

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)
) Chapter 11
)
ADVANTA CORP., et al.,) Case No. 09-13931 (KJC)
)
 Debtors.) Jointly Administered
)
) Re: Docket Nos. 10, 28
)
) Objection Deadline: 11/25/09, 4:00 p.m.
) Hearing Date: 12/4/09, 11:00 a.m.
)

OBJECTION OF PECO ENERGY COMPANY TO THE MOTION
OF DEBTORS PURSUANT TO SECTIONS 105(a) AND 366 OF
THE BANKRUPTCY CODE FOR AN INTERIM AND FINAL ORDER
(I) PROHIBITING UTILITIES FROM ALTERING, REFUSING,
OR DISCONTINUING SERVICE; (II) APPROVING THE DEBTORS'
PROPOSED ADEQUATE ASSURANCE; AND (III) APPROVING PROCEDURES
FOR RESOLVING REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE

PECO Energy Company ("PECO"), by counsel, hereby objects to the *Motion of Debtors Pursuant To Sections 105() and 366 of the Bankruptcy Code For An Interim and Final Order (I) Prohibiting Utilities From Altering, Refusing, or Discontinuing Service; (II) Approving the Debtors' Proposed Adequate Assurance; and (III) Approving Procedures For Resolving Requests For Additional Adequate Assurance* (the "Utility Motion"), and sets forth the following:

Introduction

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

If a debtor believes the amount of the utility's request pursuant to Section 366(c)(2) needs to be modified, the debtor can file a motion pursuant to Section 366(c)(3) seeking to modify the amount of the utility's request. Exhibit "C" to the Utility Motion reflects that the Debtors listed only three utility providers, with PECO apparently being the Debtors' largest utility provider. Accordingly, the Debtors should have at least attempted to contact PECO to obtain its adequate assurance request before filing the Utility Motion and obtaining *ex parte* interim relief. Despite the foregoing, the Debtors filed the Utility Motion at the outset of this case that sought, without evidence or supporting documentation, to establish that the Debtors' offer to supposedly deposit approximately two-weeks of utility charges into a segregated account (the "Escrow Account") constitutes adequate assurance of payment.

PECO does not agree that the Escrow Account constitutes adequate assurance of payment and it certainly is not adequate assurance of payment satisfactory to PECO. Moreover, with respect to the Escrow Account, the Debtors failed to identify: (i) who would hold the Escrow Account, (ii) how PECO would access the Escrow Account, or (iii) what would happen to the monies contained in the Escrow Account in the event of a default by the Debtors concerning their use of cash collateral or post-petition financing. Additionally, the proposed Escrow Account is not a

recognized form of adequate assurance under Section 366(c)(1)(A) of the Bankruptcy Code, and does not constitute a "cash deposit" pursuant to Section 366(c)(1)(A) of the Bankruptcy Code.

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

The Debtors, as customers of PECO, are or should be aware that, pursuant to PECO's applicable tariffs and state laws (collectively, the "Tariffs") that govern both the prepetition and post-petition relationship between PECO and the Debtors, PECO: (1) bills its customers on a monthly basis in arrears and provides the Debtors with generous trade terms; and (2) is allowed to obtain two-month deposits to cover the billing exposure created by the Tariff-mandated billing cycles. With the foregoing knowledge, the Debtors should be required, at a minimum, to set forth a factual and evidentiary basis why this Court should consider modifying the amount that PECO is entitled to request under applicable state law. In this case, PECO is requesting adequate assurance of payment in the form of a two-month cash deposit that it is permitted to request from its customers pursuant to the applicable Tariffs.

This Court should deny the Utility Motion as not being

properly before the Court because: (1) the Utility Motion does not address PECO's deposit request; (2) the Utility Motion does not seek to modify the amount of PECO's deposit request; (3) the Debtors fail to provide PECO with adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy Code; and (4) The Debtors' claim to have \$100 million in cash or cash equivalents, so they have more than sufficient cash to fund the deposit requested by PECO.

Facts

Procedural Facts

1. On November 8, 2009 (the "Petition Date"), the Debtors commenced their cases under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") that are now pending with this Court. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

2. The Debtors' cases are being jointly administered.

The Utility Motion

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

4. No notice of the Utility Motion was given to the Debtors' three utilities prior to the Court entering the *Interim Order Pursuant To Sections 105(a) and 366 of the Bankruptcy Code (I) Prohibiting Utilities From Altering, Refusing, or*

Discontinuing Service; (II) Approving the Debtors' Proposed Adequate Assurance; and (III) Approving Procedures For Resolving Requests For Additional Adequate Assurance (the "Interim Utility Order") on November 10, 2009.

