

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)
) Chapter 11
)
F21 OPCO, LLC, et al.,) Case No. 25-10469 (MFW)
)
) (Jointly Administered)
Debtors.)
) Re: Docket Nos. 5, 73
)
) Obj. Deadline: 4/8/25 at 4:00 p.m.
) Hearing Date: 4/15/25 at 2:00 p.m.
)

**OBJECTION OF CERTAIN UTILITY COMPANIES TO THE DEBTORS' MOTION
FOR ENTRY OF INTERIM AND FINAL ORDERS (I) (A) PROHIBITING UTILITY
COMPANIES FROM DISCONTINUING, ALTERING, OR REFUSING SERVICE, (B)
DEEMING UTILITY COMPANIES TO HAVE ADEQUATE ASSURANCE OF FUTURE
PAYMENT, (C) ESTABLISHING PROCEDURES FOR RESOLVING REQUESTS FOR
ADDITIONAL ASSURANCE, AND (II) GRANTING RELATED RELIEF**

Salt River Project ("SRP"), Southern California Edison
Company ("SCE"), San Diego Gas and Electric Company ("SDG&E"),
Entergy Arkansas, LLC ("Entergy AR"), Entergy Louisiana, LLC
("Entergy LA"), Entergy Mississippi, LLC ("Entergy MS"), Entergy
Texas, Inc. ("Entergy TX"), Baltimore Gas and Electric Company
("BGE"), Atlantic City Electric Company ("ACE"), PECO Energy
Company ("PECO"), The Potomac Electric Power Company ("Pepco"),
Commonwealth Edison Company ("ComEd"), Georgia Power Company
("Georgia Power"), The Connecticut Light & Power Company
("CL&P"), Public Service Company of New Hampshire ("PSNH"),
Consolidated Edison Company of New York, Inc. ("Con Ed"), Orlando
Utilities Commission ("OUC"), PSEG Long Island ("PSEGLI"), Boston



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Gas Company ("BGC"), Massachusetts Electric Company ("MEC"), KeySpan Gas East Corporation ("KeySpan"), Niagara Mohawk Power Corporation ("NIMO") and Florida Power & Light Company ("FPL") (collectively, the "Utilities"), hereby object to the *Debtors' Motion For Entry of Interim and Final Orders (I) (A) Prohibiting Utility Companies From Discontinuing, Altering, or Refusing Service, (B) Deeming Utility Companies To Have Adequate Assurance of Future Payment, (C) Establishing Procedures For Resolving Requests For Additional Assurance, and (II) Granting Related Relief* (the "Utility Motion") (Docket No. 5), and set forth the following:

Introduction

The Debtors' Utility Motion improperly seeks to shift the Debtors' obligations under Section 366(c)(3) of the Bankruptcy Code from seeking to modify the amounts of the adequate assurance of payment requested by the Utilities under Section 366(c)(2) to setting the form and amounts of the adequate assurance of payment acceptable to the Debtors. This Court should not permit the Debtors to avoid the plain language and requirements of Section 366(c).

Through the Utility Motion, the Debtors seek to have this Court approve their form of adequate assurance of payment, which is a bank account containing \$1.5 million which supposedly reflects approximately 50% of the Debtors' estimated monthly

post-petition utility charges, using the historical average for such payments over the last twelve months (the "Bank Account"). The Utility Services List attached at Exhibit "C" to the Utility Motion does not reflect the Debtors' proposed amounts to be contained in the Bank Account for each of the Utilities.

The Court should reject the Debtors' proposed Bank Account because: (1) The Utilities bill the Debtors on a monthly basis and provide the Debtors with generous payment terms pursuant to applicable state law, tariffs and/or regulations, such that a supposed two-week account maintained by the Debtors is not sufficient in amount or in form to provide the Utilities with adequate assurance of payment; (2) Section 366(c) of the Bankruptcy Code specifically defines the forms of adequate assurance of payment in Section 366(c)(1), none of which include a segregated bank account; and (3) Even if this Court were to improperly consider the Bank Account as a form of adequate assurance of payment for the Utilities (which it should not), this Court should reject it as an insufficient form of adequate assurance of payment for the reasons set forth in Section A.1. of this Objection.

