the

Bankruptcy Code.

- In the event of a material adverse change to the Debtors' liquidity position, any Requesting Utility may request the Court find that it no longer has adequate assurance of payment for future services (and/or a finding that it would have such adequate assurance only if the Debtors provide a deposit or other security).
- With respect to the Requesting Utilities, notwithstanding any longer time authorized under the applicable tariffs, the Debtors' time to pay their monthly bills in respect of post-petition utility services will be fixed at the greater of (a) the number of days allowed under each such Requesting Utility's ordinary course billing cycle in effect prior to the Petition Date, with any disputes as to such cycle to be resolved by this Court, or (b) the last business day in the fourteen calendar days following receipt of the post-petition invoice by the Debtors.
- In the event of a post-petition payment default by the Debtors (*i.e.*, a failure by the Debtors to timely pay an undisputed utility bill in accordance with the preceding paragraph and any order of this Court), the Requesting Utility may fax a notice to the Debtors (with a copy to their counsel, James A. Pardo, Jr., King & Spalding LLP) demanding payment, and if the Debtors fail to make such payment within five business days of receipt of such notice, the Requesting Utility may move the Court, on an expedited basis, for leave to terminate utility services.

Section 366 of the Bankruptcy Code sets forth the statutory framework with respect to utility companies' providing utility services to debtors in possession. Under Section 366(b) of the Bankruptcy Code, this Court may determine the standards for adequate assurance of future payments for utility services. Bankruptcy courts have the exclusive responsibility for determining what constitutes adequate assurance for payment of post-petition utility charges and are not bound by local or state tariff regulations. See In re Adelphia Business Solutions, Inc., 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002). Determinations of adequate assurance under Section 366 of the Bankruptcy Code lie fully within the Court's discretion. See Marion Steel Co. v. Ohio Edison Co. (In re Marion Steel Co.), 35 B.R. 188, 195 (Bankr. N.D. Ohio 1983).

8. Significantly, “adequate assurance” under Section 366 is not synonymous with “adequate protection.” Adelphia, 280 B.R. at 80. In determining adequate assurance, the Court is not required to give the Requesting Utilities the equivalent of a guaranty of payment, but must only determine that the utility is not subject to an unreasonable risk of nonpayment for post-petition services. See In re Caldor, Inc.-N.Y., 199 B.R. 1 (S.D.N.Y. 1996), aff’d, 117 F.3d 646 (2d Cir. 1997) (refusing a deposit request made by Virginia Electric & Power Company, which operates in Virginia as Dominion Virginia Power—one of the Requesting Utilities in this case).

9. Whether a utility is subject to an unreasonable risk of nonpayment must be determined from the facts and circumstances of each case. Massachusetts Elec. Co. v. Keydata Corp. (In re Keydata Corp.), 12 B.R. 156 (B.A.P. 1st Cir. 1981). One bankruptcy court in this District has granted similar relief to that requested in this motion. In In re C.T. Harris, Inc., the Court found the debtor’s offer of current liquidity combined with its DIP financing agreement to be adequate assurance of payment. 295 B.R. 405, 406-07 (Bankr. M.D. Ga. 2003) (Hershner, C.J.). The court relied in part on the legislative history of Section 366, which provides: “If an estate is sufficiently liquid, the guarantee of an administrative expense priority may constitute adequate assurance of payment for future services. It will not be necessary to have a deposit in every case.” Id. (quoting HR Rep No. 595, 95th Cong, 1st Sess 350 (1977)); accord Virginia Elec. & Power Co. v. Caldor, Inc.-NY, 117 F.3d 646, 651-652 (2d Cir. 1997) (“[T]he bankruptcy court need not require some additional safeguard where it determines that safeguards otherwise available under the Code provide the ‘adequate assurance of payment,’ . . .”).

10. In determining the amount of “adequate assurance” that a debtor should provide to a utility company to ensure continued receipt of post-petition services, courts generally “focus upon the need of the utility for assurance, and to require that the debtor supply no more than that,

since the debtor almost perforce has a conflicting need to conserve scarce financial resources.”
Caldor, 117 F.3d at 650.

