

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

In re:

EXTRACTION OIL & GAS INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 20-11548 (CSS)
(Jointly Administered)

Related Docket Nos. 16, 20, 92, 94, 108, and 112
Objection Deadline: June 30, 2020 at 4:00 p.m.²

**UNITED POWER, INC.'S OMNIBUS LIMITED OBJECTION TO DEBTORS'
(I) UTILITIES MOTION AND (II) POSTPETITION FINANCING MOTION**

United Power, Inc. ("United Power"), by and through its undersigned counsel, hereby files this omnibus limited objection (this "Objection") to (i) *Debtors' Motion for Entry of Interim and Final Orders (I) Approving the Debtors' Proposed Adequate Assurance of Payment for Future Utility Services, (II) Prohibiting Utility Companies from Altering, Refusing, or Discontinuing Services, (III) Approving the Debtors' Proposed Procedures for Resolving Additional Adequate Assurance Requests, and (IV) Granting Related Relief* [Docket No. 16] (the "Utility Motion")³ and (ii) *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* [Docket No. 40] (the "DIP Motion") and, in support thereof, respectfully states as follows:

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

² The Debtors have agreed to extend this deadline to July 1, 2020, at 4:00 p.m. (ET).

³ Capitalized terms not otherwise defined herein shall have the meaning set forth in the Utility Motion.



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General Background

1. United Power is a member-owned, not-for-profit electric cooperative serving more than 93,000 homes and businesses in northern Colorado.
2. Among United Power's electricity customers is debtor Extraction Oil & Gas, Inc. (the "Debtor") and collectively with its above-captioned debtor affiliates, the "Debtors").
3. As of June 14, 2020 (the "Petition Date"), the Debtor had 21 active accounts with United Power (the "Accounts") in relation to electricity that United Power provides for the Debtor's benefit.
4. For the 12-month billing cycle ending before the Petition Date, across the Accounts, the Debtor's debt to United Power averages \$211,587.45 per month.⁴
5. United Power's invoices to the Debtor are payable within 20 days of issuance, with a 10-day grace period. Thus, invoices are past-due 30 days after issuance.
6. Though the Debtors state that "there are no defaults or arrearages with respect to the Debtors' undisputed invoices for prepetition Utility Services[,]" Utility Motion, ¶ 10, as of the Petition Date, the Debtor owes United Power approximately \$177,000. To this end, United Power has in the past had to resort to collection efforts to be paid, and has genuine concerns about the Debtor timely paying its invoices to United Power on a postpetition basis.
7. On June 15, 2020, the Debtors filed the Utility Motion generally seeking the Court's approval of proposed adequate assurance of payment for future utility service providers with adequate assurance of payment under 11 U.S.C. § 366 and proposed procedures for resolving additional adequate assurance requests. Attached as Exhibit C to the Utility Motion is a list of

⁴ The documentation supporting this average calculation is voluminous. Interested parties may obtain same by requesting it from undersigned counsel in writing.

utility providers, which includes 17 of the 21 Accounts in relation to United Power. *See* Docket No. 16-3, at 4-5.⁵

8. In terms of proposed adequate assurance, the Debtors initially rely on cash on hand, cash generated in the ordinary course, and debtor-in-possession financing. Utility Motion, ¶ 11.

And they secondarily propose additional assurance with a \$460,000 deposit as follows:

To provide additional assurance of payment, the Debtors propose to deposit approximately \$460,000 into a segregated account (the “Adequate Assurance Deposit”). The Adequate Assurance Deposit represents an amount equal to approximately one half of the Debtors’ average monthly cost of Utility Services, calculated as a historical average payment for the twelve-month period ended April 20, 2020 excluding any prepaid amounts or Prepetition Deposits provided to the Utility Companies in the ordinary course, as detailed in **Exhibit C**. The Adequate Assurance Deposit will be held in a segregated account at Wells Fargo Bank, N.A. for the benefit of the Utility Companies (the “Adequate Assurance Account”) for the duration of these chapter 11 cases and may be applied to any postpetition defaults in payment to the Utility Companies. The Adequate Assurance Deposit will be held by the Debtors.

Utility Motion, ¶ 12.

9. United Power’s proposed share of the \$460,000 Adequate Assurance Deposit is \$128,341 (per Exhibit C, \$114,376 + \$13,965).

10. The Debtors also propose Adequate Assurance Procedures (as defined in the Utility Motion) whereby utilities could request different or additional adequate assurance of future performance. These procedures propose to limit the additional Adequate Assurance Request to an “amount that is equal to two weeks of the Utility Services the Utility Company provides to the Debtors[.]” Utility Motion, ¶ 17(g). Subsection (j) does state that additional adequate assurance

⁵ Account numbers 440304, 440405, 641204, and 20178100 are not included on Exhibit C to the Utility Motion. One account is marked “N/A,” which United Power assumes is account number 19553200.

could be “cash deposits, prepayments, or other forms of security if the Debtors believe that such additional assurance is reasonable[.]” In addition, the procedures provide for 14 days for the parties to resolve any adequate assurance issues, failing which the Debtors will request a hearing at the next regularly scheduled omnibus hearing. *Id.* at 17(k).

11. On June 16, 2020, the Court granted the Utility Motion on an interim basis, setting a final hearing for July 7, 2020 [Docket No 92].

12. On June 15, 2020, the Debtors filed the DIP Motion, and on June 16, 2020, the Court granted it on an interim basis, also setting a final hearing for July 7 [Docket No. 94]. Nothing in these documents appears to carve-out or exclude from the proposed collateral the Adequate Assurance Deposit or any other adequate assurance consideration.