As discussed below, the Debtors filed the *Debtors' Motion For Entry of (I) Interim Order Authorizing (A) the Conduct of the Store Closing Sales, With Such Sales To Be Free and Clear of All Liens, Claims, and Encumbrances and (B) Granting Related*

Relief, and (II) Final Order, Authorizing (A) the Debtors To Assume the Agency Agreement, (B) the Conduct of the Store Closing Sales, With Such Sales To Be Free and Clear of All Liens, Claims, and Encumbrances, and (C) Granting Related Relief (the "Store Closing Sales Motion") (Docket No. 14) requesting approval to conduct store closing sales and other relief. The Store Closing Sales Motion does not include procedures or requirements for the Debtors to timely contact the applicable Utilities to terminate utility service to any Debtor store locations once a store closing sale is completed. Also, as discussed below, the Debtors filed the *Debtors' First (1st) Omnibus Motion For Entry of An Order Authorizing (I) Rejection of (A) Certain Unexpired Leases of Nonresidential Real Property (B) Certain Executory Contracts Effective As of the Petition Date; (II) Abandonment of Any Remaining Personal Property Located at the Leased Premises, Effective As of the Petition Date, and (III) Granting Related Relief* (the "First Lease Rejection Motion") (Docket No. 43). The First Lease Rejection Motion does not include procedures or requirements for the Debtors to timely contact the applicable Utilities to terminate utility service to any Debtor locations as of the proposed lease rejection date, which is the March 16, 2025 Petition Date (the "Petition Date"). As such, there is no way for a Utility to know when the Debtors no longer require service at a store

location where (i) store closings have been completed, or (ii) a lease is rejected. Outside of bankruptcy, applicable state law and/or tariffs require the Debtors to close accounts when they no longer require utility service. Accordingly, the Debtors should be required to close their accounts with the Utilities on the date that the Debtors no longer require post-petition utility service or remain administratively obligated for the payment of such charges until they close the applicable account(s).

The Utilities are seeking the following cash deposits from the Debtors, which are amounts that they are authorized to obtain pursuant to applicable state law: (a) SRP - \$9,030 (2-month); (b) SCE - \$921,623 (2-month); (c) SDG&E - \$60,592 (2-month); (d) Entergy AR - \$15,800 (2-month); (e) Entergy LA - \$18,450 (2-month); (f) Entergy MS - \$8,180 (2-month); (g) Entergy TX - \$26,530 (2-month); (h) BGE - \$19,839 (2-month); (i) ACE - \$9,970 (2-month); (j) PECO - \$735 (2-month); (k) Pepco - \$17,410 (2-month); (l) ComEd - \$47,865 (2-month); (m) Georgia Power - 48,310 (2-month); (n) CL&P - \$10,740 (1.5-month); (o) PSNH - \$10,460 (2-month); (p) Con Ed - \$26,422 (2-month); (q) OUC - \$12,800 (2-month); (r) PSEGLI - \$46,387 (2-month); (s) BGC - \$288 (2-month); (t) MEC - \$17,140 (2-month); (u) KeySpan - \$2,490 (2-month); (v) NIMO - \$24,962 (2-month); and (w) FPL - \$96,996 (2-month). Based on all of the foregoing, this Court should deny the Utility

Motion as to the Utilities because the amounts of the Utilities' post-petition deposit requests are reasonable under the circumstances and should not be modified.

Facts

Procedural Facts

1. On March 16, 2025 (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' Chapter 11 bankruptcy cases are being jointly administered.

The Utility Motion

3. On the Petition Date, the Debtors filed the Utility Motion.

4. On March 18, 2025, the Court entered the *Interim Order (I) (A) Prohibiting Utility Companies From Discontinuing, Altering, or Refusing Service, (B) Deeming Utility Companies To Have Adequate Assurance of Future Payment, (C) Establishing Procedures For Resolving Requests For Additional Assurance, and (II) Granting Related Relief* (the "Interim Utility Order") (Docket No. 73). The Interim Utility Order set (i) an objection deadline of April 8, 2025 and (ii) the final hearing on the

Utility Motion to take place on April 15, 2025 at 20:00 p.m.

