

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)
) Chapter 11
)
RC SOONER HOLDINGS, LLC,) Case No. 10-10528 (BLS)
et al.,) Jointly Administered
)
Debtors.) Re: Docket Nos. 6, 22 & 26
) Objection Due: 03/11/10 at 4:00 p.m.
) Hearing Date: 03/18/10 at 10:30 a.m.
)

**OBJECTION OF AMERICAN ELECTRIC POWER TO MOTION
OF THE DEBTORS FOR INTERIM AND FINAL ORDERS UNDER
SECTION 366 OF THE BANKRUPTCY CODE (A) PROHIBITING
UTILITY PROVIDERS FROM ALTERING, REFUSING OR
DISCONTINUING SERVICE, (B) DEEMING UTILITIES ADEQUATELY
ASSURED OF FUTURE PAYMENT, AND (C) ESTABLISHING
PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

Public Service Company Of Oklahoma, d/b/a American Electric Power ("AEP"), by counsel, hereby objects to the *Motion Of The Debtors For Interim And Final Orders Under Section 366 Of The Bankruptcy Code (A) Prohibiting Utility Providers From Altering, Refusing Or Discontinuing Service, (B) Deeming Utilities Adequately Assured Of Future Payment, And (C) Establishing Procedures For Determining Adequate Assurance Of Payment* (the "Utility Motion"), and sets forth the following:

Introduction

As an initial matter, it does not make sense why these cases involving buildings located within Oklahoma were filed in this District. The fact that the United States Trustee was unable to find sufficient interest to form an Unsecured Creditors'

Committee should not be surprising since most, if not all, of the utilities and creditors are from Oklahoma. Possibly one of the reasons the Debtors filed in this District was to avoid the automatic denial of the Utility Motion. See *In re Eskridge, Inc.*, Case No. 09-14001 (TLM), United States Bankruptcy Court For the Northern District of Oklahoma, *Order Denying Debtor's Amended Motion For Entry Of An Order Pursuant To Section 366 Of The Bankruptcy Code Deeming Utility Companies Adequately Assured Of Future Performance*[Docket No. 25] and *In re Ramsey Holdings, Inc.*, Case No. 09-13998-M (TLM), United States Bankruptcy Court For the Northern District of Oklahoma, *Order Denying Debtor's Amended Motion For Entry of an Order Pursuant To Section 366 of the Bankruptcy Code Deeming Utility Companies Adequately Assured of Future Performance* entered on December 21, 2009 (Denying debtor's motion seeking to establish adequate assurance of payment, and holding that the debtor is required by Section 366 to first approach its utility providers and attempt to arrange a mutually agreeable form of adequate assurance of payment, and if such attempts are unsuccessful, the debtor can then petition the Court to establish adequate assurance.).

Section 366(c)(2), as amended, requires a Chapter 11 debtor to provide utilities with adequate assurance of payment that is satisfactory to the utility within 30 days of the Petition Date.

If a debtor believes the amount of the utility's request pursuant to Section 366(c)(2) needs to be modified, the debtor can file a motion pursuant to Section 366(c)(3) seeking to modify the amount of the utility's request. The Debtors, however, have filed the Utility Motion seeking to avoid the express procedures and requirements of Section 366(c). Specifically, the Debtors filed the Utility Motion at the outset of this case seeking Court approval, without evidence or supporting documentation, to establish their own form and amount of adequate assurance to their utility providers - a deposit into a segregated account (the "Escrow Account"). Accordingly and in violation of the express requirements under Section 366(c)(2), the Debtors are seeking to unilaterally determine the amount and conditions for adequate assurance of payment satisfactory to the Debtors. Neither this Court nor the Debtors have the authority to establish the form of adequate assurance of payment. Section 366(c)(3) only provides the Debtors with the ability, after notice and a hearing, to seek to modify the adequate assurance of payment deemed satisfactory to AEP under Section 366(c)(2).

As case law is clear that adequate assurance of payment is to be determined on a case-by-case basis, it is remarkable how a two-week deposit or two-week escrow account are becoming the debtor's proposed form and amount of adequate assurance in

virtually every bankruptcy case filed in this District. Moreover, as customers of AEP, the Debtors are aware that AEP bills on a monthly basis in arrears and provides the Debtors with generous trade terms. Accordingly, at a minimum, the Debtors should be required to set forth an evidentiary and legal basis as to why this Court should consider modifying the amount of adequate assurance of payment necessary to cover the foregoing billing cycles, which is generally the amount of security that would be satisfactory to AEP under Section 366(c)(2). The Debtors, however, who bear the burden of proof under Section 366(c)(3), do not address why this Court should begin to consider modifying AEP's request for adequate assurance of payment. Accordingly, this Court should deny the Utility Motion as not being properly before the Court because the Utility Motion: (1) was not heard after notice and a hearing; (2) does not address AEP's deposit request; (3) does not seek to modify the amount of AEP's deposit request; and, (4) does not provide AEP with adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy Code.