5. Because PECO was never served with the Utility Motion, it had no opportunity to respond to the Utility Motion or otherwise be heard at the *ex parte* hearing on the Utility Motion that took place on November 10, 2009, despite the fact that Section 366(c)(3) (presuming this was the statutory basis for the relief sought by the Debtors) requires that there be "notice and a hearing" and PECO (i) was one of only three utility providers identified by the Debtors, (ii) is the Debtors' largest utility provider, and (iii) provided continuous prepetition utility goods and services to the Debtors.

6. Through the Utility Motion, the Debtors seek to avoid the procedural and substantive requirements of Section 366. Instead of responding to adequate assurance demands of their three utility companies, the Debtors elected to file the Utility Motion and seek Court approval for their own form of adequate assurance in the form of an escrow account supposedly containing two-weeks of utility charges (the "Escrow Account"). Utility Motion at ¶ 4; Interim Utility Order at pp. 2-3.

7. According to the Debtors, the Debtors pay approximately \$58,000 a month for utility goods/services. Utility Motion at ¶

2.

8. The Debtors have \$100 million in cash or cash equivalents to fund their post-petition expenses. *Declaration Of William Rosoff In Support Of The Debtors' Chapter 11 Petitions And First-Day Motions* at paragraph 28.

Facts Concerning PECO

9. PECO 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.

10. Under PECO's billing cycle, the Debtors receive approximately one month of utility goods and/or services before PECO issues a bill for such charges. Once a bill is issued, the Debtors have 15 to 20 days to pay the applicable bill. If the Debtors fail to timely pay the bill, a past-due notice is issued and a late fee is subsequently imposed on the account. If the Debtors fail to pay the bill after the issuance of the past-due notice, PECO would provide written notice informing the Debtors that they must cure the arrearage within a certain period of time or their service will be disconnected. Additionally, pursuant to applicable regulations, PECO must make personal contact with the customer at least 3 days prior to the discontinuance for non-payment of utility charges. Accordingly, under PECO's billing cycle, the Debtors could receive at least two months of unpaid charges before PECO could cease the supply of goods and/or

services for the post-petition payment default.

11. In order to avoid the need to bring witnesses and have lengthy testimony regarding PECO's regulated billing cycle, PECO requests that this Court, pursuant to Rule 201 of the Federal Rules of Evidence, take judicial notice of PECO's billing cycle. Pursuant to the foregoing request and based on the voluminous size of the applicable documents, PECO is providing the following web site links to the applicable Tariffs and Regulations:

Tariffs -

http://www.peco.com/pecobiz/energy_rates/our_rates_and_prices.htm

Regulations -

<http://www.pacode.com/secure/data/052/chapter55/chap55toc.html>

12. Subject to a reservation of PECO's right to supplement its post-petition deposit request if additional accounts belonging to the Debtors are subsequently identified, PECO's estimated prepetition debt owed by the Debtors to PECO, and post-petition deposit request is currently as follows:

<u>Utility</u>	<u>No. of Accts.</u>	<u>Est. Prepet. Debt</u>	<u>Dep. Request</u>
PECO	4	\$26,670.00	\$66,540 (2-month)

Discussion

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

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

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date.

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

- (i) a cash deposit;
- (ii) a letter of credit;
- (iii) a certificate of deposit;
- (iv) a surety bond;
- (v) a prepayment of utility consumption; or
- (vi) another form of security that is mutually agreed upon between the utility and the debtor or the trustee.

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

(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility;

(3)(A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

(B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider

- (i) the absence of security before the date

of the filing of the petition;

(ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or

(iii) the availability of an administrative expense priority.

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

11 U.S.C. §366.

As set forth by the United States Supreme Court, "[i]t is well-established that 'when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct., 1942, 147 L. Ed. 2d 1 (2000)). *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, 597 (6th Cir. 1997) ("Statutes . . . must be read in a 'straightforward' and 'commonsense' manner.").

A plain reading of Section 366(c)(2) makes clear that a debtor is required to provide adequate assurance of payment satisfactory to its utilities on or within thirty (30) days of the filing of the petition. If a debtor believes the amount of the utility's request needs to be modified, then the debtor can

file a motion under Section 366(c)(3) requesting the court to modify the amount of the utility's request.

In this case, the Debtors completely ignore PECO's adequate assurance request. Instead, the Debtors filed the Utility Motion to improperly shift the focus of their obligations under Section 366(c) from modifying the amount of PECO's adequate assurance request to establishing the amount of adequate assurance of payment acceptable to the Debtors.