5. The Debtors claim that they pay approximately \$4 million each month for utility services. Utility Motion at ¶ 8.

6. Through the Utility Motion, the Debtors seek to avoid the applicable legal standards under Bankruptcy Code Sections 366(c)(2) and (3) by seeking Court approval for their own proposed form of adequate assurance of payment, which is the Bank Account containing \$1.5 million which supposedly reflects approximately 50% of the Debtors' estimated monthly post-petition utility charges, using the historical average for such payments over the last twelve months. Utility Motion at ¶ 8.

7. The Debtors propose to "deposit" \$1.5 million into the Bank Account, and refer to the Bank Account as the "Utility Deposit." Utility Motion at ¶ 8. However, monies contained in an escrow account controlled by a customer of a utility such as the proposed Bank Account are not recognized by any state public utility commission as a "cash deposit" provided by a customer to a utility. Section 366(c) of the Bankruptcy Code specifically defines the forms of adequate assurance of payment in Section 366(c)(1), none of which include a segregated utility bank account. Additionally, the Debtors acknowledge that "the form of Adequate Assurance may be limited to the types of security enumerated in section 366(c)(1)(A) of the Bankruptcy Code." Utility Motion at ¶ 16. Simply put, the Debtors are not

proposing to provide any of their utilities with cash deposits as adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy Code.

8. The proposed Bank Account is not acceptable to the Utilities and should not be considered relevant by this Court because Sections 366(c)(2) and (3) do not allow the Debtors to establish the form or amount of adequate assurance of payment. Under Sections 366(c)(2) and (3), this Court and the Debtors are limited to modifying, if at all, the amount of the security sought by the Utilities under Section 366(c)(2).

9. The Debtors propose that upon the earlier of the effective date of a Chapter 11 plan or such other time as the Chapter 11 cases may be closed, the Debtors would not have to maintain the Bank Account, without the need for any further notice or action, order or approval of the Court. Utility Motion at ¶ 15. The Utilities bill the Debtors in arrears and will likely provide post-petition utility goods/services to the Debtors through the effective date of a plan, a store closing date or lease rejection date, meaning that any monies contained in the Bank Account should not be returned to the Debtors until the Debtors confirm that they have paid in full their post-petition utility expenses owed to their utility companies.

10. The Utility Motion does not address why the Bank Account would be underfunded with supposedly two-weeks of

utility charges when the Debtors know that the Utilities are required by applicable state laws, regulations or tariffs to bill the Debtors monthly. Moreover, the Debtors presumably want the Utilities to continue to bill them monthly and provide them with the same generous payment terms that they received prepetition. Accordingly, if the Bank Account is relevant, which the Utilities dispute, and two-week amounts were actually contained in the Bank Account for each of the Utilities, the Debtors need to explain: (A) Why they are only proposing to deposit supposed two-week amounts into the Bank Account; and (B) How such an insufficient amount could even begin to constitute adequate assurance of payment for the Utilities' monthly bills.

11. Furthermore, the Utility Motion does not address why this Court should consider modifying, if at all, the amounts of the Utilities' adequate assurance requests pursuant to Section 366(c)(2). Rather, without providing any specifics, the Utility Motion merely states that "[t]he Debtors submit that the Utility Deposit constitutes sufficient Adequate Assurance for the Utility Companies." Utility Motion at ¶ 17.

The Debtors' Cash Collateral Motion

12. On March 17, 2025, the Debtors filed the *Debtors' Motion For Entry of Interim and Final Orders (I) Authorizing Postpetition Use of Cash Collateral, (II) Granting Adequate Protection To the Secured Parties, (III) Modifying the Automatic*

Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief (the "Cash Collateral Motion") (Docket No. 15).