Objection

13. Neither this Court nor the Debtors have the authority to select the *form* of adequate assurance of payment. Section 366(c)(A) of the Bankruptcy Code provides that the Debtors and this Court can only modify “the amount of an assurance of payment under paragraph (2),” which is the provision by which the Debtors must provide adequate assurance of payment to the utility that is satisfactory to the utility. Therefore, in implementing procedures to avoid the 30-day deadline of section 366(c)(2), the Court should consider the remaining requirements of section 366.

14. Even so, United Power appreciates in a large case like this, the Debtors may need more time to address the adequate assurance of payment requests of their numerous utilities, and confirm that they have identified all of the applicable accounts and their deposit information. Accordingly, United Power does not object to extending the 30-day period of section 366(c) in this case to a mutually agreeable date with the Debtors, but does not agree to the procedural posture

of the adequate assurance determination or the procedures proposed by the Debtors, and reserves and does not waive any and all rights in that regard.

15. If the Debtors could select the form of adequate assurance, section 366(c)(1)(A) defines the forms of adequate assurance, none of which include a segregated account held by the Debtors absent utility consent. Here, United Power does not request a segregated bank account maintained by the Debtors as its form of assurance of payment. Rather, it seeks a cash deposit from the Debtors to be held by United Power equal to the average amount of two months of invoices that United Power could be immediately draw down against any outstanding postpetition debt without leave of the Court following the end of any grace period, and be forthwith replenished by the Debtors.

16. Based on the average billing of the last 12 months, the proposed deposit amount is \$423,174.49. As with the proposed Adequate Assurance Deposit into the Adequate Assurance Account, United Power is willing to return any remaining deposit to the Debtors on the earlier of (i) reconciliation and payment by the Debtors of United Power's final invoice in accordance with applicable nonbankruptcy law following the Debtors' termination of Utility Services from United Power, or (ii) the effective date of any chapter 11 plan confirmed in these chapter 11 cases (all subject to United Power's ability to request any other deposit(s) pursuant to its ordinary course operations).

17. The request for two months of billing as a deposit is consistent with United Power's *General Rules and Regulations*, which provides for up to 90 days of deposit.⁶ In this regard, paragraph 4, entitled "Customer Deposits," states in part:

⁶ United Power's *General Rules and Regulations* are available at: <https://unitedpower.com/sites/unitedpower/files/Documents/Rate%20Tariff/3-RulesRegulations.pdf>,

a. **Purpose Of Customer Deposits For Service**

A deposit required pursuant to this rule may be in addition to any advance, contribution, or guarantee, in connection with construction of lines or facilities, as provided in the extension policy of the utility's tariffs on file with the Commission. Any deposit as required herein is not to be considered as advance payment or partial payment of any bill for service. The making of a deposit shall not relieve any customer from payment of current bills as they become due and no deposit shall be applied by United to any indebtedness of the customer to the utility except to a bill for utility services due or past due after service is terminated or upon bankruptcy of the applicant. In the latter case, the deposit shall be deemed as payment for services provided prior to bankruptcy.

* * *

c. **Deposit Calculation**

A deposit intended to guarantee payment of current bills shall not exceed an amount equal to an estimated ninety days' bill of the customer.

United Power's general business practice is to require a deposit of two months of the anticipated invoice amounts, though it does not hold any deposit from the Debtor.

18. Section 366 of the Bankruptcy Code balances 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). With essentially 30-day payment terms, United Power could easily be owed two months of billing on a postpetition basis without payment. As such, just one half month of a billing deposit is inadequate and unduly puts United Power at risk of nonpayment, particularly with some \$177,000 already owed to it on a prepetition basis (contrary to the Debtors' statement that "the Utility Companies are adequately assured against any risk of nonpayment for future services, especially in light of the Debtors' history of paying all utility bills on time and in the ordinary course." Utility Motion, ¶ 21.).

19. Moreover, regardless of where the Adequate Assurance Deposit is held, any final Orders on the Utility Motion and the DIP Motion, as applicable, should provide (i) that there are no security interests on that account and the related funds that are equal or superior to the rights of the utilities, including in relation to the Debtors, any DIP lenders, and any other third parties; (ii) any deposit draw down is not subject to disgorgement, including if the cases are administratively insolvent or converted to chapter 7 or dismissed; and (iii) so as to avoid prejudice that could result from having to wait for the expiration of the 14-day negotiation period and the next omnibus hearing, Utility Motion, ¶ 17(k), utilities should have the opportunity to seek expedited relief from the Court if and when they deem it appropriate.

Joinder

20. United Power joins in the objections to the Debtors' requested relief filed by other parties-in-interest to the extent they are not inconsistent with the Objection.

Reservation of Rights

21. Nothing in this Objection is intended to be, or should be construed as, a waiver by United Power of any of its rights under the Bankruptcy Code or applicable law. United Power

expressly reserves all such rights, including, without limitation, the right to: (i) supplement and/or amend this Objection; and (ii) assert any further objections as they deem necessary or appropriate.

Conclusion

WHEREFORE, United Power respectfully requests that this Court enter an order: (i) sustaining this Objection; and (ii) granting United Power such other and further relief as this Court deems just and appropriate under the circumstances.

Dated: July 1, 2020
Wilmington, Delaware

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Chapter 11

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CERTIFICATE OF SERVICE

I, Kevin S. Neiman, hereby certify that on July 1, 2020, a true and correct copy of *United Power, Inc.'s Omnibus Limited Objection to Debtors' (I) Utilities Motion and (II) Postpetition Financing Motion* were served via CM/ECF and First Class Mail on the following individuals identified below:

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¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corporation (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

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