Hearing Date and Time: July 26, 2012 at 2:00 p.m.
Objection Deadline: July 20, 2012 at 4:00 p.m.

Thomas R. Slome, Esq.
Jessica G. Berman, Esq.
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, New York 11530-9194
Telephone: (516) 741-6565
Facsimile: (516) 741-6706

and

Russell R. Johnson III, Esq.
John M. Craig, Esq.
LAW FIRM OF RUSSELL R. JOHNSON III, PLC
2258 Wheatlands Drive
Manakin-Sabot, Virginia 23103
Telephone: (804) 749-8861
Facsimile: (804) 749-8862

Co-Counsel for American Electric Power, Monongahela Power Company, West Penn Power Company, and Hope Gas, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
PATRIOT COAL CORPORATION, *et al.*,	**Case No. 12-12900 (SCC)**
Debtors.	**(Jointly Administered)**

OBJECTION OF CERTAIN UTILITY COMPANIES TO THE DEBTORS' MOTION FOR AN ORDER (i) PROHIBITING UTILITIES FROM ALTERING, REFUSING OR DISCONTINUING SERVICE, (ii) DEEMING UTILITY COMPANIES ADEQUATELY ASSURED OF FUTURE PERFORMANCE, AND (iii) ESTABLISHING PROCEDURES FOR DETERMINING REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE

American Electric Power, Monongahela Power Company, West Penn Power Company, and Hope Gas, Inc., d/b/a Dominion Hope (collectively, the "Utilities"), by counsel, hereby object to the *Debtors' Motion For An Order (i) Prohibiting Utilities From Altering, Refusing or Discontinuing Service, (ii) Deeming Utility Companies Adequately Assured of Future Performance, and (iii) Establishing Procedures For Determining Requests For Additional Adequate Assurance* (the "Utility Motion"), and set forth the following:

Introduction

In 2005, Congress amended section 366 of title 11 of the United States Code (the "Bankruptcy Code") to add, among other things, section 366(c) to address adequate assurance of payment requests in Chapter 11 cases. Prior to 2005, section 366(b) governed adequate assurance of payment determinations in all bankruptcy cases, including Chapter 11 cases. Section 366(b), which has not been modified, provides, in pertinent part:

> On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

As set forth above, the courts had the authority to modify the amount of the deposit or other security that was necessary to provide adequate assurance of payment, which is significantly broader than the legal standard established in sections 366(c)(2) and (3).

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).

The significant difference between the two provisions is the pre-2005 standard required a court to focus on whether or not to "order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment" and section 366(c) now requires a court to focus on whether or not to "order modification of the amount of an assurance of payment under paragraph (2)." The amount of assurance of payment under paragraph (2) (section 366(c)(2)) in these cases are the two-month deposits requested by the Utilities. Accordingly, under the foregoing legal standard, it is the Debtors' burden to present evidence to demonstrate, why, if at all, the amount of the Utilities' deposit requests should be modified. *See In re Stagecoach Enters., 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); *see also Great Atlantic & Pacific Tea Co.*, 2011 WL 5546954 at page 5 (Bankr. S.D.N.Y. 2011). Courts that have found that the courts retain the same discretion as under section 366(b), or allow the debtor to pick the form and/or amount of security, simply refuse to follow the plain language of the statute.

In addition to changing the legal standard, section 366(c) also changes the adequate assurance of payment determination as follows: (1) the statute provides the Debtors with 30 days to provide adequate assurance of payment instead of 20 days; (2) section 366(c)(1) defines the forms of adequate assurance of payment, which was not included in section 366(b); (3) section 366(c)(1)(B) and (c)(3)(B) limit what the Court can consider.

The post-petition deposits sought by the Utilities in this case are as follows:

A. American Electric Power ("AEP") – a two-month deposit in the amount of $6,009,813 (This includes an $84,000 deposit for service recently requested for a new account).

B. Monongahela Power Company ("Monongahela Power") – a two-month deposit in the amount of $1,466,036.

C. West Penn Power Company ("West Penn Power") – a two-month deposit in the amount of $3,976.

D. Hope Gas, Inc., d/b/a Dominion Hope – a two-month deposit in the amount of $26,212.

As set forth herein, this Court should deny the Utility Motion because the amounts of the post-petition deposit requests of the Utilities are reasonable and should not be modified.

