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**
	)	

DEBTORS' RESPONSE TO MOTION TO VACATE, AND/OR RECONSIDER, AND/OR MODIFY, 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

Dan River Inc. and its debtor affiliates (the "Debtors") respond to the Motion to Vacate, and/or Reconsider, and/or Modify, 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 "Motion to Vacate") filed by American Electric Power, Dominion Virginia Power, Duke Power Company, and Progress Energy Carolinas (the "Utilities").

BACKGROUND

1. 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"). The pertinent terms of the Utility Order provide as follows:

- Absent any further order of this Court, utility companies providing services to the Debtors . . . (i) are deemed adequately assured of payment for post-petition services under Section 366 of the Bankruptcy Code; (ii) shall not alter, refuse, or discontinue service to, or discriminate against, the Debtors, solely on the basis of the commencement of these bankruptcy cases or on account of any unpaid invoice

for service provided prior to the Petition Date; and (iii) shall not require the payment of a deposit or other security in connection or draw down on an existing letter of credit with the Utility Company's continued provision of utility services, including but not limited to the furnishing of telephone, electric, gas, water, sewer, waste management, or services of like kind, to the Debtors.

- This Order is without prejudice to the rights of any Utility Company to make a written request (a "Request") to counsel for the debtors, for additional adequate assurance in the form of a deposit or other security from the Debtors, within twenty days of the date hereof (the "Request Deadline"), provided that any Request must set forth the location for which utility services are provided.

- If a Utility Company makes a timely Request that the Debtors believe is unreasonable, and no consensual resolution of the Request is reached within sixty days after the Debtors received such Request, the Debtors shall file a motion for determination of adequate assurance of payment ("Motion for Determination") with respect to such Request.

- [N]othing in this Order shall preclude a Utility Company from filing a motion with this Court at a subsequent time during the pendency of these cases pursuant to section 366(b) of the Bankruptcy Code seeking a deposit or security as adequate assurance of payment, or a reasonable modification of the amount of any deposit or security previously established, in the event of a material adverse change in the Debtors' financial condition, or should a Utility Company believe circumstances merit reconsideration of whether a deposit or security should be required or modified, or from seeking expedited treatment of such a motion.

Utility Order at ¶¶ 3, 5, 8, 10.

2. The Utilities made timely requests for additional assurance on April 13, 2004. Under the terms of the Utility Order, if no consensual resolution of the request is reached before June 12, 2004 (sixty days after April 13), the Debtors must file a motion for a determination of adequate assurance of payment, and this Court will then hear the dispute.

3. The Debtors have paid in a timely fashion for the post-petition utility services provided by the Utilities. The Debtors will continue to pay in a timely fashion for post-petition utility services throughout their bankruptcy cases.

4. Well within the sixty-day period in which the Debtors and the Utilities were to negotiate a resolution to the Utilities' request for additional assurance, the Utilities filed their

Motion to Vacate. They primarily rely on three arguments in support of their Motion to Vacate: (i) the Utility Order improperly prevents the Utilities from making claims on their pre-petition letters of credit, (ii) the Utility Order includes improper and unwarranted procedural requirements, and (iii) a deposit in the amount of nearly $2 million should be paid to the Utilities. Throughout their Motion to Vacate, the Utilities also complain of improper notice of the original first-day motion.[1] None of the Utilities' arguments is persuasive.

ARGUMENT

A. The Debtors Do Not Object to the Utilities' Making Claims Against Pre-Petition Letters of Credit.

5. The Utility Order does not prohibit the Utilities from making draws under pre-petition letters of credit in respect of amounts owed by the Debtors to the Utilities in respect of pre-petition utility service. Rather, the Utility Order only prohibits a utility company from "draw[ing] down on an existing letter of credit [in connection] with the [u]tility [c]ompany's continued provision of utility services." (emphasis added). Thus, the intent and terms of the Utility Order were only to prevent a utility holding an existing letter of credit from making draws under the letter of credit to obtain inappropriate and unnecessary post-petition deposits or security to the detriment of the Debtors, their estates, and their other creditors.

6. Regardless, the Debtors do not object to the Utilities' making draws under existing letters of credit to satisfy amounts owed by the Debtors for pre-petition services

[1] The Utilities contend that they "had no opportunity to respond to the Utility Motion, despite the fact that the Utilities were known entities." Motion to Vacate at ¶ 8. This, like the Utilities' other procedural arguments, is a red herring, as three of the four Utilities received facsimile notice on March 31, 2004, the day before the Court's April 1 hearing. See Certificate of Service (attached as Exhibit "A"). This clearly was notice "appropriate in the particular circumstances" of the case within the meaning of Section 102(1) of the Bankruptcy Code, as evidenced by the fact that other creditors and parties in interest who received similar notice of the April 1 hearing on the Debtors' various first-day motions appeared and participated actively at the hearing.

provided to them by the Utilities, and the Debtors would consent to such clarifying relief in any order entered by this Court.

