

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
Fleming Companies, Inc., <i>et al.</i> ,)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
)	Objection Deadline: April 14, 2003
)	Hearing Date: April 21, 2003

**OBJECTION OF ALABAMA POWER COMPANY TO (I) BRIDGE ORDER
PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE EXTENDING
PROHIBITION ON UTILITIES FROM ALTERING, REFUSING OR DISCONTINUING
SERVICE TO THE DEBTORS AND (II) PROPOSED FINAL ORDER (A)
PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING OR
DISCONTINUING SERVICES, (B) DEEMING UTILITIES ADEQUATELY ASSURED
OF PAYMENT FOR POSTPETITION SERVICES AND (C) ESTABLISHING
PROCEDURES FOR ADDITIONAL ASSURANCES PURSUANT TO SECTIONS 105
AND 366 OF THE BANKRUPTCY CODE AND REQUEST FOR ADEQUATE
ASSURANCE OF PAYMENT**

Alabama Power Company (“APCO”) hereby objects to the Bridge Order Pursuant to Section 366 of the Bankruptcy Code Extending Prohibition on Utilities From Altering, Refusing or Discontinuing Service to the Debtors (the “Bridge Order”) entered on April 3, 2003 and also to the proposed Final Order (A) Prohibiting Utility Companies From Altering, Refusing, or Discontinuing Services, (B) Deeming Utilities Adequately Assured of Payment for Postpetition Services and (C) Establishing Procedures for Determining Requests for Additional Assurances Pursuant to Sections 105 and 366 of the Bankruptcy Code (the “Final Order”). In addition, APCO requests that Fleming Companies, Inc., and/or the jointly administered debtors (collectively, the “Debtors”), be required to deliver to APCO the adequate assurance of payment described herein. In support of its objection and the request set forth herein, APCO states the following:

I.

BACKGROUND

1. APCO is a utility that provides electric service to the Debtors at various locations in the State of Alabama pursuant to six separate Contracts for Electric Power (the “Contracts”), each of which is more fully described in Exhibit “A” hereto. Additionally, APCO provides electric service to the Debtors at various locations in the State of Alabama through accounts which are not governed by electric service contracts. Exhibit “B” hereto lists the non-contract locations. As of April 1, 2003 (the “Petition Date”), the Debtors owed APCO approximately Two Hundred Eighteen Thousand Nine Hundred Forty-Seven and 26/100 Dollars (\$218,947.26) for electric service delivered by APCO to the Debtors through such date.¹ Each of the Contracts are for initial terms of varying lengths and may thereafter be terminated upon providing advance written notice of termination to the other party. The term of each Contract is set forth in Exhibit “A”. The Contracts are executory contracts for purposes of Section 365 of the Bankruptcy Code and, as of the date of this objection, the Debtors have neither assumed nor rejected the Contracts.

2. On April 3, 2003, and without prior notice and opportunity for hearing to APCO, the Court entered the Bridge Order in response to the Motion of Debtors for Order (A) Prohibiting Utility Companies from Altering, Refusing or Discontinuing Services, (B) Deeming Utilities Adequately Assured of Payment for Post Petition Services and (C) Establishing

¹ The amounts owed by the Debtors to APCO as of the Petition Date can only be estimated since the meters for each location of the Debtors as of the Petition Date were not read on that date. The estimated amounts referred to herein are based on unpaid accounts receivable as of the Petition Date and an estimate of the charges for consumed but unbilled electric service as of the Petition Date.

Procedures for Determining Requests for Additional Assurances Pursuant to Sections 105 and 366 of the Bankruptcy Code (the “Utility Motion”).

3. The Bridge Order provides, among other things, that pending the entry of a final order on the Utility Motion, utilities are forbidden to discontinue, alter or refuse services to the Debtors on account of any unpaid prepetition charges, or to discriminate against the Debtors, or to require payment of a deposit or receipt of other security for continued service as a result of the Debtors’ bankruptcy filing or any outstanding prepetition invoices in connection with any unpaid charges for utility services.

4. The proposed Final Order provides, among other things, that: (i) all utilities providing services to the Debtors are deemed to be adequately assured of payment for future services based exclusively upon the liquidity of the Debtors’ estates, the Debtors’ perceived ability to pay for postpetition utility service and the entitlement to an administrative expense priority; (ii) utilities may not alter, refuse or discontinue service to the Debtors or discriminate against the Debtors due to the commencement of these bankruptcy cases or any unpaid prepetition debt; (iii) utilities must affirmatively request additional assurance of payment within a short period of time in order to assert the rights granted to them in Section 366; (iv) if a utility and the Debtors are unable to agree upon additional assurance of payment, the Debtors will “promptly schedule a hearing”; and (v) utilities are prohibited from exercising their lawful recoupment rights as to prepetition deposits, bonds, letters of credit or other assurances of payment provided by the Debtors unless so ordered by this Court (despite the fact that this relief is not specifically requested in the Utility Motion).

