

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Chapter 11
)	
CEP HOLDINGS, LLC, <u>et al.</u> ¹ ,)	Case No. 06-61796
)	(Jointly Administered)
Debtors.)	
)	Honorable Marilyn Shea-Stonum

**OBJECTION OF ALABAMA POWER COMPANY TO MOTION OF
DEBTORS AND DEBTORS IN POSSESSION PURSUANT TO SECTION
366 OF THE BANKRUPTCY CODE, FOR INTERIM AND FINAL
ORDERS: (A) PROHIBITING UTILITIES FROM ALTERING,
REFUSING OR DISCONTINUING SERVICES TO, OR
DISCRIMINATING AGAINST, THE DEBTORS ON ACCOUNT OF
PREPETITION INVOICES; (B) DETERMINING THAT THE UTILITIES
ARE ADEQUATELY ASSURED OF FUTURE PAYMENT; (C)
ESTABLISHING PROCEDURES FOR DETERMINING REQUESTS FOR
ADDITIONAL ASSURANCE; AND (D) PERMITTING UTILITIES TO
OPT OUT OF THE PROPOSED PROCEDURES**

Alabama Power Company (“APCO”), by its undersigned counsel, objects to the Motion of Debtors and Debtors in Possession Pursuant to Section 366 of the Bankruptcy Code for Interim and Final Orders: (A) Prohibiting Utilities from Altering, Refusing or Discontinuing Services to, or Discriminating Against, the Debtors on Account of Prepetition Invoices; (B) Determining that the Utilities are Adequately Assured of Future Payment; (C) Establishing Procedures for Determining Requests for Additional Assurance; and (D) Permitting Utilities to Opt Out of the Proposed Procedures (the “Utility Motion”) (*Docket No. 38*). In support of its objection, APCO states as follows:

¹ The Debtors include: CEP Holdings, LLC, Creative Engineered Polymer Products, LLC and Thermoplastics Acquisitions, LLC.

INTRODUCTION

1. The Utility Motion disregards the significant changes made to 11 U.S.C. § 366 by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Notwithstanding the manifest intent of Congress to protect the interests of utilities in chapter 11 bankruptcy cases, and the new procedures imposed by BAPCPA with respect to those protections, the Debtors have made only a token effort to comply with the new legislation. Therefore, based upon the various reasons recited in this objection, the Utility Motion should be denied.

BACKGROUND

2. On September 20, 2006 (the “Petition Date”), CEP Holdings, LLC and its affiliated debtors and debtors in possession (collectively, the “Debtors”) each filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).

3. APCO provides electric service to the Debtors’ facility located at 1401 Industrial Park Drive, Tuscaloosa, Alabama.

4. On the Petition Date, the Debtors filed the Utility Motion in which the Debtors requested an order providing, among other things: (i) that a cash deposit in an amount equal to charges for the Debtors’ average two-week historical usage (the “Proposed Deposit”) constitutes adequate assurance of payment for purposes of § 366 of the Bankruptcy Code; (ii) that delivery of the Proposed Deposit be required of the Debtors only upon the written request of a utility; (iii) that the Debtors need not deliver the Proposed Deposit if a utility has an existing prepetition deposit in an amount equivalent to or greater than the Proposed Deposit; (iv) that utilities

requesting additional adequate assurance of payment (in lieu of, or in addition to, the Proposed Deposit) must provide various items of historical information relating to prior utility service provided to the Debtors; (v) that utilities be enjoined from altering, refusing or discontinuing service to, or discriminating against the Debtors in connection with unpaid utility charges attributable to service provided prior to the Petition Date; and (vi) that unless and until the Court enters an order compelling the Debtors to provide additional adequate assurance of payment, APCO and other requesting utilities are deemed to be adequately assured of payment.

SECTION 366

5. Section 366 of the Bankruptcy Code (“Section 366”) was enacted originally 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 these essential services. See In re Hanratty, 907 F.2d 1418, 1424 (3d Cir. 1990).