13. The Debtors seek through the Cash Collateral Motion a carve-out for payments to the Debtors' professionals incurred prior to the delivery of a Carve-Out Trigger Notice, plus an additional \$1.5 million after delivery of a Carve-Out Trigger Notice (the "Carve-Out"). Cash Collateral Motion at pages 11-12.

14. The Debtors have the following Milestones: (i) no later than 35 days after the Petition Date - entry of final Cash Collateral Order and final order authorizing the Debtors to assume the Store Closing Agreement and conduct store closing sales; (ii) no later than 50 days after the Petition Date - entry of order approving the Disclosure Statement and the Solicitation Procedures; (iii) no later than 90 days after the Petition Date - entry of order approving the Plan; and (iv) no later than 95 days after the Petition Date - the Plan effective date shall have occurred. Cash Collateral Motion at pages 12-13.

15. On March 19, 2025, the Court entered the *Interim Order (I) Authorizing Postpetition Use of Cash Collateral, (II) Granting Adequate Protection To the Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* (the "Interim Cash Collateral Order") (Docket No. 88).

16. The Interim Cash Collateral Order approved the Carve-

Out. Interim Cash Collateral Order at pages 49-56.

17. Attached as Exhibit "A" to the Interim Cash Collateral Order is a 15-week initial budget through the week ending July 5, 2025 (the "Budget"). The Budget does not include a line-item for the payment of post-petition utility charges. As such, it is not apparent from the Budget whether sufficient funds have in fact been budgeted for the timely (and full) payment of the Debtors' post-petition utility charges. The Budget includes a line-item for "Utility Deposits" in the amount of \$940,000. If the \$940,000 reflects the monies to be contained in the Bank Account, then that budgeted amount is significantly less than the \$1.5 million that the Debtors' propose to be contained in the Bank Account that would supposedly reflect 50% of the Debtors' average monthly utility charges.

The Debtors' Store Closing Sales Motion

18. On March 17, 2025, the Debtors filed the Store Closing Sales Motion (Docket No. 14), requesting approval to conduct store closing sales and other relief.

19. On March 18, 2025, the Court entered the *Interim Order Authorizing (I) the Conduct of the Store Closing Sales, With Such Sales To Be Free and Clear of All Liens, Claims, and Encumbrances and (II) Granting Related Relief* (the "Interim Store Closing Sales Order") (Docket No. 80).

20. The Interim Store Closing Sales Order does not set

forth procedures or requirements for the Debtors to timely contact the applicable Utilities to terminate utility service to any Debtor store locations as of a store closing date.

21. Although not requested in the Store Closing Sales Motion, Paragraph 20 of the Interim Store Closing Sales Order includes the following injunctive relief:

"Except as expressly provided for herein or in the Sale Guidelines, and except with respect to any Governmental Unit (as to which paragraphs 15 and 30 of this Interim Order shall apply), no person or entity, including, but not limited to, any landlord, licensor, service providers, **utilities**, and creditor, shall take any action to directly or indirectly prevent, interfere with, or otherwise hinder the continuation of the Store Closing Sales or the sale of Sale Closing Assets, or the advertising and promotion (including the posting of signs and exterior banners or the use of signwalkers) of such sales, and all such parties and persons of every nature and description, including, but not limited to, any landlord, licensor, service providers, **utilities**, and creditor and all those acting for or on behalf of such parties, are prohibited and **enjoined** from (a) interfering in any way with, obstructing, or otherwise impeding, the conduct of the Store Closing Sales . . ."

(emphasis added)

(the "Store Closings Injunctive Relief").

22. The statutory and legal basis for the relief requested in the Store Closing Sales Motion is set forth in paragraph 3 of the Store Closing Sales Motion. However, the Debtors fail to cite to Rules 7001 and 7065 of the Federal Rules of Bankruptcy Procedure, which govern how injunctive or other equitable relief must be sought in bankruptcy. Despite the fact that the Store Closings Injunctive Relief is clearly equitable in nature, the

Debtors did not seek Court approval of the Store Closings Injunctive Relief via an adversary proceeding, but rather obtained Court approval of the Store Closing Injunctive Relief via a provision in the Interim Closing Sales Order.