5. The Utility Motion, the resulting Bridge Order and the proposed Final Order are examples of the ever-increasing practice of debtors-in-possession to use *ex parte* proceedings and accelerated deadlines to (a) evade the requirements of 11 U.S.C. § 366 (“Section 366”), (b) compel utilities to initiate extraordinary proceedings, incur inappropriate expenses and wait for an indeterminable period of time to avail themselves of the rights that are affirmatively granted to utilities by Section 366, and (c) unilaterally enjoin the legitimate business practices of utilities without complying with applicable legal standards or affording utilities appropriate notice or opportunity for hearing. Such practices deprive utilities of their statutory rights, often before they are even aware of the filing of the bankruptcy case. Moreover, such proceedings eliminate the need for debtors-in-possession to promptly negotiate in good faith with utilities concerning adequate assurance of payment, and replace it with a procedure in which a debtor is allowed, for all practical purposes, to unilaterally decide if a utility’s request for assurance of post-petition payments is reasonable. These practices result in delays and expenses to utilities that are contrary to the plain meaning of Section 366 and Congress’s purpose in enacting that statute.

II.

THE ADEQUATE ASSURANCE OF PAYMENT PROPOSED BY THE DEBTORS DOES NOT MEET THE EXPRESS REQUIREMENTS OF SECTION 366

6. Section 366 provides as follows:

(a) Except as provided in subsection (b) 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.

(b) 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.

7. A determination of adequate assurance is within the Court's discretion, and is made on a case-by-case basis. In re Utica Floor Maintenance, Inc., 25 B.R. 1010, 1016 (Bankr. N.D.N.Y. 1982); In re Cunha, 1 B.R. 330, 332-33 (Bankr. E.D. Va. 1979).

8. Section 366 was enacted to balance a debtor's need for utility services from a provider that holds a monopoly on such services, with the need of the utility to ensure for itself and its rate payers that it receives payment for providing these essential services. See In re Hanratty, 907 F.2d 1418, 1424 (3d Cir. 1990).

9. The deposit or other security required of a debtor by Section 366 "should bear a reasonable relationship to expected or anticipated utility consumption by a debtor." In re Coastal Dry Dock & Repair Corp. 62, B.R. 879, 883 (Bankr. E.D.N.Y. 1986). In making such a determination, it is appropriate for the court to consider "the length of time necessary for the utility to effect termination once one billing cycle is missed." In re Begley, 760 F.2d 46, 49 (3d Cir. 1985).

10. APCO's practice is to read the service meters of its customers on a monthly basis. On the date that a meter is read, APCO has already delivered approximately thirty (30) days of electric service for which no payment has been received (*Day 30*). As a general rule,

approximately two to three days after a meter is read, APCO issues a bill to its customer (*Day 33*). Payment of the bill is due upon receipt (*Day 35*), but is not delinquent until ten (10) days after receipt (*Day 45*). Once a bill is delinquent, APCO is required by Rule 10 of the Alabama Public Service Commission to send a written notice of termination to the delinquent customer. APCO cannot terminate service until the expiration of five (5) days after delivery of the termination notice to a United States Post Office for postal delivery to the delinquent customer (*at the earliest, Day 51*). Additional time invariably passes before service is actually terminated. Therefore, APCO customarily provides businesses such as the Debtors with more than fifty-one (51) days of utility service at a particular location before it can terminate electric service. This very substantial risk has resulted in formal recognition by the Alabama Public Service Commission in General Rule 8 that a deposit equal to two (2) months average electric service is reasonable and appropriate.

11. No effort is made by the Debtors in the Utility Motion to examine the circumstances and requirements of the various utilities, including factors such as billing cycles, termination procedures, regulatory requirements that have a significant influence on the risk that is assumed (involuntarily) by utilities, and the protections afforded to the Debtors under non-bankruptcy law. Indeed, the significant risks that are imposed upon utilities in this case are totally ignored in the Utility Motion, the Bridge Order and the Final Order in favor of sweeping accommodations for the Debtors that are blatantly inconsistent with Section 366.

