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Hearing Date and Time: April 26, 2017 at 2:00 p.m.
Objection Deadline: April 19, 2017 at 4:00 p.m.

Thomas R. Slome
Michael Kwiatkowski
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
Email: tslome@msek.com
mkwiatkowski@msek.com

and

Russell R. Johnson III
John M. Craig
LAW FIRM OF RUSSELL R. JOHNSON III, PLC
2258 Wheatlands Drive
Manakin-Sabot, Virginia 23103
Telephone: (804) 749-8861
Facsimile: (804) 749-8862
Email: russj4478@aol.com

Co-Counsel for Commonwealth Edison Company, Public Service Company of New Hampshire, Connecticut Light & Power Company, FirstEnergy Solutions Corp., Metropolitan Edison Company, Pennsylvania Power Company, West Penn Power Company, PECO Energy Company

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**) Chapter 11**
	)
WESTINGHOUSE ELECTRIC COMPANY LLC, *et al.*,	**) Case No. 17-10751 (MEW)**
	)
	) (Jointly Administered)
Debtors.[1]	**)**

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: Westinghouse Electric Company LLC (0933), CE Nuclear Power International, Inc. (8833), Fauske and Associates LLC (8538), Field Services, LLC (2550), Nuclear Technology Solutions LLC (1921), PaR Nuclear Holding Co., Inc. (7944), PaR Nuclear, Inc. (6586), PCI Energy Services LLC (9100), Shaw Global Services, LLC (0436), Shaw Nuclear Services, Inc. (6250), Stone & Webster Asia Inc. (1348), Stone & Webster Construction Inc. (1673), Stone & Webster International Inc. (1586), Stone & Webster Services LLC (5448),

OBJECTION OF CERTAIN UTILITY COMPANIES TO THE MOTION OF DEBTORS PURSUANT TO 11 U.S.C. §§ 105(a) AND 366 FOR INTERIM AND FINAL ORDERS (I) APPROVING PROPOSED FORM OF ADEQUATE ASSURANCE OF PAYMENT TO UTILITY COMPANIES, (II) ESTABLISHING PROCEDURES FOR RESOLVING OBJECTIONS BY UTILITY COMPANIES, AND (III) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING, OR DISCONTINUING SERVICE

Commonwealth Edison Company ("ComEd"), Connecticut Light and Power Company ("CL&P"), Public Service Company of New Hampshire ("PSNH"), Metropolitan Edison Company ("MetEd"), Pennsylvania Power Company ("Penn Power"), West Penn Power Company ("West Penn"), FirstEnergy Solutions Corp. ("FES") and PECO Energy Company ("PECO") (collectively, the "Utilities"), by counsel, hereby object to the *Motion of Debtors Pursuant to 11 U.S.C. §§ 105(a) and 366 for Interim and Final Orders (I) Approving Proposed Form of Adequate Assurance of Payment to Utility Companies, (II) Establishing Procedures for Resolving Objections by Utility Companies, and (III) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Service* [Docket No. 36] (the "Utility Motion"), and set forth the following:

Introduction

The Debtors' entire business enterprise, both in the U.S. and abroad, has experienced a severe liquidity crisis over the past year due at least in part to significant delays and cost overruns associated with two construction projects in Georgia and South Carolina. While the full extent of the damage caused to the Debtors' business enterprise and goodwill is unknown, it is known

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Toshiba Nuclear Energy Holdings (UK) Limited (N/A), TSB Nuclear Energy Services Inc. (2348), WEC Carolina Energy Solutions, Inc. (8735), WEC Carolina Energy Solutions, LLC (2002), WEC Engineering Services Inc. (6759), WEC Equipment & Machining Solutions, LLC (3135), WEC Specialty LLC (N/A), WEC Welding and Machining, LLC (8771), WECTEC Contractors Inc. (4168), WECTEC Global Project Services Inc. (8572), WECTEC LLC (6222), WECTEC Staffing Services LLC (4135), Westinghouse Energy Systems LLC (0328), Westinghouse Industry Products International Company LLC (3909), Westinghouse International Technology LLC (N/A), and Westinghouse Technology Licensing Company LLC (5961). The Debtors' principal offices are located at 1000 Westinghouse Drive, Cranberry Township, Pennsylvania 16066.

that emergency funding provided by the Debtors' parent company to the Debtors and one of their non-debtor foreign affiliates, in the aggregate amount of $900 million, was not enough to solve the liquidity problem, and the Debtors needed additional funding, both for themselves and their foreign affiliates, just one month later. Now, however, the Debtors are claiming that the post-petition financing they have obtained, in an amount less than their prior emergency funding, will provide them and their entire enterprise with sufficient liquidity to timely pay all of their expenses, including utility expenses, going forward.