Facts

Procedural Facts

1. On July 9, 2012 (the "Petition Date"), the Debtors commenced their cases under chapter 11 of the Bankruptcy Code, which 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 July 13, 2012, the Debtors filed the Utility Motion.

4. Through the Utility Motion, the Debtors seek to avoid the procedural and substantive requirements of section 366 by seeking Court approval of their proposed adequate

assurance of payment in the form of two-week deposits to any utility provider that requests such adequate assurance in writing. The Debtors do not propose to provide any adequate assurance whatsoever to a utility provider that held a prepetition deposit equal to or greater than two-weeks of utility charges or was paid in advance for utility services. Furthermore, the Debtors' propose that any utility provider that accepts a two-week deposit shall be deemed to have waived its right to seek a modification of adequate assurance in the future, pursuant to section 366(c)(3), despite any change in circumstances that may occur. Utility Motion at ¶ 11. There is nothing in section 366(c) that allows a debtor to avoid providing a utility with post-petition security if they held prepetition security or that would require a utility to waive its rights under section 366(c)(3). Section 366(c)(3) allows a party in interest, such as the Debtors, to seek to modify the amount of a utility's adequate assurance of payment, nothing more.

5. The Utility Motion provides that objections to the Utility Motion must be filed by July 20, 2012 -- just one week after the Utility Motion was filed. The Utility Motion also provides that the initial hearing on the Utility Motion is set for July 26, 2012 at 2:00 p.m. Local Rule 9014-2 provides that an initial hearing on the motion is to be non-evidentiary.

6. In the Utility Motion, Debtors' allege that during the past 12 months, the Debtors paid an average of approximately $5.2 million per month on account of utility charges. Utility Motion at ¶ 8.

7. The Utility Motion does not address why this Court should consider modifying, if at all, the amount of the Utilities' adequate assurance requests pursuant to Section 366(c)(2).

Facts Regarding the Debtors

8. The Debtors are producers and marketers of coal in the United States.

Declaration of Mark N. Schroeder Pursuant To Local Bankruptcy Rule 1007-2 at ¶ 6 (hereinafter "Schroeder Dec.").

9. Prior to October 31, 2007, Debtor Patriot Coal Corporation ("Debtor Patriot Coal") and a number of its subsidiaries were wholly-owned subsidiaries of Peabody Energy Corporation ("Peabody"), the world's largest private-sector coal company, and their operations were a part of Peabody's operations. On October 31, 2007, Debtor Patriot Coal was spun off from Peabody. As a result of the spin-off, Debtor Patriot Coal became a separate, public entity. Schroeder Dec. at ¶ 8.

10. On July 23, 2008, Debtor Patriot Coal acquired Debtor Magnum Coal Company.

11. For the twelve months ended March 31, 2012, the Debtors reported revenues of $2.33 billion and Adjusted EBITDA of $164 million from the sale of approximately 29.4 million tons of coal. The Debtors' net loss during the same period was $198.5 million. Schroeder Dec. at ¶ 13.

12. Debtor Patriot Coal is the direct or indirect parent of each of the Debtors. Schroeder Dec. at ¶ 16.

The Debtors' Capital Structure

13. Debtor Patriot Coal, as borrower, and substantially all of the other Debtors, as guarantors, are parties to a $427.5 million Amended and Restated Credit Agreement dated as of May 5, 2010 (as amended, supplemented, modified, or amended and restated from time to time, the "Credit Facility") by and among the Debtors, Bank of America, N.A., as administrative agent, and the lenders party thereto. The Credit Facility provides for the issuance of letters of credit and direct borrowings. As of the Petition Date, $300.7 million in letters of credit were issued and

outstanding and $25 million in direct borrowings were outstanding under the Credit Facility. Obligations arising under the Credit Facility are guaranteed by substantially all of the Debtor subsidiaries of Debtor Patriot Coal and are secured by first priority liens on substantially all of the Debtors' assets, including, but not limited to, certain of the Debtors' mines, a substantial portion of the Debtors' coal reserves and related equipment and fixtures, and a second priority lien on approximately $120 million of receivables. Schroeder Dec. at ¶ 17.

14. Debtor Patriot Coal is also a party to a $125 million accounts receivable securitization program, which provides for the issuance of letters of credit and direct borrowings. As of the Petition Date, $51.8 million in letters of credit were issued and outstanding under the securitization facility. No cash borrowings were outstanding. Schroeder Dec. at ¶ 18.