The First Lease Rejection Motion

23. On March 17, 2025, the Debtors filed the First Lease Rejection Motion (Docket No. 43).

24. Through the First Lease Rejection Motion, the Debtors seek authorization to reject certain leases and executory contracts effective as of the Petition Date.

25. The First Lease Rejection Motion does not set forth procedures or requirements for the Debtors to timely contact the applicable Utilities to terminate utility service to any Debtor stores as of a lease rejection date.

Facts Regarding the Utilities

26. Each of the Utilities provided the Debtors with prepetition utility goods and/or services, and have continued to provide the Debtors with utility goods and/or services since the Petition Date.

27. Under the Utilities' billing cycles, the Debtors receive approximately one month of utility goods and/or services before the Utility issues a bill for such charges. Once a bill is issued, the Debtors have approximately 15 days to pay the applicable bill. If the Debtors fail to timely pay the bill, a

past due notice is issued and, in most instances, a late fee may be subsequently imposed on the account. If the Debtors fail to pay the bill after the issuance of the past due notice, the Utilities issue 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 the Utilities' billing cycles, the Debtors could receive at least two months of unpaid charges before the utility could cease the supply of goods and/or services for a post-petition payment default.

28. To avoid the need to bring witnesses and have lengthy testimony regarding the Utilities regulated billing cycles, the Utilities request that this Court, pursuant to Rule 201 of the Federal Rules of Evidence, take judicial notice of the Utilities' billing cycles. Pursuant to the foregoing request and based on the voluminous size of the applicable documents, the Utilities' web-site links to their tariffs and/or state laws, regulations and/or ordinances are set forth in **Exhibit "A"** attached hereto.

29. Subject to a reservation of the Utilities' right to supplement their post-petition deposit requests if additional accounts belonging to the Debtors are subsequently identified, the Utilities' estimated prepetition debt and post-petition deposit requests are as follows:

<u>Utility</u>	<u>No. of Accts.</u>	<u>Est. Prepet. Debt</u>	<u>Dep. Request</u>
SRP	2	\$2,552.14	\$9,030 (2-month)
SCE	36	To be supplemented	\$921,623 (2-month)
SDG&E	6	\$29,968.67	\$50,592 (2-month)
Entergy AR	1	\$5,235	\$15,800 (2-month)
Entergy LA	2	\$6,235	\$18,450 (2-month)
Entergy MS	1	\$4,270	\$8,180 (2-month)
Entergy TX	1	\$7,995	\$26,530 (2-month)
BGE	2	\$4,711.51	\$19,839 (2-month)
ACE	2	\$4,089.74	\$9,970 (2-month)
PECO	2	\$982.44	\$735 (2-month)
Pepco	1	\$7,719.14	\$17,410 (2-month)
ComEd	12	\$25,708.47	\$47,865 (2-month)
Georgia Power	10	To be supplemented	\$48,310 (2-month)
CL&P	2	\$8,686.15	\$10,740 (1.5-month)
PSNH	2	\$4,144.20	\$10,460 (2-month)
Con Ed	3	\$9,761.10	\$26,422 (2-month)
OUC	1	\$11,135.72	\$12,800 (2-month)
PSEGLI	7	\$35,197.33	\$46,387 (2-month)
BGC	1	\$292.33	\$288 (2-month)
MEC	3	\$6,477.59	\$17,140 (2-month)
KeySpan	2	\$1,375.92	\$2,490 (2-month)
NIMO	2	\$16,235.35	\$24,962 (2-month)
FPL	11	\$13,126.05	\$96,996 (2-month)

30. SRP held prepetition cash deposits totaling \$8,380 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the SRP post-petition deposit request.

31. SCE held a prepetition surety bond in the amount of \$487,450 that it will make a demand upon for unpaid prepetition charges. SCE also held a prepetition cash deposit in the amount of \$286,465.24 that it will recoup against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the SCE post-petition deposit request.

32. Entergy AR held a prepetition cash deposit in the amount of \$5,094 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition deposit amount remains after recoupment.