Accordingly, this Court should not reward the Debtors for their failure to comply with the requirements of Section 366(c) and deny the Utility Motion as to PECO. *See In re Viking Offshore (USA), Inc.*, 2008 WL 782449 at *3 (Bankr. S.D. Tex. Mar. 20, 2008) ("The relief requested by Debtors would reverse the burden, by making an advance determination that the proposed assurance was adequate. . . . the court lacks the power to reverse the statutory framework for provision of adequate assurance of payment."); *see also In re Pilgrim's Pride Corporation*, Case No. 08-45664 (DML)(Docket No. 447), United States Bankruptcy Court For the Northern District of Texas, *Memorandum Order* entered on January 5, 2009 (Denying debtors' motion seeking to establish adequate assurance of payment).

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

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

reasons:

- (i) This Court only has authority under Section 366(c)(3) to modify the amount of PECO's deposit request. Neither the Debtors nor this Court have the authority to establish the form of adequate assurance of payment, i.e., the creation of an escrow account instead of the cash deposit that PECO is requesting from the Debtors.
- (ii) The Debtors have failed to propose any procedures as to when and how utilities could obtain funds from the Escrow Account. PECO would presumably have to incur legal fees and costs to file and litigate an application for payment of post-petition administrative expenses, which would be for at least one month's service because PECO bills the Debtors on a monthly basis.
- (iii) PECO bills monthly in arrears so any request by PECO upon the Escrow Account would be, at a minimum, for monthly bills. Accordingly, the Escrow Account that would merely contain the estimated cost of two-weeks' of the Debtors' monthly utility charges would be undercapitalized from the outset.

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

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

In the Utility Motion, the Debtors fail to address why this Court should modify PECO's request for the adequate assurance of payment deposit set forth above. Under Section 366(c)(3), the Debtors have the burden of proof as to whether PECO's 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 offer the Court with any evidence or factually supported documentation to explain how or why the amount of PECO's adequate assurance request 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 requirements of Section 366(c) with respect to PECO. See *In re Lucre, Inc.*, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005) (holding that the right of a debtor or trustee to seek modification of a utility's deposit request "arises only after the adequate assurance payment has been agreed upon by the parties.").

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

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

- (i) a cash deposit;
- (ii) a letter of credit;

- (iii) a certificate of deposit;
- (iv) a surety bond;
- (v) a prepayment of utility consumption; or
- (vi) another form of security that is mutually agreed upon between the utility and the debtor or the trustee.

A determination of adequate assurance is within the court's discretion, and is made on a case-by-case basis, subject to the new requirements of Section 366(c). See *In re Utica Floor Maintenance, Inc.*, 25 B.R. 1010, 1016 (Bankr. N.D.N.Y. 1982); *In re Cunha*, 1 B.R. 330, 332-33 (Bankr. E.D. Va. 1979). Section 366 of the Bankruptcy Code was enacted to balance a debtor's need for utility services from a provider that holds a monopoly on such services, with the need of the utility to ensure for itself and its rate payers that it receives payment for providing these essential services. See *In re Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990). The deposit or other security "should bear a reasonable relationship to expected or anticipated utility consumption by a debtor." *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986). In making such a determination, it is appropriate for the Court to consider "the length of time necessary for the utility to effect termination once one billing cycle is missed." *In re Begley*, 760 F.2d 46, 49 (3d Cir. 1985). Based on the Debtors' anticipated utility consumption, the minimum period of time the Debtors could receive service from PECO before termination of service for non-payment of bills is approximately two (2) months. Accordingly, the

deposit requested by PECO is reasonable. See *In re Stagecoach*, 1 B.R. at 735-36 (holding that a two month deposit is appropriate where the debtor could receive sixty (60) days of service before termination of services because of the utilities' billing cycle.); see also *In the Matter of Robmac, Inc.*, 8 B.R. 1, 3-4 (Bankr. N.D. Ga. 1979).

As set forth above, PECO's adequate assurance request is based on: (1) PECO's billing exposure created by its applicable Tariffs and Regulations; and (2) amount that the applicable public service commission, which is a neutral third-party entity, permits PECO to request from its customers. Although PECO recognizes that this Court is not bound by the Tariffs, the Tariffs are extremely relevant information of a determination made by an independent entity on the appropriate amount of adequate assurance that should be paid to PECO.

In contrast, the Debtors do not provide an objective, much less an evidentiary, basis for their proposed adequate assurance in the form of a two-week Escrow Account. Moreover, if the Debtors have \$100 million in cash or cash equivalents, they should have no problem paying PECO its requested deposit.

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

1. Denying the Utility Motion as to PECO;
2. Awarding PECO the post-petition adequate assurance of payment pursuant to Section 366 in the amount and form satisfactory to PECO; and
3. Providing such other and further relief as the Court deems just and appropriate.

Dated: November 23, 2009 STEVENS & LEE, P.C.

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