Nevertheless, the Debtors' own counsel clearly have concerns about the Debtors' ability to pay their post-petition creditors and have obtained a retainer of almost $2 million and a carve-out from the post-petition lender's liens and superpriority claim status in the amount of $8 million upon an event of default (and in an unlimited amount prior to default). Thus, it is clear that the two-week segregated bank account offered by the Debtors to the Utilities in the Utility Motion is woefully inadequate and should be rejected by the Court. Accordingly, the Utilities are requesting the following cash deposits (estimated prepayment of post-petition charges for FES) from the Debtors, which are deposit amounts that the Utilities are authorized to obtain from their customers pursuant to applicable state-law tariffs, regulations and/or contracts: (a) ComEd - $24,172 (2-month); (b) CL&P - $29,005 (2-month); (c) PSNH - $252,608 (2-month); (d) Met-Ed - $772 (2-month); (e) Penn Power - $220,918 (2-month); (f) West Penn - $371,346 (2-month) (g) FES - $494,000; and (h) PECO - $60,190 (2-month). Based on all the foregoing, this Court should deny the Utility Motion because the amounts of the post-petition deposit requests of the Utilities are reasonable under the circumstances and should not be modified.

Facts

Procedural Facts

1. On March 29, 2017 (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. In the Utility Motion, 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 a segregated bank account purportedly to be funded with two weeks of the Debtors' estimated utility charges, based on the Debtors' historical average for utility payments over the past 12 months (the "Bank Account"). Utility Motion at ¶ 11. The foregoing proposal is unacceptable 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).

5. The Debtors' propose that the Bank Account will contain approximately $1.108 million. Utility Motion at ¶ 11. The Debtors claim that prior to the Petition Date, their average monthly utility charges were approximately $2.4 million. *See* Exhibit 1 to proposed interim and final Orders granting the Utility Motion (collectively, the "Proposed Utility Orders").

Accordingly, it appears that even by the Debtors' own estimates of the Utilities' monthly exposure, the Bank Account would actually contain less than two weeks of the Debtors' average utility charges.

6. The Utility Motion requests that the monies contained in the Bank Account "automatically, without further Court order, be available to the Debtors upon the effective date of a chapter 11 plan of the Debtors." Utility Motion at ¶ 12. In addition, the Utility Motion requests that the Debtors immediately be permitted to reduce the amount of funds in the Bank Account upon the termination of any Utility Services provided by a Utility Company. *Id.* As the Utilities bill the Debtors in arrears and the proposed two-week Bank Account is insufficient to cover their monthly billing charges, the Bank Account, if approved, should not be released until the Debtors confirm payment in full of their post-petition utility expenses.

7. The Proposed Utility Orders provide that the Bank Account "shall be deemed adequate assurance of payment, and any Utility Company that does not make a Request or otherwise comply with the Objection Procedures shall be prohibited from altering, refusing, or discontinuing Utility Services, ***including*** as a result of the Debtors' failure to pay charges for prepetition Utility Services or to provide adequate assurance of payment in addition to the Proposed Adequate Assurance." Proposed Interim Utility Order, p. 4 (emphasis added); Proposed Final Utility Order, p. 5 (emphasis added). Section 366(a) of the Bankruptcy Code, however, ***only*** precludes a utility from discontinuing, altering, or refusing service to, or discriminating against the Debtors based on: (1) commencement of the bankruptcy case; and (2) existence of an unpaid prepetition debt. Accordingly, this provision improperly seeks unauthorized injunctive relief.

8. The Proposed Utility Orders improperly provide for additional injunctive relief as

follows:

> If the Debtors, in consultation with the DIP Lenders, determine that a Request is unreasonable, then they will, within 30 days after receipt of such Request, or such longer period as may be agreed to between the Debtors and the Utility Company, file a motion (the "**Determination Motion**") pursuant to section 366(c)(3) of the Bankruptcy Code seeking a determination from the Court that the Proposed Adequate Assurance, plus any additional consideration offered by the Debtors, constitutes adequate assurance of payment. ***Pending notice and a hearing on the Determination Motion, the Utility Company that is the subject of the unresolved Request may not alter, refuse, or discontinue services to the Debtors***;

Interim Utility Order, p. 4, ¶ d (italicized emphasis added); Proposed Final Utility Order, pp. 4-5, ¶ g (italicized emphasis added).