33. Entergy LA held prepetition cash deposits totaling \$13,515 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the Entergy LA post-petition deposit request.

34. Entergy MS held a prepetition cash deposit in the amount of \$373 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition

deposit amount remains after recoupment.

35. PECO held a prepetition cash deposit in the amount of \$300 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition deposit amount remains after recoupment.

36. Pepco held a prepetition cash deposit in the amount of \$7,990 it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the Pepco post-petition deposit request.

37. ComEd held prepetition cash deposits totaling \$45,010 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the ComEd post-petition deposit request.

38. Georgia Power held a prepetition cash deposit in the amount of \$39,885.83 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the Georgia Power post-petition deposit request.

39. Con Ed held a prepetition cash deposit in the amount of \$2,705 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition deposit amount remains after recoupment.

40. OUC held a prepetition cash deposit in the amount of \$9,785 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition deposit amount remains after recoupment.

41. NIMO held prepetition cash deposits totaling \$21,335 that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the NIMO post-petition deposit request.

42. FPL held prepetition cash deposits totaling \$21,960 that it will recoup against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition deposit amount remains after recoupment. FPL also held a prepetition surety bond in the amount of \$101,338 that it will make a demand upon for unpaid prepetition charges.

Discussion

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

Sections 366(c)(2) and (3) of the Bankruptcy Code 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).

As set forth by the Supreme Court of the United States, "[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. *In re Lucre*, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005). 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 under Section 366(c) (2).

In this case, the Debtors filed the Utility Motion to improperly shift the focus of their obligations under Section 366(c) (3) from modifying the amount of the adequate assurance of

payment requested under Section 366(c)(2) to setting the form and amount of the 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 it should deny the Utility Motion as to the Utilities.

1. The Debtors' Proposed Bank Account Is Not Relevant And Even If It Is Considered, It Is Unsatisfactory Because It Does Not Provide the Utilities With Adequate Assurance of Payment.

This Court should not even consider the Bank Account as a form of adequate assurance of payment because: (1) It is not relevant because Section 366(c)(3) provides that a debtor can only modify "the amount of an assurance of payment under paragraph (2)"; and (2) The Bank Account is not a form of adequate assurance of payment recognized by Section 366(c)(1)(A). Moreover, even if this Court were to consider the Bank Account, the Bank Account is an improper and otherwise unreliable form of adequate assurance of future payment for the following reasons:

1. Unlike the statutorily approved forms of adequate assurance of payment, the Bank Account is not something held by the Utilities. Accordingly, the Utilities have no control over how long the Bank Account will remain in place.
2. It is underfunded from the outset because even if the Debtors were to place two-week amounts in the Bank Account for the Utilities, the Utilities issue monthly bills and by the time a default notice is issued, the

Debtors will have received approximately 60 days of commodity or service.

3. The Debtors fail to state whether draws from the Bank Account would be limited to two-week amounts.
4. The Debtors should not reduce the amount of the Bank Account on account of the termination of utility services to a Debtor account until the Debtors confirm that all post-petition charges on a closed account are paid in full.

Accordingly, this Court should not approve the Bank Account as adequate assurance as to the Utilities because the Bank Account: (a) Is not the form of adequate assurance requested by the Utilities; (b) Is not a form recognized by Section 366(c)(1)(A); and (c) Is an otherwise unreliable form of adequate assurance.

2. The Utility Motion Should Be Denied As To The Utilities Because The Debtors Have Not Set Forth Any Basis For Modifying The Utilities' Requested Deposits.

In the Utility Motion, the Debtors fail to address why this Court should modify the amounts of the Utilities' requests for adequate assurance of payment. Under Section 366(c)(3), the Debtors have the burden of proof as to whether the amounts of the Utilities' adequate assurance of payment requests 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). However, the Debtors do not provide this

Court with any evidence or factually supported documentation to explain why the amounts of the Utilities' adequate assurance requests should be modified. Accordingly, this 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 the Utilities.

