

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF KANSAS**

<b>IN RE:</b>	)	<b>Case No. 16-21142-11</b>
	)	
<b>JOHN Q. HAMMONS FALL 2006, LLC, et al.,</b>	)	<b>Jointly Administered</b>
	)	
<b>Debtors.</b>	)	
_____	)	

**MOTION FOR (A) RELIEF FROM ORDER APPROVING DEBTORS' METHOD OF  
FURNISHING ADEQUATE ASSURANCE OF PAYMENT FOR POST-PETITION  
UTILITY SERVICES AND (B) ADEQUATE ASSURANCE OF PAYMENT**

South Carolina Electric & Gas Company ("SCE&G") and Public Service Company of North Carolina ("PSNC") and together with SCE&G, the "SCANA Utilities") hereby move, pursuant to Fed. R. Bankr. P. 9024, (A) for relief from this *Court's Order Approving Debtors' Method of Furnishing Adequate Assurance of Payment For Post-Petition Utility Services* (the "Utilities Order") (Docket No. 46) and (B) for an order determining adequate assurance of payment to the SCANA Utilities pursuant to 11 U.S.C. § 366(c). The SCANA Utilities also join in the similar motions recently filed by (1) American Electric Power, Oklahoma Gas and Electric Company, Salt River Project, Virginia Electric and Power Company d/b/a Dominion Virginia Power, and Westar Energy, Inc. (collectively, the "Additional Utilities") (Docket No. 98) and (2) Denton County Electric Cooperative, Inc. d/b/a CoServ Electric and CoServ Gas, Ltd., d/b/a CoServ Gas (the "CoServ Utilities") (Docket No. 142). In support of their Motion, the SCANA Utilities state as follows:

**BACKGROUND**

1. The SCANA Utilities are public utility providers of electric and natural gas service in South Carolina (SCE&G) and North Carolina (PSNC). SCE&G provided prepetition electric and natural gas service to Debtor Hammons of SC LLC, and PSNC provided prepetition natural gas service to Debtor John Q. Hammons Hotel Management LLC. Neither of the SCANA

Utilities held prepetition deposits, letters of credit, or other security for the Debtors' prepetition accounts.

2. As public utilities, SCE&G and PSNC are governed by the regulations of the South Carolina Public Service Commission ("PSC") and North Carolina Utilities Commission ("UC"), respectively.

3. On June 26, 2016, the Debtors filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code").<sup>1</sup>

4. On the same date, the Debtors filed their *Motion For Order Approving Debtors' Method of Furnishing Adequate Assurances Of Payment For Post-Petition Utility Services* (the "Utilities Motion") (Docket No. 11), in which the Debtors sought to impose adequate assurance and other terms on the SCANA Utilities and other providers of utility service (as defined in the Utilities Order, the "Utility Providers"). The Debtors did not attempt to consult with the SCANA Utilities prior to the filing of the Utilities Motion.

5. Later that day, the Debtors filed a *Notice Of Expedited Hearing On Certain First Day Motions* (the "Notice") (Docket No. 22), which provided, among other things, notice that a hearing on the Utilities Motion would be held on June 28, 2016 at 10:30 a.m.

6. According to a *Certificate of Service* (Docket No. 55) subsequently filed by the Debtors, the Utilities Motion and Notice were served on the SCANA Utilities on June 27, 2016 as follows:

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<sup>1</sup> Subsequent references to the Bankruptcy Code are by section number only.

<b>Name and Address of Served Party</b>	<b>Mode of Service</b>
PSNC ENERGY, 80-617-0594	Fax
SCE&G, <u>SMALLCOMMERCIALGROUP@SCANA.COM</u>	E-mail
SCE&G, 803-933-8045	Fax

7. Notwithstanding the allegations contained in the Certificate of Service, no employee of the SCANA Utilities saw either the Utilities Motion or the Notice until June 28, the day of the hearing on the Utilities Motion, following receipt of the Utilities Motion at a customer service contact center. As such, no officer, managing or general agent, or any other agent authorized by appointment or by law received the Utilities Motion or Notice prior to June 28.

8. Moreover, given that there was, at most, only one (1) day between service of the Utilities Motion and Notice as set forth in the Certificate of Service and the hearing on the Utilities Motion—held nearly 1,000 miles away from the SCANA Utilities’ headquarters near Columbia, South Carolina—the SCANA Utilities, neither of which retains regular counsel in this District, had no meaningful opportunity to respond to the Utilities Motion or otherwise participate in the hearing on the Utilities Motion. Upon information and belief, no other utility providers were able to appear at the hearing, either.