12. In this case, APCO is requesting a cash deposit of Five Hundred Ten Thousand Nine Hundred Ninety-Four and 94/100 Dollars (\$510,994.94) as adequate assurance of future

payment by the Debtors. This deposit is equal to approximately two times the average monthly billings by APCO to the Debtors during the twelve month period prior to the Petition Date. Such a deposit is consistent with the anticipated electricity consumption by the Debtors and the minimum period of time that the Debtors could receive service from APCO before service could be terminated for non-payment of bills.

13. Utilities are inherently at risk since they are statutorily compelled by Section 366 to continue post-petition service to a debtor in possession for a minimum period of twenty days after the commencement of a case on an around-the-clock basis and their invoices are customarily payable only after the service has been delivered and irreversibly consumed by the debtor. No other creditor in a bankruptcy case is compelled to take such a risk. Typical trade creditors can avail themselves of significantly greater protections such as payment in advance, C.O.D. and refusal to make any further sales until prior invoices are paid in full. Due to the manner in which debtors utilize and pay for utility services, only through a cash deposit or surety bond equal to a utilities' maximum postpetition exposure is a utility adequately assured of payment. Such assurance is both the purpose and goal of Section 366.

14. The deposit requested by APCO is the deposit it would require from other customers with questionable or unknown credit. The deposit amount requested by APCO is also within the range that has been approved by case law. See Matter of Houdashell, 7 B.R. 901, 903 (Bankr. W.D. Mo. 1981) (deposit equal to twice customer's highest monthly electric and natural gas service bill approved); In re Stagecoach Enterprises, Inc., 1 B.R. 732 (Bankr. M.D. Fla. 1979) (deposit equal to amount charged for two natural gas utility billing periods approved). See

also Lloyd v. Champaign Telephone Co., 52 B.R. 653, 656-57 (Bankr. S.D. Ohio 1985) (deposit equal to 2.3 times average monthly telephone billing approved); In re Smith, Richardson & Conroy, 50 B.R. 5, 5-6 (Bankr S.D. Fla. 1985) (deposit equal to three months' approximated electric usage approved).

15. Neither the Bridge Order nor the Final Order provides utilities with the “deposit or other security” expressly required by Section 366. No provision is made for utilities in either order that even remotely equates to “security” for the payment of future obligations by the Debtor. In the context of a utility-customer relationship, the ordinary or common meaning of “other security” means prepayment of bills, shortened payment deadlines, letters of credit, surety bond or similar device and means more than the mere promise to pay an administrative expense claim. See In re Best Products Co., 203 B.R. 51, 56 (Bankr. E.D. Va. 1996). Although the Debtors assert that the proposed treatment of postpetition utility charges as administrative expenses equates to adequate assurance, these charges would be entitled to administrative expense priority regardless of the entry of the Final Order. In re Continental Airlines, Inc., 146 B.R. 520, 526 (Bankr. D. Del. 1992).

16. Based upon the foregoing, a cash deposit of Five Hundred Ten Thousand Nine Hundred Ninety-Four and 94/100 Dollars (\$510,994.94) for APCO, which is equal to approximately two (2) months average electric service, is a fair and reasonable request and is consistent with both the express provisions and the intent of Section 366. Moreover, the Final Order should clearly state that utilities are entitled to exercise all remedies available to them

without further leave of the Court, including termination of service, in the event that the Debtors default on their postpetition payment obligations.

III.

THE COURT SHOULD NOT ENTER THE PROPOSED FINAL ORDER BECAUSE IT IS CONTRARY TO SECTION 366 AND UNNECESSARILY DELAYS A DETERMINATION OF ADEQUATE ASSURANCE

17. As described above, Section 366 establishes a procedure whereby a debtor is to provide a utility with “adequate assurance of payment, in the form of a deposit or other security” within the first 20 days of the bankruptcy case. If a debtor fails to timely provide the utility with adequate assurance of payment, the utility may alter, refuse or discontinue service to the debtor. If either party is dissatisfied with the deposit or security that is serving as adequate assurance, it may move the bankruptcy court, upon notice and hearing, to modify the amount.

18. Pursuant to the proposed Final Order, the Debtors are requesting that the Court conduct a hearing on adequate assurance only after (a) the Final Order is entered, (b) the Debtors and the utility disagree on the form and amount of adequate assurance, (c) the Debtors request the court schedule a hearing at an undeterminable time; (d) the Court conducts the hearing and (e) the Court issues its ruling on the amount of adequate assurance requested by the utility.