The Requested Relief Should Be Granted

11. For the reasons set forth herein, the Deposit Demands are unreasonable. The Requesting Utilities are adequately assured of payment for future utility services. Adequate assurance exists in these cases because of the Debtors’ excellent pre-petition payment history as well as their present and projected future administrative liquidity position. The Debtors have in place a \$145 million debtor-in-possession financing facility. Also, the Debtors’ financial projections indicate that they will maintain adequate administrative liquidity throughout 2004, and the Debtors anticipate they will be able to successfully emerge from Chapter 11 by the end of 2004 or early 2005. In light of the foregoing, the Debtors have more than sufficient funds with which to pay all undisputed post-petition utility charges and other administrative expenses.

12. From the testimony of Robert Del Genio and Barry Shea at this Court’s April 27, 2004 hearing on the Debtors’ DIP Motion, it appears that the Debtors have a sizeable equity cushion sufficient to allow their payment of all administrative claims.

13. Moreover, the Payment Safeguards proposed by the Debtors provide substantial adequate assurance of payment to the Requesting Utilities. Specifically, if the Debtors suffer any material adverse change in administrative liquidity, the Requesting Utilities may move the Court to require the Debtors to provide additional assurance in the form of a deposit or other security. Also, in the event the Debtors default in payment of a post-petition utility bill, the Payment Safeguards provide an expedited procedure to obtain a hearing before this Court for leave to terminate utility services.

14. Finally, requiring the posting of deposits would reduce the Debtors' liquidity and potentially force them to incur additional interest expense and trigger requests for additional utility deposits. As noted above, the aggregate Deposit Demands, to date, total approximately \$2.55 million. Other creditors and parties in interest in these cases should not bear the additional costs such deposits would impose on the estates to provide the Requesting Utilities with far greater protection than the Bankruptcy Code requires.

Notice

15. Notice of this motion has been provided to the Requesting Utilities and the parties listed on the Master Service List. In light of the nature of the relief requested, the Debtors submit that no further notice is necessary

Conclusion

For the foregoing reasons, the Debtors respectfully request that this Court enter an order under Bankruptcy Code Sections 105(a) and 366 deeming the Requesting Utilities to be adequately assured of payment and approving the Payment Safeguards as outlined in the motion.

This 28th day of May, 2004.

Respectfully submitted,

KING & SPALDING LLP

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ATTORNEYS FOR THE DEBTOR

EXHIBIT “B”

Name of Utility	Address	Request Deposit
American Electric Power (AEP)	c/o Russell R. Johnson III, Esq. 3434 Byfield Place Richmond, Virginia 23233	\$1,584,469
Columbia Gas of Virginia ¹	P.O. Box 35674 Richmond, Virginia 23235	\$347,203
Con Edison	Bankruptcy Department 4 Irving Place, Room 1875-S New York, New York 10003	\$13,695
Dominion Virginia Power	c/o Russell R. Johnson III, Esq. 3434 Byfield Place Richmond, Virginia 23233	\$224,041
Duke Power Co.	c/o Russell R. Johnson III, Esq. 3434 Byfield Place Richmond, Virginia 23233	\$103,376
Georgia Power Co.	c/o Mario D. Breedlove, Esq. 600 Peachtree Street, NE Suite 5200 Atlanta, Georgia 30308	\$21,390
Progress Energy Carolinas	c/o Russell R. Johnson III, Esq. 3434 Byfield Place Richmond, Virginia 23233	\$66,600
Public Service of North Carolina	c/o David B. Wheeler, Esq. P.O. Box 22828 Charleston, South Carolina 29413-2828	\$32,000
Sevier County Electric System	P.O. Box 4870 Sevierville, Tennessee 37864	\$150,000
Sevier County Utility District ²	P.O. Box 4398 Sevierville, Tennessee 37864-4398	\$2,000
South Carolina Electric & Gas Co.	c/o David B. Wheeler, Esq. P.O. Box 22828 Charleston, South Carolina 29413-2828	\$4,255
	Total	\$2,549,029

¹ Columbia Gas submitted a timely Request under the terms of the order, seeking a \$964 deposit. The Debtors received an additional request, dated April 30, 2004 but postmarked May 13, 2004, seeking \$346,239. The latter Request was neither served on Debtors’ counsel nor sent within twenty days of entry of the Utility Order.