9. The Utilities Order was entered on June 29, 2016, and provides, among other things:

- That Utility Providers are prohibited from unilaterally altering, refusing or discontinuing service as long as the Debtors are in compliance with the procedures set forth therein, subject to subsequent modification after notice and hearing;
- That Utility Providers shall have an administrative claim for any unpaid post-petition services, payable upon confirmation of a plan or at an earlier date as provided by the Court;

- For the Debtors to create and fund a \$805,968.44 segregated, interest-bearing account (as defined in the Utilities Order, the “Adequate Assurance Deposit Account”), which amount equals the estimated aggregate cost of two weeks of utility service, calculated as a historical average of the Debtors’ usage over the past twelve (12) months;
- That Utility Providers are prohibited from imposing a “cross default” should the Debtors default on one of multiple post-petition accounts with any Utility Provider; and
- That the Adequate Assurance Deposit, along with the Debtors’ intention to pay post-petition utility expenses, constitutes sufficient adequate assurance.

10. The Utilities Order is silent as the mechanism by which a Utility Provider could access the Adequate Assurance Deposit Account in the event the Debtors default on their post-petition utility obligations.

11. While orders similar to the Utilities Order in other large chapter 11 cases are often entered following expedited, first-day motions on an *interim* basis, the Utilities Order is notable in that it appears to be a *final* order.

12. The adequate assurance proposed in the Utilities Motion is not acceptable to the SCANA Utilities and ignores the realities of the SCANA Utilities billing practices, which are subject to regulation of the PSC and UC.

13. Under the regulations propagated by the PSC and UC, the SCANA Utilities provide utility services for approximately thirty days before issuing an invoice requesting payment for these services. Payment is due approximately one month after issuance.

14. SCE&G must then provide at least ten days’ notice subsequent to the prior month’s delinquency before it terminates electrical or gas services for nonpayment. *See* S.C. Reg. 103-352 (electrical service); S.C. Reg. 103-452 (gas service). Similarly, PSNC must provide at least five days’ notice before it terminates gas services for nonpayment. During this time, the SCANA Utilities continue to provide utility services for a new thirty-day period. As a

result, by the time invoices from the SCANA Utilities must be paid, the SCANA Utilities will have delivered over two months of utility services for which they bear the risk of nonpayment.

15. Deposit procedures approved by the PSC and UC recognize the realities of the SCANA Utilities' billing procedures. The PSC has authorized utilities such as SCE&G to require a deposit to be held by the utility in the amount of the total actual bills of the highest two consecutive months within the preceding year. *See* S.C. Reg. 103-332 (electrical service); S.C. Reg. 103-432 (gas service). The UC has authorized utilities such as PSNC to require a deposit and hold an amount not to exceed two-twelfths of the estimated charge for the service for the ensuing twelve months. *See* N.C. Admin. Code Tit. 12, Rule R12-4 (April 2006).

16. Under the applicable regulations promulgated by the PSC and UC, SCE&G is entitled to a two month security deposit in the amount of \$51,515.00 and PSNC is entitled to a two-month security deposit in the amount of \$5,780.00 (the "SCANA Deposits").

### **JURISDICTION AND VENUE**

The Court has jurisdiction over this Motion under 28 U.S.C. § 1334(b), this matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and venue is proper in this district pursuant to 28 U.S.C. § 1409.

### **RELIEF REQUESTED**

Pursuant to this Motion, the SCANA Utilities request that the Court grant relief from the Utilities Order by vacating the same as to the SCANA Utilities. The SCANA Utilities further request that the Court find that the SCANA Deposits, along with the ability to terminate service in the event of post-petition default without further order of this Court, constitute adequate assurance under § 366(c) as to the SCANA Utilities.

## **DISCUSSION**

**A. The Utilities Order Should Be Vacated Pursuant To Rule 9024 As To The SCANA Utilities Because It Was Entered In Violation Of The SCANA Utilities’ Due Process Rights.**

Bankruptcy Rule 9024, which makes Federal Rule of Civil Procedure 60 applicable in cases under the Bankruptcy Code, allows a court to relieve a party from a final judgment or order for a number of reasons, including: “the judgment is void” and “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(4) and (6).