Procedural Facts

1. On February 22, 2010 (the "Petition Date"), the Debtors commenced their cases under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") that are now pending with

this Court. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

2. The Debtors' cases are being jointly administered.

The Utility Motion

3. On the Petition Date the Debtors filed the Utility Motion seeking *ex parte* Court approval for the Escrow Account that will contain a deposit of \$45,000, which is an amount that is purportedly equal to the Debtors' aggregate cost for two weeks of utility service.¹ In the Utility Motion, Debtors allege that on a monthly basis, the Debtors spend approximately \$90,000 on utility expenses. Utility Motion at ¶ 11.

4. No notice of the Utility Motion was given to the Debtors' utilities prior to the Court entering the *Interim Order (A) Prohibiting Utility Providers From Altering, Refusing Or Discontinuing Service, (B) Deeming Utilities Adequately Assured Of Future Payment, And (C) Establishing Procedures For Determining Adequate Assurance Of Payment* (the "Interim Utility Order") on February 24, 2010.

¹ The Utility Motion commences a contested matter. Debtors, however, failed to serve the Utility Motion upon AEP in the manner required under Rule 9014(b) of the Federal Rules of Bankruptcy Procedure. Accordingly, the Debtors have failed to provide AEP with proper notice of the Utility Motion in violation of AEP's rights to Due Process. Furthermore, Debtors allege that the amount of the Escrow Account represents approximately 50% of the Debtors' estimated monthly utility costs. Debtors, however, do not provide the Court or

5. Because AEP was not served with the Utility Motion, AEP had no opportunity to respond to the Utility Motion or otherwise be heard at the *ex parte* hearing on the Utility Motion that took place on February 24, 2010, despite the fact that Section 366(c)(3) (presuming this was the statutory basis for the relief sought by the Debtors) requires that there be "notice and a hearing."

6. In the Utility Motion, the Debtors are attempting to establish adequate assurance in a form and in an amount that is satisfactory to the Debtors - a position clearly in violation of the express provisions of Section 366(c)(2), which requires the Debtors to provide AEP with adequate assurance of payment satisfactory to AEP.

7. In support of the Utility Motion, the Debtors contend that the Escrow Account constitutes adequate assurance of payment. Utility Motion at ¶¶ 13 & 19. The Debtors, however, do not have the authority to establish the form of adequate assurance of payment. Section 366(c)(3) only provides the Debtors with the ability, after notice and a hearing, to seek to modify the amount of the adequate assurance of payment deemed satisfactory to AEP under Section 366(c)(2).

8. Finally, throughout the Utility Motion, the Debtors

AEP with any documentation to validate this amount.

seek to avoid the procedural and substantive requirements of Section 366 by imposing upon AEP various burdensome procedures that are either not authorized by Section 366 or are contrary to its specific provisions. Utility Motion at ¶¶ 14 & 16. In particular, through the proposed procedures, the Debtors are attempting to improperly extend the thirty-day time period required under Section 366(c)(2) by seeking time beyond the first thirty days of their bankruptcy cases in which to consider any request for additional adequate assurance and then additional time in which to file a modification motion with the Court and request a Determination Hearing pursuant to Section 366(c)(3)(A). Utility Motion at ¶¶ 14(c), (f) & (g). During this same period of time, however, Debtors will continue simultaneously to enjoy uninterrupted unsecured post-petition utility services from AEP.

9. In the Interim Utility Order, the Court: (a) granted the Utility Motion on an interim basis; and, (b) directed the Debtors to fund the Escrow Account as set forth in the Utility Motion. Further, the Court set an objection deadline to the Utility Motion of March 11, 2010, at 4:00 p.m. and a Final Hearing on March 18, 2010, at 10:30 a.m.

Facts Regarding AEP

10. AEP provided the Debtors with prepetition utility goods and/or services and has continued to provide the Debtors with

utility goods and/or services since the Petition Date.

11. Under AEP' billing cycles, the Debtors receive approximately one month of utility goods and/or services before AEP issues a bill for such charges. Once a bill is issued, the Debtors have approximately 20 days to pay the applicable bill. If the Debtors fail to timely pay the bill, a past due notice is issued and a late fee is subsequently imposed on the account. If the Debtors fail to pay the bill after the issuance of the past due notice, AEP issues a notice that informs the Debtors that they must cure the arrearage within a certain period of time or their service will be disconnected. Accordingly, under AEP's billing cycles, the Debtors could receive at least 2 months of unpaid goods and/or services before AEP could cease the supply of goods and/or services based upon a post-petition payment default.