B. The Procedural Requirements in the Utility Order are Customary, Sound, and Appropriate.

7. The Utilities also contend that the procedural requirements in the Utility Order are burdensome, onerous, and improper. The procedures outlined in the Utility Order are, however, customary in large Chapter 11 cases. Courts in this District have granted similar relief. See, e.g., In re Centennial HealthCare Corp., Case No. 02-74974 (Bankr. N.D. Ga. Jan. 9, 2003) (Massey, J.); In re The New Power Co., Case No. 02-10835 (Bankr. N.D. Ga. June 17, 2002) (Drake, J.); In re NetRail Inc., Case No. 01-69510 (Bankr. N.D. Ga. Aug. 1, 2001) (Bihary, J.). Further, bankruptcy courts in other major textile-industry cases have granted similar relief. See, e.g., In re Cone Mills Corp., Case No. 03-12944 (Bankr. D. Del. Oct. 10, 2003); In re WestPoint Stevens, Inc., Case No. 03-13532 (Bankr. S.D.N.Y. June 3, 2002); In re Burlington Indus., Inc., Case No. 01-11282 (Bankr. D. Del. Mar. 15, 2001).

8. Additionally, the Utility Order provides a logical, sound framework for orderly negotiations with utility providers. The Debtors have engaged in good-faith negotiations with the Utilities and other utility providers.[2] The Debtors have paid their post-petition utility bills on time, so they cannot be accused of delay for the sake of avoiding post-petition payments. The May 3, 2004 letter the Debtors sent to the Utilities, which the Utilities describe as evidence that the Debtors "were not interested in providing the Utilities with meaningful adequate assurance of payment," was actually an offer of compromise. The Utilities' acceptance of that offer would

[2] Besides the Utilities, the Debtors engaged in good-faith negotiations with several other utility providers. On May 19, 2004, SCANA Energy Marketing Inc. and the Debtors filed a stipulation in this case that resolved on mutually agreed upon terms SCANA's request to adequate assurance. The Debtors also have reached agreement with Bentonville City Utilities, Cooke County Electric, SBC California, and Taas, within the terms of the Court's original

have alleviated many of their current objections. This could not have been accomplished outside the framework of the Utility Order.

9. The Utilities characterize the Court's process as "burdensome and prejudicial," motivated by "the sole purpose of delaying, or even precluding, a Court determination of adequate assurance." Motion to Vacate at ¶ 41. To the contrary, the Utility Order specifically states:

> [N]othing in this Order shall preclude a Utility Company from filing a motion with this Court at a subsequent time during the pendency of these cases pursuant to section 366(b) of the Bankruptcy Code seeking a deposit or security as adequate assurance of payment, or a reasonable modification of the amount of any deposit or security previously established, in the event of a material adverse change in the Debtors' financial condition, or should a Utility Company believe circumstances merit reconsideration of whether a deposit or security should be required or modified . . . .

Utility Order at 3-4. Not only does that language resolve the Utilities' specific objection that the Utility Order "is contrary to the clear dictates of the last sentence of Section 366, the purpose of which is to allow the Court to revisit the issue of adequate assurance at any time during the bankruptcy case as the Debtors' financial situation may change," Motion to Vacate at ¶ 39, but it also addresses more broadly all of the Utilities' procedural concerns, because under the Utility Order, utility providers are always permitted to make requests for additional assurance if and when circumstances change.

Utility Order. In addition, the Debtors have open offers to other utility providers. Any allegation that the Debtors did not intend to negotiate in good faith or that they intended to delay or hinder the process is baseless.

C. Deposits in these Cases are Unnecessary.

10. In their Motion to Vacate, the Utilities request nearly $2,000,000.00 in deposits. Those deposits are wildly out of line for a case in which there exists a $145 million DIP facility and a sizeable excess collateral value over and above the indebtedness owed to the Debtors' pre-petition secured lenders.

11. A deposit is not required in every bankruptcy case. According to the legislative history of Section 366, "[i]f 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." H.R. Rep. No. 95-595 at 350 (1977). Here, there can be little doubt that the Debtors are administratively solvent by a wide margin. Based on the testimony of Robert Del Genio and Barry Shea at this Court's April 27, 2004 hearing on the Debtors' motion for approval of an interim post-petition credit facility, it is clear that the Debtors have an equity cushion sufficient to allow their payment of all administrative claims. It is equally clear that charges by the Utilities, to the extent unpaid, would receive administrative priority status under Section 507(a)(1) of the Bankruptcy Code. The Utilities' fears of exposure are exaggerated, as they must be to justify an exaggerated deposit request.

12. In their Motion to Vacate, the Utilities take issue with the Debtors' reliance on DIP financing for post-petition operations; they assume that if DIP financing fell through, the Utilities would not be paid. Motion to Vacate at ¶¶ 49-52. What the Utilities overlook, however, is that the administrative priority status to which any unpaid claims for utility services would be entitled, and the Debtors' sizeable equity cushion discussed above, would combine, even in the absence of the DIP financing, to adequately assure the Utilities of payment.

Conclusion

For the foregoing reasons, the Debtors respectfully request that this Court deny the Utilities' Motion to Vacate.

This 28th day of May, 2004.

Respectfully submitted,

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