6. Despite the apparent protections afforded to utilities under Section 366, *ex parte* orders and other judicial decisions interpreting the statute steadily eroded those safeguards in a manner that Congress apparently did not intend. Therefore, when enacting BAPCPA, substantial modifications were made to the text of Section 366 (as amended, “New Section 366”), which became effective in bankruptcy cases commenced on or after October 17, 2005. Congress has clearly expressed in the new legislation that utilities are entitled to be treated in bankruptcy cases in a manner that is consistent with a plain reading of the phrase “adequate assurance of payment”. New Section 366 (i) grants to utilities significant substantive rights concerning the security to which they are entitled and (ii) prescribes a new procedure that eliminates the need for first day motions, interim orders and other practices that were common prior to BAPCPA.

7. Subsections (a) and (b) of New Section 366 are substantively identical to their statutory predecessors. However, subsection (c) of New Section 366 is a new provision that unambiguously prohibits many of the practices that were common to cases filed prior to October 17, 2006 and which are proposed by the Debtors in this case. Subsection (c) provides as follows:

(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 on 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 –

- (ii) the absence of security before the date of the filing of the petition;
- (iii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or
- (iv) 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.

SIGNIFICANCE OF NEW SECTION 366

8. New Section 366 prohibits debtors from claiming that utilities are adequately assured of payment of postpetition charges simply by conceding that such charges are entitled to an administrative expense priority. Pursuant to 11 U.S.C. § 366(c)(1)(A), only the tangible forms of security listed in the statute qualify as assurance of payment, unless a utility otherwise agrees. The protections granted to utilities by New Section 366 recognize the inherent risk that utilities must bear since they are statutorily compelled to provide uninterrupted postpetition service to a debtor for a minimum period, even though their invoices are payable only after the utility service has been irreversibly consumed by the debtor. No creditors in this bankruptcy case, other than utilities, are required to incur such risks.

9. Paragraph (c)(2) of New Section 366 establishes a new procedure by which debtors are to provide assurance of payment to utilities. Prior to BAPCPA, debtors were required to “furnish” adequate assurance of payment within 20 days of the petition date to avoid a disruption in service. However, paragraph (c)(2) of New Section 366 requires that one of the allowed forms of assurance of payment “that is satisfactory to the utility” be “received” by the utility within 30 days of the petition date to ensure continuous service. This purposeful revision of Section 366 requires the debtor to timely deliver assurance of payment to a utility without imposing any burdens or other measures upon utilities, including first day motions, interim orders, *ex parte* hearings and other court proceedings.

10. Following delivery of assurance of payment to a utility, if the amount of the delivered assurance is deemed unreasonable by the debtor, 11 U.S.C. § 366(c)(3) authorizes a

court, after a motion and hearing, to modify the amount of assurance required by and delivered to the utility. Paragraph (c)(3) of New Section 366 does not authorize a bankruptcy court to either (i) determine the “form” of adequate assurance that a utility may require or (ii) establish the “amount” of assurance that is adequate prior to the utility “receiv[ing] from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.” 11 U.S.C. § 366(c)(3). Court modification of the amount of an assurance of payment may occur only after the security described in New Section 366 is received by a utility. See In re Lucre, Inc., 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005); 11 U.S.C. § 366(c)(3)(A).

11. Textually and in theory, New Section 366(c) requires a debtor to timely communicate with its utility service providers (and not by the filing of a first-day motion) in an effort to reach an agreement within the first 30 days of a case concerning the assurance of payment that will be required. During this 30 day period, three scenarios could occur: (1) the debtor and a utility will agree on the adequacy of payment assurance to be received by the utility to ensure uninterrupted service; (2) the debtor will deem the service provided by a utility to be unnecessary and will request that the service be terminated; or (3) the debtor will deliver to the utility the requested assurance of payment and then move the bankruptcy court to modify the amount. Regardless of the scenario, a bankruptcy court’s involvement under New Section 366, if any, should commence only after the debtor has delivered the assurance of payment required by the utility.

**THE UTILITY MOTION DOES NOT MEET THE REQUIREMENTS OF
NEW SECTION 366**

12. Many of the provisions of the Utility Motion conflict with both the letter and the intent of New Section 366.

13. First, the Proposed Deposit is not “adequate”. It is inconceivable that the Bankruptcy Code would specifically authorize a utility to liquidate its prepetition security, yet compel the utility to provide postpetition service under terms less favorable than those previously bargained for between the parties. Indeed, since 11 U.S.C. § 366(c)(3)(B) now prohibits a court from considering the absence of prepetition security, it is reasonable to assume that adequate assurance of payment should often be greater than the prepetition security received by utilities.