15. Debtor Patriot Coal has issued two series of unsecured notes: (a) $250 million in 8.25% senior unsecured notes due 2018 which are guaranteed by substantially all of the Debtor subsidiaries of Debtor Patriot Coal; and (b) $200 million in 3.25% unsecured convertible notes due 2013. Schroeder Dec. at ¶ 19.

16. In 2005, a subsidiary of Debtor Patriot Coal issued unsecured promissory notes in conjunction with an exchange transaction involving the acquisition of Illinois Basin coal reserves. The promissory notes and related interest are payable in annual installments of $1.7 million and mature in January 2017. As of the Petition Date, approximately $7 million was outstanding under the promissory notes. Schroeder Dec. at ¶ 20.

Events Leading to the Debtors' Chapter 11 Cases

17. The Debtors contend that their business has reached the point of unsustainability absent the utilization of the tools presented by chapter 11 of the Bankruptcy Code. In recent

years, the demand for coal has decreased in large part because alternative sources of energy have become increasingly attractive to electricity generators in light of declining natural gas prices and more burdensome environmental and other governmental regulations. At the same time, the Debtors' liabilities have been increasing as the Debtors face sharply rising costs to comply with such regulations and because of unsustainable labor-related legacy liabilities. Schroeder Dec. at ¶ 21.

18. The declining demand for coal has had a material impact on the Debtors' business. During the first half of this year, the Debtors were approached by certain customers seeking to cancel or delay shipments of coal contracted for delivery under their coal supply agreements. Schroeder Dec. at ¶ 25.

19. In light of the decreased demand for both thermal and metallurgical coal, it has become uneconomical to operate certain of the Debtors' mining complexes, and the Debtors have taken steps to reduce coal production to match expected sales volumes. In January 2012, the Debtors announced the idling of four metallurgical coal mines and production curtailment at one additional metallurgical coal mine. In February and April 2012, the Debtors announced the closure of additional mines due to reduced thermal coal demand. In total, since the beginning of 2012, the Debtors have decreased their annual thermal coal production by just under 5 million tons compared to 2011. Schroeder Dec. at ¶ 26.

20. The regulatory environment, both with respect to customers who use coal and the operation of coal mining companies, has also contributed to the Debtors' current financial situation. Specifically, the regulation of electricity generators has made it increasingly difficult for companies to use coal as an energy source and may lead to a further reduction in the amount

of coal consumed by the electricity generation industry. At the same time, the Debtors are faced with dramatically increasing costs to comply with environmental laws and other governmental regulations. Schroeder Dec. at ¶ 27.

21. The Debtors have substantial and unsustainable legacy labor costs, primarily in the form of medical benefits and pension obligations. As a result of the spin-off from Peabody and the acquisition of Debtor Magnum Coal, the Debtors assumed certain liabilities relating to former employees and retirees of Peabody and Arch who retired prior to the formation of Patriot. The Debtors currently provide benefits to more than three times the number of retirees and non-active employees and those parties' dependents than to active employees. The Debtors' state that there is a mismatch between the cost of the Debtors' legacy obligations and their ongoing ability to generate revenue. The Debtors' contend that their return to long-term viability depends on their ability to achieve savings with respect to these liabilities. Schroeder Dec. at ¶ 33.

22. Certain of the Debtors are signatories to labor agreements with the United Mine Workers of America ("UMWA"), known as the National Bituminous Coal Wage Agreement of 2011 (the "NBCWA"). Since 1950, the NBCWA has been negotiated by the UMWA and the Bituminous Coal Operators' Association (the "BCOA"). Although Debtor Patriot Coal's unionized subsidiaries are not members of the BCOA, the UMWA has historically demanded that all unionized coal companies sign a "Me-Too" agreement that binds these companies to the terms of the existing NBCWA. Certain of the Debtors are also signatories to collective bargaining agreements with the UMWA that differ in important respects from the 2011 NBCWA. Through these signatory companies, the Debtors are the second largest employer of UMWA miners in the United States. While less than 11.4% of miners currently employed in the

U.S. coal industry are represented by the UMWA, more than 42% of the Debtors' employees are represented by the UMWA. Schroeder Dec. at ¶ 34.