B. THIS COURT SHOULD ORDER THE DEBTORS TO PROVIDE THE ADEQUATE ASSURANCE OF PAYMENT REQUESTED BY THE UTILITIES 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), holding 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 follows:

- (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.

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).

The Utilities bill the Debtors on a monthly basis for the charges already incurred by the Debtors in the prior month. They then provide the Debtors with 20 to 30 days to pay the bill, the timing of which is set forth in applicable state laws, tariffs and/or regulations. Based on the foregoing state-mandated billing cycles, the minimum period of time the Debtors could receive service from the Utilities before termination of service for non-payment of post-petition bills is approximately two (2) months. Moreover, even if the Debtors timely pay their post-petition utility bills, the Utilities still have potential exposure of approximately 60 days or more based on their billing cycles. Furthermore, the forms and amounts of the Utilities' adequate assurance requests are the forms and amounts that the applicable public service commission, which is a neutral third-party entity, permits a Utility to request from its customers. The Utilities are not taking the position that the cash deposits

that they are entitled to obtain under applicable state law or contract are binding on this Court, but instead are introducing those forms and amounts as evidence of the forms and amounts that the applicable regulatory entity or contract permit the Utilities to request from their customers.

In contrast, the Debtors failed to address in the Utility Motion why this Court should modify, if at all, the amounts of the Utilities' adequate assurance of payment requests, which is the Debtors' statutory burden. Instead, the Debtors merely asked this Court to approve the Bank Account supposedly containing approximately two-weeks of the Debtors' utility charges. The Debtors did not provide an objective, much less an evidentiary, basis for their proposed adequate assurance in the form of the Bank Account. Moreover, in contrast to the improper treatment proposed to the Utilities, the Debtors have made certain that post-petition professionals are favored creditors over the Utilities by ensuring that the post-petition bills/expenses of Debtors' counsel are paid, even in the event of a post-petition default on the use of DIP financing and cash collateral, by obtaining a \$1.5 million professionals' carve-out for the payment of their fees/expenses after a default and a guarantee of payment for fees incurred up to a default.

Additionally, the store closing sales procedures and lease rejection procedures do not include procedures or requirements

for the Debtors to timely: (i) Contact the applicable Utilities to terminate utility service to any Debtor store locations as of a proposed lease rejection date; (ii) Contact the applicable Utilities to terminate utility service to any Debtor store locations once a store closing sale is completed and the Debtors no longer require utility services at an applicable closed Debtor store; or (iii) Close a post-petition account with the Utilities when the Debtors no longer require post-petition service for that account. As such, there is no way for a Utility to know when the Debtors no longer require service at a store location where (i) store closings have been completed or (ii) the lease is rejected. The Debtors should be required to close accounts with the Utilities when they no longer require post-petition service for such accounts, or otherwise they should remain administratively responsible for such charges until they do close the applicable account(s).

Despite the fact that the Utilities continue to provide the Debtors with admittedly crucial post-petition utility goods/services on the same generous terms that were provided prepetition, with the risk of non-payment, the Debtors are seeking to deprive the Utilities of any adequate assurance of payment for which they are entitled to receive for continuing to provide the Debtors with post-petition utility goods/services. Against this factual background, it is reasonable for the

Utilities to seek and be awarded the full security that they have requested herein.

WHEREFORE, the Utilities respectfully request that this Court enter an order:

1. Denying the Utility Motion as to the Utilities;
2. Awarding the Utilities the post-petition adequate assurance of payments pursuant to Section 366 in the amount and form satisfactory to the Utilities, which is the form and amount requested herein;
3. Require the Debtors to close accounts with the Utilities when they no longer require post-petition service from the Utility for that account or remain administratively responsible for such charges until they do close the account(s); and
4. Providing such other and further relief as the Court deems just and appropriate.