14. The Debtors have made no effort in the Utility Motion to justify their conclusion that a mere two-week deposit is “adequate assurance of payment” and have made no attempts to discuss with APCO, as contemplated by New Section 366, what amount of assurance APCO deems adequate. Instead, the Debtors merely aver that they intend to pay postpetition utility charges and their postpetition financing will enable them to make those payments. This is nothing more than a re-packaging of the pre-BAPCPA argument that an administrative expense priority is adequate assurance of payment. An administrative expense priority is not an assurance of payment, 11 U.S.C. § 366(c)(1)(B), and may not even be considered by the Court, 11 U.S.C. § 366(c)(3)(B)(iii) in determining whether an assurance of payment is adequate. The Debtors’ subjective prediction that they can pay postpetition utility service is immaterial.

15. The Proposed Deposit also wholly ignores the manner in which APCO invoices the Debtors for electric service. APCO service meters are read on a monthly basis. On the date that a meter is read, APCO has already delivered approximately thirty 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 an invoice (*Day 33*). Payment of the invoice is due upon receipt (*Day 35*), but is not delinquent until ten (10) days after receipt (*Day 45*). Once an invoice

is delinquent, APCO is required by Rule 10 of the Alabama Public Service Commission to send a written notice of termination to the customer. APCO cannot terminate service until the expiration of five (5) days after delivery of the termination notice to a United States Post Office (*at the earliest, Day 51*). Additional time invariably passes before service is actually terminated by APCO. Therefore, APCO customarily provides businesses such as the Debtor with approximately two (2) months 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 “for the purpose of guaranteeing final payment for service, when, in the judgment of the utility, such deposit is necessary.” Rule 8, General Rules of the Alabama Public Service Commission.

16. Under virtually any canon of statutory construction, it is inconceivable that a deposit based upon 14 days average service is “adequate assurance of payment” for two months or more of service. The Proposed Deposit should not be endorsed by this Court as being consistent with the requirements of New Section 366.

17. The Utility Motion is also flawed because the Debtors propose to furnish the Proposed Deposit only to those utilities that request it. This violates paragraph (c)(2) of New Section 366 which authorizes service refusal, modification or termination if the utility “does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.” (*emphasis added*). Although 11 U.S.C. § 366(c)(3) authorizes a court to modify the amount of assurance of payment, it does not permit a debtor to shift the burden to utilities to have to request assurance of payment.

18. The Utility Motion must also be denied because it conditions the amount of the Proposed Deposit on whether a utility possessed a prepetition deposit or other form of prepetition security. Section 366(c)(4) specifically authorizes a utility to apply prepetition deposits held by the utility to a debtor's unpaid prepetition electric service charges and thus, the amount of the prepetition deposit should not be considered when determining the necessary payment assurance amount.

19. Finally, the Utility Motion fails to adhere to the provisions of New Section 366 in that it requires utilities seeking additional adequate assurance of payment (in lieu of, or in addition to, the Proposed Deposit) to provide various items of historical information related to the Debtor's electric service account with APCO. This requirement ignores the explicit statement in New Section 366(c)(3)(B)(ii) that a court may not consider the payment by the debtor of charges for utility service in a timely manner before the petition date when determining whether an assurance of payment is adequate.

RELIEF REQUESTED

20. Based upon the foregoing, APCO requests that the Court enter an order denying the Utility Motion or alternatively:

(i) denying the Debtors' request for approval of the Adequate Assurance Procedures and Opt-Out Procedures to the extent that such procedures violate New Section 366; and

(ii) requiring the Debtor to deliver to APCO a cash deposit in the amount of \$129,000.00, which amount is equal to the charges for approximately two months average

electric service based on the Debtor's account history for the twelve months preceding the Petition Date; and

(iii) granting to APCO such other, further and additional relief as the Court deems proper.

Dated: September 21, 2006

/s/ W. Clark Watson

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been filed and delivered via the CM/ECF system and delivered upon the following by facsimile (where indicated) and U.S. mail, properly addressed and postage prepaid, on this the 21st day of September, 2006:

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