23. The NBCWA contains many provisions that restrict the ability of signatory employers to deploy labor and operate their mines in a flexible and cost-effective manner, which puts signatory companies at a cost disadvantage with the union-free competitors. Over the years, an extensive and costly package of pension and non-pension benefits for active and retired miners has evolved under successive NBCWAs, including funding benefits for tens of thousands of retired mineworkers whose employers are no longer in business. For example, there is just one working miner for every ten pensioners who receive benefits from the 1974 Pension Plan (defined below). The Debtors currently contribute $12,000 per year to this plan for each of their unionized employees. This amount is projected to increase to more than $27,000 per employee by 2017 and more than $46,000 per employee by 2020. The 2011 NBCWA and other existing UMWA agreements also require employers to sponsor a healthcare plan that effectively provides 100% first dollar coverage for active and retired employees. In 2011, the Debtors paid $48,185 per active represented employee to provide these healthcare benefits. These liabilities, on which the Debtors are projected to spend over $100 million this year, are estimated to exceed $1.3 billion in the aggregate. Schroeder Dec. at ¶ 35.

24. Pursuant to the NBCWA and similar UMWA collective bargaining agreements, certain of the Debtors are required to make significant pension contributions to a multi-employer pension fund under the UMWA 1974 Pension Plan (the "1974 Pension Plan"). In 2007, the contribution rate to the 1974 Pension Plan was $2.00 per hour worked. It is currently $5.50 per hour, and the Debtors expect the rate to remain at this level through 2016. On May 25, 2012, the

UMWA and the BCOA sent a notice to all employers advising that under the Pension Protection Act, contributions to the 1974 Pension Plan would increase to a minimum of $12.50 in 2017, and to a minimum of $21.50 by 2020. Currently, the Debtors' annual contribution to the 1974 Pension Plan is approximately $22 million. Additionally, the NBCWA requires the Debtors to contribute $1.50 per hour worked to the 2012 Retiree Bonus Account Trust, which will make an annual payment of either $455 or $580 to each participant in the 1974 Pension Plan in 2014, 2015 and 2016. The Debtors are also required to contribute $1.10 per hour worked to the UMWA 1993 Benefit Plan through 2016, which provides health benefits to UMWA retirees whose last employer is no longer in business. Schroeder Dec. at ¶ 36.

25. The Debtors are also obligated by statute to provide benefits to certain retirees who retired before October 1, 1994 under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 et seq. (the "Coal Act"). In 2011, the Debtors paid approximately $14 million with respect to such retirees, and as of January 1, 2012, the Debtors estimate the present value of their Coal Act liabilities to be approximately $140 million. Schroeder Dec. at ¶ 37.

26. In connection with the Debtors' spin-off from Peabody, a subsidiary of Peabody assumed certain of the Debtors' pre-spin-off obligations associated with the Coal Act, the NBCWA and certain salaries employee retiree healthcare benefits. As of December 31, 2011, these liabilities had a present value of $696.8 million and are not reflected above. The Debtors continue to administer these benefits and receive reimbursement from Peabody. The Debtors are required to post approximately $54 million in letters of credit to secure these obligations, of which the costs of $44 million of those letters of credit is reimbursed by Peabody. Certain of the Debtors remain jointly and severally liable for the Coal Act obligations and secondarily liable for

the NBCWA and other obligations. Schroeder Dec. at ¶ 38.

27. The Debtors are also subject to the Federal Coal Mine Health and Safety Act of 1969 (the "Black Lung Act") and other workers' compensation laws in the states in which they operate. The Debtors estimate that as of January 1, 2012, their Black Lung Act liabilities total approximately $186 million. Separately, the Debtors have posted approximately $132 million in letters of credit and/or bonds to secure their liabilities with respect to state traumatic and workers' compensation. The Debtors estimate that as of January 1, 2012, workers' compensation liabilities total approximately $73 million. Schroeder Dec. at ¶ 39.