Rule 60(b)(4) applies in situations where, as here, “a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.” *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1377 (2010). Bankruptcy Rule 9014(a) provides that where relief is requested by motion, “reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought.” Here, the Debtors’ attempts to serve the SCANA Utilities one day prior to a hearing held nearly 1,000 miles away from the SCANA Utilities’ headquarters near Columbia, South Carolina, clearly did not provide the SCANA Utilities with a meaningful opportunity to attend and be heard at the hearing on the Utilities Motion.

Additionally, as noted by the Additional Utilities in their motion to reconsider, Bankruptcy Rules 7004 and 9014, which incorporate the service requirements of Federal Rule 4 for motions practice, require that service of a motion on a corporation—such as SCE&G and PSNC—must, under Bankruptcy Rule 7004(b)(3), be made to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law. Bankruptcy Rule 7004(b)(3) serves to assure that a corporate defendant is placed on actual notice of a matter against it; compliance with this notice requirement protects the corporation’s due

process rights. *Addison v. Gibson Equipment Co., Inc. (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995).

The due process issues outlined above and in the Additional Utilities' and CoServ Utilities' motions would be less problematic had entry of the Utilities Order been requested on an interim basis, with a final hearing being held after providing Utility Providers with an actual, meaningful opportunity to respond. Unfortunately, because the Debtors did not seek an interim version of the Utilities Order, the SCANA Utilities are left without any other recourse than seeking to have the Utilities Order set aside under Rule 9024, a result to which they are entitled due to lack of due process.

**B. The Utilities Order Should Be Vacated Because The Debtors' Proposed Adequate Assurance Does Not Comply With § 366(c).**

In addition to the lack of due process afforded to Utility Providers, including the SCANA Utilities, the Utilities Order is not in accord with § 366(c), as the Debtors have neither (a) complied with the procedures set forth in that section or (b) furnished the Utility Providers with one of the forms of adequate assurance authorized therein. This lack of compliance by the Debtors with § 366 constitutes an "other reason that justifies relief" to vacate the Utilities Order under Bankruptcy Rule 60(b)(6).

The procedures by which a party may request a modification of adequate assurance are prescribed by § 366(c)(2) and (3), which provide:

(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).

Therefore, as noted by the Additional Utilities in their motion to reconsider, a plain reading of § 366(c)(2) requires that a debtor provide adequate assurance of payment satisfactory to a utility within thirty days of the petition date. Under § 366(c)(3), if a debtor believes the amount of adequate assurance requested by a utility is excessive, the debtor can move to modify the requested amount.

Here, the Debtors' Utilities Motion was not filed in an effort to modify the amount of adequate assurance sought by the SCANA Utilities because the SCANA Utilities never had an opportunity to request adequate assurance prior to the Utilities Motion being filed or hearing being held. Instead, the Debtors have attempted to circumvent the clear mandates of § 366(c) by using the Utilities Motion to obtain an ex parte order that establishes a form and amount of adequate assurance which is acceptable solely to the Debtors. As such, the Debtors have improperly sought to shift the burden to the Utility Providers, a procedure that has no basis under § 366 and which therefore constitutes a basis for vacation of the Utilities Order.

Moreover, the form of the adequate assurance proposed by the Debtors does not comply with § 366(c). Section 366(c) defines "assurance of payment" to consist of six enumerated forms: "(i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a surety bond; (v) a prepayment of utility consumption; or (vi) 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). Notably absent from the first five types of adequate assurance on that list is the segregated account that the Debtors have offered as adequate assurance. Additionally, the catch-all provision of § 366(C)(1)(A)(vi) does not apply to the SCANA Utilities because there has been no mutual agreement on a different form of security with the Debtors. As a result, the fact that the form of



adequate assurance approved in the Utilities Order does not comply with § 366 is an additional basis to vacate the Utilities Order.

Finally, it should be noted that the Debtors have refused to even engage in any meaningful negotiations with respect to adequate assurance. In an e-mail dated Sunday, July 10, 2016, counsel for Debtors vehemently stated he would not negotiate revisions to the adequate assurance provided for in the Utilities Order and essentially told the SCANA Utilities and other similarly situated utilities to file motions with the Court if the provided adequate assurance treatment was not acceptable. This position is distinctly at odds with the position asserted in the Utilities Motion that the Debtors desired to obtain additional time beyond the thirty days prescribed in § 366(c)(2) in order to, “make alternative arrangements with the Utility Providers without the need for Court intervention” and to, “allow the Debtors sufficient time to negotiate the resolution of any adequate assurance issues that might arise.” (Utilities Motion, paras. 20 and 21.)