Dated: March 31, 2025 WHITEFORD TAYLOR & PRESTON LLC

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EXHIBIT A

SRP: Rules and Regulations:

<http://www.srpnet.com/about/rulesregs.aspx>

Price Plans:

<https://www.srpnet.com/prices/pdfx/ratebook.pdf>

SCE: <https://www.sce.com/regulatory/tariff-books>

SDG&E: <https://www.sdge.com/rates-and-regulations>

Entergy AK:

https://www.entergy-arkansas.com/your_business/business_tariffs/

Entergy LA: [https://cdn.entergy-](https://cdn.entergy-louisiana.com/userfiles/content/price/tariffs/ell_elec_terms-conditions.pdf)

[louisiana.com/userfiles/content/price/tariffs/ell_elec_terms-conditions.pdf](https://cdn.entergy-louisiana.com/userfiles/content/price/tariffs/ell_elec_terms-conditions.pdf)

Entergy MS: [https://www.entergy-](https://www.entergy-mississippi.com/your_business/business_tariffs/)

[mississippi.com/your_business/business_tariffs/](https://www.entergy-mississippi.com/your_business/business_tariffs/)

Entergy TX: [https://www.entergy-](https://www.entergy-texas.com/your_business/business_tariffs/)

[texas.com/your_business/business_tariffs/](https://www.entergy-texas.com/your_business/business_tariffs/)

BGE:

Electric -

<https://www.bge.com/MyAccount/MyBillUsage/Pages/ElectricServiceRatesTariffs.aspx>

Gas -

<https://www.bge.com/MyAccount/MyBillUsage/Pages/GasServiceRatesTariffs.aspx>

ACE:

<https://www.atlanticcityelectric.com/MyAccount/MyBillUsage/Pages/Current-Tariffs.aspx>

PECO:

Electric: <https://www.peco.com/SiteCollectionDocuments/CurrentElecTariff.pdf>

Gas: <https://www.peco.com/SiteCollectionDocuments/CurrentGasTariff.pdf>

Pepco:

Maryland:

<https://www.pepco.com/MyAccount/MyBillUsage/Pages/Maryland.aspx>

ComEd:

Tariffs: <https://www.comed.com/customer-service/rates-pricing/rates-information/Pages/current-rates.aspx>

Regulations: <http://www.ilga.gov/commission/jcar/admincode/083/08300280sections.html>

Georgia Power: <https://www.georgiapower.com/business/prices-rates/business-tariffs.cshtml>

CL&P: <https://www.eversource.com/content/nh/business/about/doing-business-with-us/builders-contractors/interconnections/connecticut-net-metering/connecticut-tariffs-rules>

PSNH:

<http://www.psnh.com/Templates/Content.aspx?id=4294967779&terms=tariffs>

Con Ed:

Electric - https://lite.coned.com/_external/cerates/elec.asp

Gas - <https://www.coned.com/en/rates-tariffs/rates/natural-gas?facettab=8cec6928-c68d-40f7-838c-56468a08f82c>

OUC: The OUC Electric Service Policies, which sets forth the OUC billing cycle, will be provided upon request.

PSEGLI:

<https://www.psegliny.com/aboutpseglongisland/ratesandtariffs>

BGC:

<http://gasrates.nationalgridus.com/ne/index-rates-afternov.jsp>

MEC:

http://www.nationalgridus.com/masselectric/non_html/rates_tariff.pdf

KeySpan: <https://www.nationalgridus.com/NY-Business/Default>

NIMO:

<http://www.nationalgridus.com/niagaramohawk/business/rates/rates.asp>

FPL:

http://www.fpl.com/customer/rates_and_bill/rules_tariffs.shtml

CERTIFICATE OF SERVICE

I hereby certify that in addition to the notice and service provided through the Court's ECF system, on March 31, 2025, I caused a true and correct copy of the *Objection of Certain Utility Companies to the Debtors' Motion for Entry of Interim and Final Orders (I) (A) Prohibiting Utility Companies from Discontinuing, Altering, or Refusing Service, (B) Deeming Utility Companies to Have Adequate Assurance of Future Payment, (C) Establishing Procedures for Resolving Requests for Additional Assurance, and (II) Granting Related Relief* to be served by email on:

Andrew L. Magaziner
Robert F. Poppiti, Jr.
Ashley E. Jacobs
S. Alexander Faris
Kristin L. McElroy
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