The Debtors' Post-Petition Financing

28. On July 10, 2012, the Debtors filed the *Debtors' Motion For Entry of Interim and Final Orders (I) Authorizing Debtors (A) To Obtain Postpetition Financing Pursuant To 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) To Utilize Cash Collateral Pursuant To 11 U.S.C. § 363, (II) Granting Adequate Protection To Prepetition Secured Lenders Pursuant To 11 U.S.C. §§ 361, 362, 363 and 364 and (III) Scheduling Final Hearing Pursuant To Bankruptcy Rules 4001(b) and (c)* (the "Financing Motion"). Through the Financing Motion, the Debtors are seeking authority to borrow up to $802 million. The DIP Facility will consist of: (1) a $125 million asset based revolver and a $375 million term loan; and (2) a $302 million facility into which existing letters of credit outstanding the existing credit facility will be rolled. $377 million of the DIP Facility will be used to refinance outstanding debt. . Schroeder Dec. at ¶ 41.

29. Through the Financing Motion, the Debtors also seek Court approval for a $7 million carve-out for the payment of fees and expenses of the Debtors' counsel and other

professionals.

30. On July 11, 2012, the Court entered the *Interim Order (I) Authorizing Debtors (A) To Obtain Post-Petition Financing Pursuant To 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) To Utilize Cash Collateral Pursuant To 11 U.S.C. § 363, (II) Granting Adequate Protection To Pre-Petition Secured Lenders Pursuant To 11 U.S.C. §§ 361, 362, 363 and 364 and (III) Scheduling Final Hearing Pursuant To Bankruptcy Rules 4001(b) and (c)* (the "Interim Financing Order").

The Debtors' Motion to Pay Prepetition Claims of Critical Vendors

31. On the Petition Date, the Debtors filed the *Debtors' Motion for an Order Authorizing (i) Payment of Certain Prepetition Claims of Critical Vendors and (ii) Financial Institutions to Honor and Process Related Checks and Transfers* (the "Critical Vendor Motion"). Through the Critical Vendor Motion, the Debtors are seeking authority to pay certain prepetition claims of certain creditors who supply goods or services that the Debtors' deem essential to the continued operation of the Debtors' business operations. The Debtors claim that their critical vendors include (i) safety equipment suppliers and service providers, (ii) environmental testing and service providers, (iii) fuel and lubricant service providers, and (iv) sole or limited source mining-related equipment and parts suppliers. Critical Vendor Motion at ¶ 8. The Debtors contend that their critical vendors are so essential to the Debtors' businesses that the lack of any of their particular services, even for a short duration, could disrupt the Debtors' operations and cause irreparable harm to the Debtors' businesses, goodwill, employees, customer base and market share. Critical Vendor Motion at ¶ 10. Interestingly, despite stating in paragraph 9 of the Utility Motion that the Utilities' supply of utility goods/services "are essential to the Debtors'

ongoing operations," the Debtors do not consider their utility providers to be critical vendors for the purposes of the Critical Vendor Motion.

Facts Concerning the Utilities

32. 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.

33. Under the Utilities' billing cycles, which are governed by applicable state laws, regulations and/or tariffs (collectively, the "Tariffs"), 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 to 30 days to pay the applicable bill. Accordingly, even if the Debtors timely pay their post-petition utility invoices, the Utilities face billing exposure of 45 to 60 days because of the Tariff mandated billing cycles.

34. 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, 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 more than two months of unpaid charges before the utility could cease the supply of goods and/or services for the post-petition payment default.

35. In order 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 are providing the following web site links to the tariffs and/or state laws, regulations and/or ordinances, and/or cooperative service rules:

AEP (approximately 929,000 customers):
West Virginia:
https://www.appalachianpower.com/account/bills/rates/APCORatesTariffsWV.aspx

Kentucky:
https://www.kentuckypower.com/account/bills/rates/KentuckyPowerRatesTariffsKY.aspx

Monongahela Power (approximately 383,600 customers):
https://www.firstenergycorp.com/customer_choice/west_virginia/west_virginia_tariffs.html

West Penn Power (approximately 715,000 customers):
https://www.firstenergycorp.com/customer_choice/pennsylvania/pennsylvania_tariffs.html

Dominion Hope (approximately 117,000 customers):
http://www.dom.com/dominion-hope/customer-service/your-service/rates-and-tariffs.jsp

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

Utility	**No. of Accts.**	**Est. Prepet. Debt**	**Dep. Request**
AEP	85	$3,800,000	$6,009,813 (2-month)
Monongahela Power	12	$1,139,307	$1,466,036 (2-month)
West Penn Power	1	($4,392.08)credit	$3,976 (2-month)
Dominion Hope	4	$2,931.93	$26,212 (2-month)

37. West Penn Power held a prepetition deposit in the amount of $5,710 that was recouped against prepetition debt pursuant to section 366(c)(4) of the Bankruptcy Code, resulting

in a deposit credit of $4,392.08 that can be applied to West Penn Power's 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 provides:

> (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 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. U.S. Tr.*, 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.