19. The foregoing procedure is a gross distortion of the procedure contemplated and prescribed by Section 366 and therefore, the Court should not enter or otherwise approve the proposed Final Order.

IV.

UTILITIES ARE ENTITLED TO EXERCISE THEIR RIGHTS OF RECOUPMENT WITHOUT LEAVE OF COURT

20. Although not specifically requested or even addressed in the Utility Motion, the Final Order provides that “any deposits, bonds, letters of credit or other assurances of payment that were in place prior to the Petition Date shall remain in place and shall continue to be held by those Utility Companies holding same, except upon entry of further order of this Court.” By this language, the Debtors seek not only to erode Section 366, but they are also attempting to selectively expand the scope and effect of 11 U.S.C. § 362 (“Section 362”) to utilities.

21. The postpetition application of a prepetition deposit to prepetition electric service debt constitutes recoupment and is not subject to the stay prescribed by Section 362. In re McMahon, 129 F.3d 93, 96 (2d Cir. 1997). Therefore, absent the extraordinary injunctive relief proposed in the Final Order, utilities may apply prepetition deposits maintained on the Debtors’ accounts against any unpaid prepetition utility charges incurred by the Debtor.

22. Section 366 provides no reasonable support for an argument that the recoupment rights of a utility can be diminished. While Section 105 provides a bankruptcy court with expansive authority to carry out the provisions of the Bankruptcy Code, the Debtors have not produced any evidence or cited any provision of the Bankruptcy Code to support its request for this injunctive relief. Such injunctive relief is contrary to the clear requirements of Section 366(b). One of the basic maxims of equity is that “[a] court will not act in a manner contrary to a statutory provision dealing with the precise issue.” Timken Company v. U.S., 37 F.3d 1470,

1477 (Fed. Cir. 1994). Although a bankruptcy court is a court of equity, it must nevertheless follow the law. Solomon v. Gerstel, 207 F.2d 601, 602 (5th Cir. 1953).

23. The Debtors have also failed to comply with appropriate procedural requirements for obtaining the injunctive relief proposed by the Final Order. The United States Court of Appeals for the Third Circuit has repeatedly held that a litigant is not entitled to injunctive relief unless it proves each of the following elements:

- (1) a substantial likelihood of success on the merits,
- (2) a substantial threat of irreparable injury if the injunction were not granted,
- (3) that the threatened injury to the plaintiff outweighs the harm an injunction may cause the defendant, and
- (4) that granting the injunction would not disserve the public interest.

ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1477 n. 2-3 (3d Cir. 1996). These standards and the burdens placed upon a party requesting injunctive relief have not been satisfied by the Debtors in this case. Moreover, Rule 7001 of the Federal Rules of Bankruptcy Procedure requires a proceeding to obtain an injunction or other equitable relief (except as provided in a confirmed plan) to be an adversary proceeding. No such action has been commenced by the Debtors. Finally, the regulatory procedures described in paragraph 10 above provide significant safeguards which must be observed by APCO before service can be terminated, thus making injunctive relief unnecessary.

WHEREFORE, APCO requests (i) relief from the Bridge Order, (ii) the entry of a final order that is consistent with the issues and objections raised herein; (iii) an order requiring the Debtors to pay a deposit in the amount of Five Hundred Ten Thousand Nine Hundred Ninety-

Four and 94/100 Dollars (\$510,994.94) to APCO and (iv) granting to APCO such other and further relief as is appropriate.

Dated: April 14, 2003

/s/ W. Clark Watson

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EXHIBIT "A"

CONTRACTS FOR ELECTRIC POWER

<u>Contract Date</u>	<u>Premises Served</u>	<u>Applicable Rate Schedule</u>	<u>Term</u>
05/21/1997	1015 W Magnolia Street Geneva, Alabama	LPM	5 years (rolling)
03/28/1996	1015 W Magnolia Street Geneva, Alabama	LPM	5 years (rolling)
03/03/1997	Highway 52 Geneva, Alabama	LPTL	5 years (rolling)
03/03/1997	1015 W Magnolia Street Geneva, Alabama	LPM	5 years (rolling)
03/03/1997	1015 W Magnolia Street Geneva, Alabama	LPEM	5 years (rolling)
03/28/1996	1015 W Magnolia Street Geneva, Alabama	LPM	5 years (rolling)