12. In order to avoid the need to bring witnesses and have lengthy testimony regarding the billing cycles of AEP, AEP respectfully requests that this Court, pursuant to Rule 201 of the Federal Rules of Evidence, take judicial notice of its billing cycles. Pursuant to the foregoing request and based on the voluminous size of the applicable documents, AEP is providing the following web-site link to the applicable tariffs and/or state laws, regulations and/or ordinances (collectively, the "Tariffs"):

https://www.psoklahoma.com/global/utilities/lib/docs/ratesandtariffs/Oklahoma/ElectricServiceRules02_2009.pdf.

13. Prior to the Petition Date, AEP maintained a deposit on the Debtors' accounts totaling \$6,713.02 that AEP will recoup against the Debtors' pre-petition debt pursuant to Section 366(c)(4). AEP estimates that the amount of pre-petition debt owed by the Debtors for the two hundred twenty-six (226) pre-petition accounts in which AEP provided utility goods and/or services to the Debtors is \$86,939.86.

14. Subject to a reservation of AEP's rights to supplement its post-petition deposit request if additional accounts belonging to the Debtors are subsequently identified, AEP's two-month post-petition deposit request for the two hundred twenty-six (226) identified accounts is \$71,176 (the "Request").

Discussion

A. THE UTILITY MOTION SHOULD BE DENIED AS TO AEP.

Sections 366(b) and (c) of the Bankruptcy Code, in pertinent part, provide:

(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.

(c)(1)(A) For purposes of this subsection, the term "assurance of payment" means

- (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 upon between the utility and the Debtor or the trustee.

(B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment,

(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.

(4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility may recover or set off against a security deposit provided to the utility by the Debtor before the date of the filing of the petition without notice or order of the court.

11 U.S.C. §366.

As set forth by the United States Supreme Court, "[i]t is

well-established that 'when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct., 1942, 147 L. Ed. 2d 1 (2000)). *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, 597 (6th Cir. 1997) ("Statutes . . . must be read in a 'straightforward' and 'commonsense' manner."). A plain reading of Section 366(c)(2) makes clear that a debtor is required to provide adequate assurance of payment satisfactory to its utilities on or within thirty (30) days of the filing of the petition. If a debtor believes the amount of the utility's request needs to be modified, then the debtor can file a motion under Section 366(c)(3) requesting the court to modify the amount of the utility's request.

In this case, the Debtors completely ignore AEP's adequate assurance request. Instead, the Debtors filed the Utility Motion to improperly shift the focus of their obligations under Section 366(c) from modifying the amount of AEP's adequate assurance request to establishing adequate assurance of payment acceptable to the Debtors. Accordingly, this Court should not reward the Debtors for their failure to comply with the requirements of

Section 366(c) and deny the Utility Motion as to AEP. See *In re Viking Offshore (USA), Inc.*, 2008 WL 782449 at *3 (Bankr. S.D. Tex. Mar. 20, 2008) ("The relief requested by Debtors would reverse the burden, by making an advance determination that the proposed assurance was adequate. . . . the court lacks the power to reverse the statutory framework for provision of adequate assurance of payment."); see also *In re Pilgrim's Pride Corporation*, Case No. 08-45664 (DML)(Docket No. 447), United States Bankruptcy Court For the Northern District of Texas, *Memorandum Order* entered on January 5, 2009 (Denying debtors' motion seeking to establish adequate assurance of payment); see also *In re Ramsey Holdings, Inc.*, Case No. 09-13998-M (TLM), United States Bankruptcy Court For the Northern District of Oklahoma, *Order Denying Debtor's Amended Motion For Entry of an Order Pursuant To Section 366 of the Bankruptcy Code Deeming Utility Companies Adequately Assured of Future Performance* entered on December 21, 2009.

1. The Debtors' Proposed Escrow Account Does Not Provide AEP With Adequate Assurance of Payment.

The Escrow Account is an improper and otherwise unreliable form of adequate assurance of future payment for the following reasons:

- (i) This Court only has authority under Section 366(c)(3) to modify the amount of AEP's deposit request. Neither the Debtors nor this Court has the

authority to establish the form of adequate assurance of payment, i.e., the creation of an escrow account as opposed to adequate assurance in the form of a cash deposit that AEP is requesting from the Debtors.