Furthermore, in the Utility Motion, the Debtors fail to address why this Court should modify the amount of the Utilities' requests for the adequate assurance of payment. Under section 366(c)(3), the Debtors have the burden of proof as to whether the amount of the Utilities' adequate assurance of payment requests should be modified. *See In re Stagecoach Enters., 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); *see also Great Atlantic & Pacific Tea Co.*, 2011 WL 5546954, *5 (Bankr. S.D.N.Y. 2011). However, the Debtors do not provide the Court with any evidence or factually supported documentation to explain why the amount 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 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 Co. 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 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). Based on the Debtors' anticipated utility consumption, the minimum period of time the Debtors could receive service from the Utilities before termination of service for non-payment of bills is approximately two (2) months or more. Moreover, even if the Debtors timely pay their post-petition utility bills, the Utilities still have potential exposure of 45 to 60 days based on the Tariff mandated billing cycles. Furthermore, the amount of the Utilities' deposit requests are the amounts that the applicable public service commission, which is a neutral third-party entity, permit the Utilities to request from their customers. Although the Utilities recognize that this Court is not bound by the applicable 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 the Utilities. Accordingly, the amount of the deposits requested by the Utilities are reasonable and should not be modified. *See In re Stagecoach*, 1 B.R. 732, 735-36 (Bankr. M.D. Fla. 1979) (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 re Robmac, Inc.*, 8 B.R. 1, 3-4 (Bankr. N.D. Ga. 1979).

In contrast, the Debtors fail to address in the Utility Motion why this Court should modify, if at all, the amount of the Utilities' adequate assurance of payment requests, which is the Debtors' statutory burden. Instead, the Debtors merely ask this Court to approve their proposed form of adequate assurance of payment in the form of the two-week deposits.

It is clear from the Critical Vendor Motion the type of creditors that the Debtors intend to favor with special treatment and the Utilities are not on that list. Moreover, unlike the "critical vendors" that are receiving preferential treatment in the Critical Vendor Motion, the Utilities are willing to continue to provide the Debtors with their generous trade terms established by the Tariffs or contracts (i.e. bills issued monthly in arrears with due dates 15 to 30 days thereafter) without requiring the Debtors to pay their prepetition claims in full at the outset of the case.

Furthermore, the Debtors know the true state of their affairs and will be the first to know if their situation deteriorates any further. Interestingly, the Debtors' professionals, who have access to the foregoing information, are not taking any chances regarding the payment of their post-petition charges because they are seeking to secure the payment of their fees through a $7 million Carve Out. Accordingly, based on the foregoing, the Debtors should be required to tender the deposits sought by the Utilities at this time with the ability under section 366(c)(3) to seek to have them modified in the future if their situation improves.

If the Debtors are unwilling to pay the amount of adequate assurance of payment requested by the Utilities herein, they bear the burden of proof to demonstrate why that amount

should be modified. *See Great Atlantic & Pacific Tea Co.*, 2011 WL 5546954 at page 5 (Bankr. S.D.N.Y. 2011); *In re Stagecoach Enters., 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). At this time, however, the Utilities do not know what, if any, evidence the Debtors' intend to present in this regard and this Court should require the Debtors to file a supplemental pleading to set forth the evidentiary basis in advance of the evidentiary hearing on this matter.

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 payment pursuant to section 366 in the amount and form satisfactory to the Utilities; and

3. Providing such other and further relief as the Court deems just and appropriate.

Dated: Garden City, New York
July 20, 2012

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

By: ***/s/ Jessica Berman***
Thomas R. Slome
Jessica Berman
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, New York 11530-9194
(516) 741-6565

and

Russell R. Johnson III
John M. Craig
Law Firm of Russell R. Johnson III, PLC
2258 Wheatlands Drive
Manakin-Sabot, Virginia 23103
(804) 749-8861

Co-Counsel for American Electric Power, Monongahela Power Company, West Penn Power Company, and Hope Gas, Inc., d/b/a Dominion Hope