9. On April 3, 2017, the Debtors filed the *Notice of Hearing on April 26, 2017* with respect to the Utility Motion, among other motions (the "Notice of Hearing"), which set an April 19, 2017 deadline for filing objections to the Utility Motion and set a hearing date on the Utility Motion for April 26, 2017 at 2:00 p.m. Local Rule 9014-2, however, provides that the initial hearing on a motion, such as the Utility Motion, is non-evidentiary. As the facts that the Debtors intend to introduce to support their burden of proof and the Utilities' contrary evidence will need to be considered by the Court, a subsequent evidentiary hearing will need to be scheduled by this Court.

10. The Utility Motion does not address why the Bank Account would be undercapitalized at only a supposed two-week deposit amount when the Debtors know that the Utilities are required by applicable state laws, regulations, tariffs and/or contract to bill the Debtors monthly in arrears. Moreover, presumably the Debtors want the Utilities to continue to bill them monthly in arrears 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 to establish a two-week Bank Account (which is actually less than two-weeks of estimated utility charges); 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 the Bank Account "in conjunction with the Debtors' ability to pay for future Utility Services in the ordinary course of business . . . constitutes adequate assurance to the Utility Companies under section 366 of the Bankruptcy Code." Utility Motion at ¶ 13.

Facts Regarding the Debtors

12. Westinghouse Electric Company LLC and its affiliates operate a global business (the "Westinghouse") that provides nuclear power products and services to customers worldwide, including design and engineering services, decommissioning services, and a variety of other critical operations to both new plant construction and an existing operating fleet of nuclear power plants. *Declaration of Lisa J. Donahue Pursuant to Rule 1007-2 of the Local Bankruptcy Rules for the Southern District of New York* [Docket No. 4] ("First Day Declaration"), ¶ 4.

13. Westinghouse is divided into two chains of corporate entities: (i) a chain of U.S.-domiciled entities directly and indirectly owned by Debtor Westinghouse Electric Company LLC ("WEC"; and together with its direct and indirect subsidiaries, "WEC U.S.") and (ii) a chain of entities in the rest of the world ("WEC EMEA") that are directly and indirectly owned by Debtor Toshiba Nuclear Energy Holdings (UK) Limited, which indirectly owns 87% of WEC. WEC and most of the wholly-owned WEC U.S. entities are Debtors in these bankruptcy proceedings.

Only one of the WEC EMEA entities is a Debtor. The WEC U.S. and WEC EMEA entities depend heavily one another for business support relating to operations, intellectual property, credit support and guarantees. Thus maintenance of the value of each of WEC U.S. and WEC EMEA is dependent on the continued health, operation and cooperation of the other. First Day Declaration, ¶¶ 12-15.

Westinghouse's Deteriorating Financial Condition and Liquidity Crisis

14. While some other business lines of Westinghouse have been profitable, its construction line of business generated EBITDA from FY2013 to FY 2015 of negative $343 million, exclusive of a goodwill impairment of $394.5 million taken in FY 2013. First Day Declaration, ¶¶ 16-29 and fn.11. According to the Debtors, these losses and the Debtors' current liquidity crisis stem primarily from delays and cost-increases encountered in connection with Westinghouse's construction of four new-generation AP1000 reactors for new plants in Augusta, Georgia and Columbia, South Carolina and its subsequent acquisition of CB&I Stone & Webster, Inc. ("S&W") in order to resolve disputes associated with the construction of those projects. First Day Declaration, ¶¶ 29, 45-65.

15. The Debtors' condensed consolidated balance sheet (Unaudited) shows that during the 11-month period beginning March 31, 2016 and ending February 28, 2017, the Debtors' total assets declined by over 20%, from $5.533 billion to $4.329 billion, and their total liabilities more than doubled, from $4.561 billion to $9.391 billion. First Day Declaration, Schedule 4.

16. In recent months, as a result of Westinghouse's deteriorating liquidity, the balance of its Global Cash Pool diminished, causing liquidity issues for a number of the WEC EMEA entity participants in that cash pool, and raising concerns about their solvency going forward.

