Docket #0123 Date Filed: 06/17/2024

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	)	**Chapter 11**
LAVIE CARE CENTERS, LLC, *et al.*,	)	**Case No. 24-55507 (PMB)**
	)	**(Jointly Administered)**
Debtors.	)	**Related to Docket Nos. 12, 51**

OBJECTION OF CERTAIN UTILITY COMPANIES TO THE DEBTORS' EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) APPROVING DEBTORS' PROPOSED FORM OF ADEQUATE ASSURANCE OF PAYMENT; (II) ESTABLISHING PROCEDURES FOR RESOLVING OBJECTIONS BY UTILITY PROVIDERS; AND (III) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING, OR DISCONTINUING SERVICE

American Electric Power ("AEP"), Virginia Electric and Power Company d/b/a Dominion Energy Virginia ("DEV"), Public Service Company of North Carolina Incorporated, d/b/a Dominion Energy North Carolina ("DENC"), Entergy Louisiana, LLC ("Entergy LA") and Entergy Mississippi, LLC ("Entergy MS") (collectively, the "Utilities"), hereby object to the *Debtors' Emergency Motion For Entry of Interim and Final Orders (I) Approving Debtors' Proposed Form of Adequate Assurance of Payment; (II) Establishing Procedures For Resolving Objections By Utility Providers; and (III) Prohibiting Utility Providers From Altering, Refusing, or Discontinuing Service* (the "Utility Motion")(Docket No. 12), 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 modifying the amounts of the adequate assurance of payment requested by the Utilities under Section 366(c)(2) to setting the form and amounts of

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the adequate assurance of payment acceptable to the Debtors. This Court should not permit the Debtors to shift their clear statutory burden in this fashion.

Through the Utility Motion, the Debtors seek to have this Court approve their form of adequate assurance of payment, which is a bank account supposedly containing $550,000 that supposedly reflects two-weeks of utility charges based upon average monthly utility charges determined by an annual average (the "Bank Account"). Schedule 1 to the Interim Utility Order (defined below) reflects that the Bank Account would contain the following on behalf of the Utilities: (a) AEP - $20,335; (b) DEV - $29,500; (c) DENC - $2,800; (d) Entergy LA - $0 (not listed in Schedule 1); and (e) Entergy MS - $12,625.

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 segregated bank account supposedly containing two-weeks of utility charges that is 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, 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.

The Utilities are seeking the following two-month cash deposits from the Debtors, which are amounts that they are authorized to obtain pursuant to applicable state law or contract: (a) AEP - $66,651; (b) DEV - $110,287; (c) DENC - $9,220; (d) Entergy LA - $10,340; and (e) Entergy MS - $62,370.

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 June 2, 2024 (the "Petition Date"), the Debtors commenced their cases under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") 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 June 3, 2024, the Debtors filed the Utility Motion.

4. On June 4, 2024, the Court held a hearing on the Utility Motion.

5. On June 5, 2024, the Court entered the *Interim Order (I) Approving Debtors' Proposed Form of Adequate Assurance of Payment; (II) Establishing Procedures For Resolving Objections By Utility Providers; (III) Prohibiting Utility Providers From Altering, Refusing, or Discontinuing Service; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* (the "Utility Order")(Docket No. 51). The Interim Utility Order set (i) an objection deadline of June 21, 2024 and (ii) the final hearing on the Utility Motion to take place on June 27, 2024 at 9:30 a.m.

6. The Debtors estimate that, on average, they spend approximately $1,100,000 per month on utility services. Utility Motion at ¶ 7.

7. The Debtors seek to avoid the applicable legal standards under Sections 366(c)(2) and (3) by seeking Court approval for their own form of adequate assurance of payment, which is

the Bank Account containing $550,000 that supposedly reflects two-weeks of utility charges based upon average monthly utility charges determined by an annual average. Utility Motion at ¶ 10.

8. The Debtors propose to "place a deposit" into the Bank Account, refer to the proposed monies to be contained in the Bank Account as the "Utility Deposit," and refer to the Bank Account as the "Utility Deposit Account." Utility Motion at ¶ 10. But monies contained in an escrow account controlled by a customer of a utility such as the proposed Bank Account are not recognized as a "cash deposit" provided by a customer to a utility by any public utility commission. Additionally, 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. Simply put, the Debtors are not proposing to provide any of the Utilities with cash deposits as adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy Code.