**C. The Utilities Order Should Be Vacated Because The Debtors’ Proposed Adequate Assurance Is Insufficient.**

In addition to the lack of due process and the Debtors’ failure to comply with the procedures of § 366, the Utilities Order should also be vacated because the procedures therein are insufficient to provide the SCANA Utilities with adequate assurance of payment. As detailed earlier, the regulations imposed on the SCANA Utilities by the PSC and UC provide for the SCANA Utilities to deliver utility services to customers for approximately thirty days before issuing an invoice requesting payment for these services. Payment on the invoices is due approximately one month after issuance. Meanwhile, the SCANA Utilities continue to provide utility services for a new thirty-day period. In the event of non-payment by the invoice due date, the SCANA Utilities then must provide between five (PSNC) and ten (SCE&G) days’ notice

prior to termination of service. The result is that by the time the SCANA Utilities would be permitted to disconnect service for nonpayment pursuant to the applicable state regulations, the SCANA Utilities will have delivered at least sixty-five to seventy days of utility services.

Against this backdrop, the Debtors' proffered Adequate Assurance Deposit Account based on two weeks of utility usage is wholly insufficient to provide adequate assurance of payment to the SCANA Utilities. Indeed, because the SCANA Utilities may not be able to terminate service until seventy days (or ten weeks) have passed, two weeks represents only twenty percent of the SCANA Utilities' potential exposure for nonpayment. This is not the adequate assurance of payment contemplated by § 366.

Moreover, while the Utilities Order provides for the establishment and funding of the Adequate Assurance Deposit Account, it contains no information with respect to the terms and/or conditions on which a Utility Provider could access the funds in the account which, presumably, is controlled by the Debtors. Without any defined rights in the Adequate Assurance Deposit Account, the SCANA Utilities are provided little actual assurance of payment thereby. When this is considered along with the fact that the Debtors' proposed deposit represents only 20% of the SCANA Utilities' nonpayment exposure, the Adequate Assurance Deposit Account is clearly insufficient.

**D. The SCANA Utilities Should Be Provided Adequate Assurance In The Form Of A Two-Month Deposit.**

What does constitute adequate assurance of payment for the SCANA Utilities is a cash deposit in the amount authorized by the PSC and UC, the entities which regulate SCE&G and PSNC, respectively. In recognition of the SCANA Utilities' billing procedures, the PSC and UC have also approved deposit procedures that balance the SCANA Utilities' interest in assurance of payment against potentially "overreaching" deposit requests. To wit, the PSC has authorized

SCE&G to require a deposit in the amount of the total actual bills of the highest two consecutive months within the preceding year. *See* S.C. Reg. 103-332 (electrical service); S.C. Reg. 103-432 (gas service). Similarly, the UC has authorized PSNC to require a deposit in an amount not to exceed two-twelfths of the estimated charge for the service for the ensuing twelve months. *See* N.C. Admin. Code Tit. 12, Rule R12-4 (April 2006).

Under the applicable regulations promulgated by the PSC and UC, the SCANA Utilities request that the Court grant them adequate assurance in the amount of the SCANA Deposits: \$51,515.00 for SCE&G and \$5,780.00 PSNC. These deposit requests are by no means a “guarantee of payment”, but instead represent historically representative amounts that the SCANA Utilities’ respective regulatory entities have deemed permissible, and, therefore, are entitled to deference from the Court as to their reasonableness.

### **CONCLUSION**

For the reasons set forth herein, as well as those in the respective motions to reconsider filed by the Additional Utilities and the CoServ Utilities, the SCANA Utilities respectfully request that the Court (a) grant the Motion, (b) vacate the Utilities Order as to the SCANA Utilities, and (c) find that the SCANA Deposits, along with the ability to terminate service in the event of post-petition default without further order of this Court, constitute adequate assurance under § 366(c) as to the SCANA Utilities.

Respectfully submitted,

/s/ Paul D. Sinclair

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ATTORNEYS FOR SOUTH CAROLINA

ELECTRIC & GAS COMPANY AND PUBLIC

SERVICE COMPANY OF SOUTH CAROLINA

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 20, 2016, a true and correct copy of the foregoing pleading was electronically filed with the Clerk of the Court by using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF System.

/s/ Paul D. Sinclair

Attorney