Motion of Debtors Pursuant to 11 U.S.C. §§ 362, 363, 364, 507, and 105 and Fed. R. Bankr. P. 2002, 4001, 6003, 6004 and 9014 for Interim and Final Orders (I) Authorizing the Debtors To Obtain Senior Secured, Superpriority, Postpetition Financing, (II) Granting Liens and Superpriority Claims, and (III) Scheduling a Final Hearing [Docket No. 19] (the "DIP Financing Motion"), ¶ 24.

17. In January and February, 2017, the Debtors' parent, Toshiba Corporation ("Toshiba"), provided emergency funding to WEC and one of its non-debtor affiliates totaling $900 million. First Day Declaration, ¶ 63. Nevertheless, Westinghouse's overall liquidity crisis deepened over the next several weeks and began to spill over from WEC U.S. to WEC EMEA, requiring additional emergency funding. Toshiba would not provide additional emergency funding without obtaining collateral to secure that funding. First Day Declaration, ¶ 64.

18. "As a result of the dramatic liquidity drain caused by Westinghouse's obligations related to the U.S. AP1000 Projects, as of the Petition Date, the Debtors [did] not have sufficient liquidity to support their ongoing operations. In addition to funding their own operations, the Debtors need to access the DIP Facility on-lend funds to WEC EMEA to maintain the solvency and operations of such entities to avoid value destructive actions taken by such entities' stakeholders. Absent authority to access DIP Financing, even for a limited period of time, Westinghouse (including EMEA) would not be able to operate its businesses, which would destroy value and cause immediate and irreparable harm to the Debtors' estates and creditors." First Day Declaration, ¶ 70.

The Debtors' Post-Petition Financing

19. The Debtors have obtained a commitment for post-petition financing of up to $800 million ($350 million on an interim basis) (the "DIP Facility"), inclusive of an up to $225

million ($100 million on an interim basis) sublimit that may be used to provide cash for a cash collateralized letter of credit facility (the "DIP LC Facility"). DIP Financing Motion, ¶¶ 1, 9. On March 31, 2017, the Court entered an interim order approving the DIP Facility and DIP LC Facility [Docket No. 86] (the "Interim DIP Financing Order"). A final hearing on the DIP Financing Motion is scheduled for April 26, 2017.

20. The DIP Facility is to be secured by first priority priming security interests and liens on all of the Debtors' assets and superpriority administrative expense claims in the Debtors' bankruptcy proceedings, as well as a letter of credit cash collateral account. In addition, they are to be guaranteed by all of WEC's direct and indirect subsidiaries and Toshiba Nuclear Energy Holdings (UK) Limited. DIP Financing Motion, ¶ 9.

21. Proceeds of the DIP Facility must be used in accordance with budgets to be provided by WEC U.S. to the DIP Agent on a rolling 13-week basis. DIP Financing Motion, ¶ 9. The budget submitted in connection with the DIP Financing Motion is a 13-week cash-flow projection that does not disclose whether the Debtors have budgeted sufficient sums for the payment of their post-petition utility expenses. *See* DIP Financing Motion, Exhibit 2; *see also* Docket No. 86-2.

22. Up to $375 million of the DIP Facility, including up to $75 million of the DIP LC Facility, may be lent by the Debtors to certain non-Debtor foreign WEC EMEA entities, on a secured basis, through an intercompany lending facility. DIP Financing Motion, ¶ 6(e).

23. Events of default under the DIP Financing Facility include: failure to pay any amounts under the DIP Facility when due; failure to comply with the covenants (including use of proceeds); post-petition judgments (with carve-outs in excess of $10 million); the occurrence of ERISA events resulting in liabilities having an Adverse Material Effect; entry of a dismissal or

conversion order in the Debtors' bankruptcy cases; entry of an order staying, reversing, vacating or otherwise modifying the interim or final orders approving the DIP Facility; entry of the final DIP Financing order shall not have occurred within 45 days after entry of the Interim DIP Financing Order; and entry of a sale order approving a sale that does not fully repay the DIP loans. *See* Amended Summary of Terms and Conditions for DIP Financing Facility [Docket No. 46] ("Amended Term Sheet"), pp. 16-19.

24. Upon an event of default, the DIP lenders, among other actions, (1) may declare the termination, reduction or restriction of any further commitment to the extent any such commitment remains, and (2) may immediately, without notice, block or limit withdrawals made from the Debtors' bank accounts. Interim DIP Financing Order, ¶ 11; Amended Term Sheet, p. 19.