9. 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 amounts 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 amounts of the security sought by the Utilities under Section 366(c)(2).

10. The Utility Motion does not address why the Bank Account would be funded at supposedly two-weeks of utility charges for some of the Utilities when the Debtors know that the Utilities are required by applicable state laws, regulations and/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, the Debtors need to explain: (A) why they are only proposing that the Bank Account would contain supposed two-week amounts for some of

the Utilities; and (B) how such an insufficient amount could even begin to constitute adequate assurance of payment for the Utilities' monthly bills even if the Bank Account contained funds on behalf of all of the Utilities.

11. Although not requested in the Utility Motion, the Interim Utility Order provides that "[t]he Debtors are authorized, but not directed, to continue paying the Administrative Fees in the ordinary course of the Debtors' business, including, but not limited to, payment of any prepetition amounts." Interim Utility Order at ¶ 4; proposed Final Utility Order at ¶ 3. See also Interim Utility Order ¶¶ 17 and 18. If the Debtors are seeking to pay the Utilities' prepetition charges as adequate assurance of payment, it is something that the Utilities will consider.

12. 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 "the Utility Deposits to be held in the Utility Deposit Account" somehow constitutes sufficient adequate assurance to the Debtors' utility providers. Utility Motion at ¶ 11.

The Debtors' Financing Motion

13. On June 3, 2024, the Debtors filed the *Debtors' Emergency Motion For Entry of Interim and Final Orders (I) Authorizing the Debtors To (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection To Prepetition Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* (the "Financing Motion")(Docket No. 15).

14. Through the Financing Motion, the Debtors seek authorization to obtain post-petition financing on a secured superpriority basis, consisting of a new money term loan facility,

and loans issued thereunder (the "DIP Loans"), in an aggregate principal amount of up to $20 million. Financing Motion at ¶ 1.

15. The Debtors also seek through the Financing Motion a carve-out for payments to the Debtors' professionals incurred prior to delivery of a Carve-Out Trigger Notice, plus an additional $500,000 after delivery of a Carve-Out Trigger Notice (the "Carve-Out"). Financing Motion at pages 30-31.

16. The obligations of the DIP Lenders to advance the DIP Loans is subject to the Debtors satisfying the following milestones: (i) no later than 35 calendar days after the Petition Date – entry of Bidding Procedures Order; (ii) no later than 45 calendar days after the Petition Date – Debtors shall have filed a Plan and related Disclosure statement in each case; (iii) no later than 95 calendar days after the Petition Date – deadline for submitting qualified bids; (iv) no later than 100 calendar days after the Petition Date – auction to select a winning bidder; and (v) no later than 110 calendar days after the Petition Date – entry of an order approving the sale of some or all of the Debtors' assets or confirming the Plan. Financing Motion at pages 31-32.

17. On June 5, 2024, the Court entered the *Interim Order (I) Authorizing the Debtors To (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection To Prepetition Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing For June 27, 2024, and (V) Granting Related Relief* (the "Interim Financing Order")(Docket No. 49).

18. The Interim Financing Order authorized the Debtors to borrow up to $11 million of new money DIP Loans. Interim Financing Order at page 26.

19. The Interim Financing Order approved the Carve-Out. Interim Financing Order at ¶ 21.

20. Attached as Exhibit "2" to the Interim Financing Order is a 5-week initial budget through the week ending July 5, 2024 (the "Budget"). Although the Budget includes a line-item for "Utilities," no funds are budgeted for the payment of post-petition utility charges.

<u>The Bid Procedures Motion</u>

21. On June 10, 2024, the Debtors filed the *Debtors' Motion For Entry of An Order (I) Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines With Respect Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures For the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets* (the "Bid Procedures Motion")(Docket No. 104).