EXHIBIT “B”**NON-CONTRACT ACCOUNTS FOR ELECTRIC POWER**

Customer Name	Account Number	Service Location
Piggly Wiggly	00803-44001	110 County Road 31 Ashland, Alabama
Piggly Wiggly	05343-91001	205 Conecuh Avenue E Union Springs, Alabama
Piggly Wiggly	15185-21000	161 Old Hwy. 134 Daleville, Alabama
Piggly Wiggly	15025-21014	161 Old Hwy. 134 (sign) Daleville, Alabama
Piggly Wiggly	17325-13004	134 Eufaula Avenue Clayton, Alabama
Piggly Wiggly	17634-45004	115 Main Street (warehouse) Greensboro, Alabama
Piggly Wiggly	17644-45004	115 Main Street Greensboro, Alabama
Piggly Wiggly	18012-60007	6842 Old Springville Road Clay, Alabama
Piggly Wiggly	18222-60007	6842 Old Springville Road (unit light) Pinson, Alabama
Piggly Wiggly	26603-46003	132 LaFayette Street E Dadeville, Alabama
Piggly Wiggly	08492-14088	212 LaFayette Street E Dadeville, Alabama
Piggly Wiggly	28171-91004	219 LaFayette Street E Dadeville, Alabama
Piggly Wiggly	08134-06012	224 LaFayette Street E Dadeville, Alabama
Piggly Wiggly	27254-65003	1026 S Alabama Avenue Monroeville, Alabama
Piggly Wiggly	28694-44004	RR1 Box Haleyville, Alabama
Piggly Wiggly	30283-08002	800 Ross Street N Heflin, Alabama
Piggly Wiggly	30764-68008	300 W Pushmataha Street Butler, Alabama
Piggly Wiggly	35962-22000	2612 30th Avenue N Birmingham, Alabama
Piggly Wiggly	34854-63011	241 1st Street NW Vernon, Alabama
Piggly Wiggly	00644-45012	2421 US Highway 43 Winfield, Alabama

Customer Name	Account Number	Service Location
Piggly Wiggly	12134-42017	5636 Hwy. 278 Sulligent, Alabama
Piggly Wiggly	36232-68014	7245 Highway 160 (other) Hayden, Alabama
Piggly Wiggly	36022-68005	7245 Highway 160 Hayden, Alabama
Piggly Wiggly	37062-24001	3000 Independence Drive Birmingham, Alabama
Piggly Wiggly	38764-42002	Highway 13 Phil Campbell, Alabama
Piggly Wiggly	48454-40006	Highway 82 Gordo, Alabama
Piggly Wiggly	50363-83002	24716 Highway 31 Jemison, Alabama
Piggly Wiggly	51593-43008	88385 Highway 9 Lineville, Alabama
Piggly Wiggly	52394-36004	34909 Highway 43 Hackleburg, Alabama
Piggly Wiggly	53483-43005	Highway 9 Lineville, Alabama
Piggly Wiggly	57815-25003	302 Main Street Headland, Alabama
Piggly Wiggly	59522-20088	93 Euclid Avenue Birmingham, Alabama
Piggly Wiggly	59752-67089	820 1st Avenue SE Leeds, Alabama
Piggly Wiggly	60572-30007	2400 J Terrell Wooten Drive Bessemer, Alabama
Piggly Wiggly	61154-34007	101 Memorial Parkway E Aliceville, Alabama
Piggly Wiggly	37659-43005	101 Memorial Parkway E (temp) Aliceville, Alabama
Piggly Wiggly	61412-30002	2410 J Terrell Wooten Drive Bessemer, Alabama
Piggly Wiggly	61832-30002	2410 J Terrell Wooten Drive Bessemer, Alabama
Piggly Wiggly	64494-40006	1009 19th Street Haleyville, Alabama
Piggly Wiggly	65222-67005	415 Caldwell Drive Warrior, Alabama
Fleming Co., Inc.	00038-49205	1015 W Magnolia Avenue Geneva, Alabama
Fleming Co., Inc.	00038-49071	1015 W Magnolia Avenue Geneva, Alabama

Customer Name	Account Number	Service Location
Fleming Foods of Alabama	77914-37009	Highway 80 Demopolis, Alabama
Fleming Foods of Alabama	38118-09009	Highway 80 Demopolis, Alabama
Fleming Co., Inc.	16375-28003	1015 W Magnolia Avenue Geneva, Alabama
FSI, Inc.	00843-86005	Madison Avenue Montgomery, Alabama
Rainbow Foods	97645-17007	Highway 431 Phenix City, Alabama
Rainbow Foods	97905-17000	Highway 431 Phenix City, Alabama