² Sevier County Utility District did not submit a timely Request under the terms of the order. Dan River did not receive Sevier County Utility District’s Request until May 7, 2004.

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)	Jointly Administered
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Debtors.)	Judge Drake
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**ORDER PURSUANT TO SECTIONS 105(a) AND
366 DETERMINING THAT UTILITY COMPANIES
ARE ADEQUATELY ASSURED OF FUTURE PAYMENT**

This matter is before the Court on the Motion of Debtors Pursuant to Sections 105(a) and 366 for Order Determining that Utility Companies are Adequately Assured of Future Payment dated May 28, 2004 (the “Motion”).

The Court has considered the Motion and the matters reflected in the record of the hearing held on the Motion. It appears that the Court has jurisdiction over this proceeding; that this is a core proceeding; that notice of the Motion has been given to all parties on the Master Service List and to the Requesting Utilities; that no further notice is necessary; that the relief sought in the motion is in the best interests of the Debtors, their estates, and their creditors; and that good and sufficient cause exists for such relief.

Accordingly, it is hereby ORDERED as follows:

1. The Motion (document no. ____) is GRANTED.
2. Any and all objections to the Motion either were withdrawn or are hereby overruled.
3. Pursuant to Sections 503(b)(1)(A) and 507(a)(1) of the Bankruptcy Code, any undisputed or ultimately allowed charges for utility services furnished by a Utility Company to

the Debtors following the commencement of these Chapter 11 cases shall constitute an administrative expense of the Debtors' Chapter 11 cases.

4. For the reasons set forth on the record of the Hearing and the Motion and based on the totality of facts and circumstances as found therein, the Requesting Utilities are deemed to have adequate assurance of payment for future utility services in accordance with Section 366(b) of the Bankruptcy Code without the need for the posting of a deposit or other form of collateral security by the Debtors.

5. Pursuant to Sections 105(a) and 366(b) of the Bankruptcy Code, the Requesting Utilities may not require the payment of a deposit or other security absent a further order of this Court.

6. This Order is without prejudice to the right of any Requesting Utility to move the Court to find that it no longer has adequate assurance of payment for future services (and/or a finding that the Requesting Utility would have such adequate assurance only if the Debtors provide a deposit or other security) based on a material adverse change to the Debtors' liquidity position.

7. With respect to the Requesting Utilities, notwithstanding any longer time authorized under applicable tariffs, the Debtors' time to pay their monthly bills in respect of utility services will be fixed at the greater of (a) the number of days allowed under each such Requesting Utility's ordinary course billing cycle in effect prior to the Petition Date, with any disputes as to such cycle to be resolved by this Court, or (b) the last business day in the fourteen calendar days following receipt of the post-petition invoice by the Debtors.

8. In the event of a payment default by the Debtors to a Requesting Utility, the Requesting Utility may fax a notice to the Debtors, c/o Lee Goodrich, Dan River Inc., 2291

Memorial Drive, Danville, Virginia 24541 (fax number (434) 799-7276) (with a copy to the Debtors' counsel, James A. Pardo, Jr., King & Spalding LLP, 191 Peachtree Street, Atlanta, Georgia 30303, fax number (404) 572-5149), demanding payment, and if the Debtors fail to make such payment within five business days of the receipt of such notice, the Requesting Utility may move this Court, on an expedited basis, for leave to terminate utility services.

9. Nothing in this Order or the Motion shall be deemed to constitute the post-petition assumption or adoption of any agreement pursuant to Section 365 of the Bankruptcy Code.

10. Capitalized terms used in this Order without definition shall have the meanings ascribed to them in the Motion.

SO ORDERED.

At Newnan, Georgia this ____ day of June, 2004.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

Prepared and presented by:

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