22. Through the Bid Procedures Motion, the Debtors are seeking approval of the following proposed timeline: (i) July 23, 2024 – deadline to file a notice of contracts that may be assumed and assigned to any successful bidder; (ii) August 19, 2024 – deadline by which the Debtors may choose a stalking horse bidder and enter into a Stalking Horse APA; (iii) within two business days after entry into a Stalking Horse APA – deadline by which the Debtors must file a Stalking Horse Notice; (iv) August 27, 2024 – auction (if any); (v) within two business days upon the conclusion of the auction (if any) – Debtors will file notice identifying successful bidder; (vi) September 2, 2024 – sale objection and cure and adequate assurance objection deadline; and (vii) September 5, 2024 or as soon thereafter that the Debtors may be heard – sale hearing. Bid Procedures Motion at ¶ 15.

Facts Regarding the Utilities

23. Each of the Utilities 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.

24. 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 20 to 30 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 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. As the Debtors operate care centers, the Utilities would not terminate service to the Debtors unless all residents were removed from the applicable facility.

25. 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 the following tariffs and/or state laws, regulations and/or ordinances are as follows:

AEP: Virginia - https://www.appalachianpower.com/company/about/rates/va/

DEV: https://www.dominionenergy.com/virginia/rates-and-tariffs/business-rates

DENC: https://www.dominionenergy.com/north-carolina-electric/rates-and-tariffs

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

Entergy MS: https://www.entergy-mississippi.com/your_business/business_tariffs/

26. 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:

Utility	**No. of Accounts**	**Estimated Prepetition Debt**	**Deposit Request**
AEP	5	$29,720.62	$66,651 (2-month)
DEV	9	$73,259.00	$110,287 (2-month)
DENC	5	$8,609.46	$9,220 (2-month)
Entergy LA	1	$3,145.00	$10,340 (2-month)
Entergy MS	5	$18,059.00	$62,370 (2-month)

27. AEP held prepetition deposits totaling $62,289.64 that it recouped against the prepetition debt owing to AEP from the Debtors pursuant to Section 366(c)(4) of the Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the AEP post-petition deposit request.

28. Entergy LA held a prepetition deposit in the amount of $6,215 that it recouped against the prepetition debt owing to Entergy LA from the Debtors 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.

29. Entergy MS held prepetition deposits totaling $51,810 that it recouped against the prepetition debt owing to Entergy MS from the Debtors pursuant to Section 366(c)(4) of the

Bankruptcy Code. Any prepetition deposit amount remaining after recoupment can be applied to the Entergy MS post-petition deposit request.

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 stated 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)). *See also 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 the 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 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 even a form of adequate assurance of payment recognized by Section 366(c)(1)(A). Moreover, even if the 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 statutory 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. To access the Bank Account, the Utilities have to incur the expense to draft, file and serve a default pleading with the Court and possibly litigate the demand if the Debtors refuse to honor a disbursement request.

3. It is underfunded from the outset because 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.

4. The Debtors may close the Bank Account before all post-petition utility charges are paid in full.

Accordingly, the Court should not approve the Bank Account as adequate assurance as to the Utilities because the Bank Account is: (a) not the **form** of adequate assurance requested by the Utilities; (b) not a form recognized by Section 366(c)(1)(A); and (c) 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 the Court with any evidence or factually supported documentation to explain why the amounts of the Utilities' adequate assurance requests should be modified. Accordingly, the Court should deny the relief requested by Debtors in the Utility Motion and require the Debtors to comply with the plain requirements of Section 366(c) with respect to the Utilities.

B. THE 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-paying customers 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, regulations or contracts. Based on the foregoing state-mandated billing cycles, the minimum period of time that 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 commissions, which are neutral third-party entities, permit the Utilities to request from their customers. The Utilities are not taking the position that the cash deposits that they are entitled to obtain under applicable state law 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 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 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 $500,000 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.

Despite the fact that the Utilities continue to provide the Debtors with admittedly essential post-petition utility goods/services on the same generous terms that were provided prepetition, with the possibility 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; and
3. Providing such other and further relief as the Court deems just and appropriate.

Dated: June 17, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2024, a true and correct copy of the foregoing *Objection* was served via the Court's CM/ECF electronic notification system on all parties requesting same, and to the following parties as indicated below:

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