- (ii) The Debtors have failed to provide AEP with any information concerning the location of the Escrow Account. In addition, the Debtors have failed to propose any procedures as to when and how AEP could obtain funds from the Escrow Account. Presumably, AEP would have to incur legal fees and costs to file and litigate an application for payment of post-petition administrative expenses, which would be for at least one month's service because AEP bills the Debtors on a monthly basis.
- (iii) AEP bills monthly in arrears so any request upon the Escrow Account will be, at a minimum, for monthly bills. Accordingly, the Escrow Account that would merely contain the estimated cost of two weeks of the Debtors' monthly utility charges would be undercapitalized from the outset.
- (iv) The Debtors fail to specify whether AEP will still have access to the Escrow Account if the Debtors default on their obligations concerning their post-petition use of cash collateral.

Accordingly, the Court should not approve the Escrow Account as adequate assurance to AEP on a final basis because the Escrow Account is not the form of adequate assurance requested by AEP herein and because it is an otherwise unreliable form of adequate assurance.

2. The Utility Motion Should Be Denied As To AEP Because the Debtors Have Not Set Forth Any Basis For Modifying AEP's Requested Deposit.

As set forth above, in the Utility Motion the Debtors fail

to address why this Court should modify AEP's request for adequate assurance of payment. Under Section 366(c)(3), the Debtors have the burden of proof as to whether AEP's adequate assurance of payment request should be modified. See *In re Stagecoach Enterprises, Inc.*, 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979) (holding that the debtor, as the petitioning party at a Section 366 hearing, bears the burden of proof). The Debtors, however, offer the Court no evidence nor factually supported documentation to explain how or why the amount of AEP's adequate assurance request should be modified. Indeed, the Debtors never even address the matter in the Utility Motion because the Debtors failed to: (1) contact AEP concerning their adequate assurance request despite the fact that AEP is only one (1) of seven (7) other alleged utility providers listed by the Debtors on **Exhibit A** to the Utility Motion; and, (2) make any attempt to determine whether AEP's request for adequate assurance needed to be modified. Accordingly, the Court should deny the relief requested by Debtors in the Utility Motion and require the Debtors to comply with the requirements of Section 366(c) with respect to AEP. See *In re Lucre, Inc.*, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005) (holding that the right of a debtor or trustee to seek modification of a utility's deposit request "arises only after the adequate assurance payment has been agreed upon by the

parties.").

B. THE COURT SHOULD ORDER THE DEBTORS TO PROVIDE THE ADEQUATE ASSURANCE OF PAYMENT REQUESTED BY AEP PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE.

Section 366(c) was amended to overturn decisions such as *Virginia Electric and Power Company v. Caldor, Inc.*, 117 F.3d 646 (2d Cir. 1997), that held that an administrative expense, without more, could constitute adequate assurance of payment in certain cases. Section 366(c)(1)(A) specifically defines the forms that assurance of payment may take as:

- (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 upon between the utility and the debtor or the trustee.

A determination of adequate assurance is within the court's discretion, and is made on a case-by-case basis, subject to the new requirements of Section 366(c). See *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). Section 366 of the Bankruptcy Code 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). The deposit or other security "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). Based on the Debtors' anticipated utility consumption, the minimum period of time the Debtors could receive service from AEP before termination of service for non-payment of bills is approximately two (2) months. Accordingly, the deposit requested herein by AEP is reasonable. See *In re Stagecoach*, 1 B.R. at 735-36 (holding that a two month deposit is appropriate where the debtor could receive sixty (60) days of service before termination of services because of the utilities' billing cycle.); see also *In the Matter of Robmac, Inc.*, 8 B.R. 1, 3-4 (Bankr. N.D. Ga. 1979).

As set forth above, the Request is based upon: (1) AEP's billing exposure created by its applicable Tariffs; and, (2) the amount that the applicable public service commission, which is a neutral third-party entity, permits AEP to request from its customers. Although AEP recognizes that this Court is not bound by the Tariffs, the Tariffs are extremely relevant information of

a determination made by an independent entity on the appropriate amount of adequate assurance that should be paid to AEP.

In contrast, the Debtors do not provide an objective, much less an evidentiary, basis for their proposed adequate assurance in the form of the Escrow Account. Accordingly, not only have the Debtors failed to satisfy their statutory burden under Section 366 as to why the Requests should be modified, but Debtors have also failed to demonstrate why their alternative adequate assurance of payment proposal in the form of the Escrow Account should be accepted by AEP and approved by the Court. Hence, and for all of the foregoing reasons, the Court should deny the Utility Motion and require the Debtors to immediately pay AEP the adequate assurance deposit amount requested herein.

WHEREFORE, AEP respectfully requests that this Court enter an order:

1. Denying the Utility Motion as to AEP;
2. Awarding AEP with the post-petition adequate assurance of payment requested herein; and,
3. Providing such other and further relief as the Court deems just and appropriate.

Dated: March 9, 2010 STEVENS & LEE, P.C.

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