25. One of the Financial Covenants under the DIP Facility is "[m]inimum unrestricted cash and cash equivalents of the Company and the US Guarantors, on a consolidated basis, of $100 million ("Minimum Liquidity"), tested on a weekly basis." Amended Term Sheet, p. 14. This would seem to further reduce funds actually available to the Debtors for use under the DIP Facility. Moreover, if the Debtors do not maintain this liquidity, the DIP Financing can be terminated. *See* Amended Term Sheet, p. 16 (Events of Default, C).

Carve-Out for Professionals and Debtors' Counsel's Retainer

26. The DIP Financing Motion and the interim and proposed final orders granting the same provide for a carve-out from the DIP lenders' collateral and superpriority claim status for all fees, costs and expenses of Debtor and Committee counsel and other professionals. Following written notice from the DIP Agents of the occurrence of an event of default, the payment of professional fees may not exceed $8 million, provided that the carve-out does not

contain any cap on "pipeline" expenses of the Debtors' professionals. DIP Financing Motion, ¶ 9.

27. The Interim DIP Financing Order also approved the Carve-Out. Interim DIP Financing Order, pp. 19-20, ¶ 7.

28. During the 90-day period preceding the Petition Date, Debtors' counsel was paid approximately $9.8 million from the Debtors in connection with services and expenses incurred, and to be performed and incurred, including in preparation for the commencement of these chapter 11 bankruptcy cases. As of the Petition Date, Debtors' counsel held a fee advance of $1,934,128.20, which it intends to apply to any outstanding fees and expenses of the Debtors that were not processed as of the Petition Date and then retain the balance on account of post-petition services rendered to the Debtors. *Application of Debtors Pursuant to 11 U.S.C. §§ 327(a) and 328(a), Fed. R. Bankr. P. 2014(a) and 2016, and Local Rules 2014-1 and 2016-1 for Authority To Employ and Retain Weil, Gotshal & Manges LLP as Attorneys for the Debtors Nunc Pro Tunc to the Petition Date* [Docket No. 108], ¶ 15.

Facts Concerning FES

29. FES was not included as a Utility Company on Exhibit 1 annexed to the Interim DIP Financing Order or the proposed final utility order. Accordingly, it does not appear that the Debtors have offered any adequate assurance of payment to FES.

30. FES provides electricity and related services to Debtor Westinghouse Electric Company, LLC ("WEC") pursuant to a *Customer Supply Agreement*, dated September 3, 2010, and a *Fixed Price Pricing Attachment*, dated December 10, 2013, entered into between the parties pursuant thereto (collectively, the "CSA"), which sets forth the terms and conditions concerning FES's provision of electricity and related services to WEC for ten (10) accounts.

FES has continued to provide WEC with electricity and related services pursuant to the CSA since the Petition Date, and the term of the CSA ends May 23, 2017.

31. Pursuant to the CSA, WEC is billed in accordance with the billing cycles of the applicable utilities providing transmission and distribution service (i.e., Penn Power and West Penn Power). Under those billing cycles, WEC receives approximately one month of electricity and related services before the utility issues a bill. Once a bill is issued, WEC has 15 days to pay the applicable bill. If WEC fails to timely pay the bill, a late fee may be subsequently imposed on the account and a notice may issue that informs WEC that it must cure the arrearage within a certain period of time or service may be terminated. Accordingly, WEC could receive up to two months of electricity and related services before FES could terminate the CSA after a post-petition payment default.

32. The estimated pre-petition debt owed by WEC to FES is approximately $561,000.

33. WEC's one-month average indebtedness to FES incurred under the CSA is approximately $247,000.

34. FES currently holds a prepetition cash deposit in the amount of $494,000 (the "FES Prepetition Deposit") on WEC's accounts with FES.

35. FES intends to apply the FES Prepetition Deposit to the outstanding prepetition debt owing by WEC to FES under the CSA pursuant to Section 366(c)(4) of the Bankruptcy Code.

36. The first post-petition bills on most of the accounts under the CSA will issue at the end of April (due in May), and the final post-petition bills will issue at the end of May (due at the end of June).

37. As its adequate assurance of payment request (the "FES Request") pursuant to

section 366 of the Bankruptcy Code, FES is requesting a lump sum cash payment in the amount of $494,000 (representing approximately two-months of charges under the CSA) as an estimated prepayment for post-petition charges, which FES will reconcile against actual post-petition charges as billed and return the excess, if any, once the bills for charges through the end of May 2017 have been satisfied. In accordance with the terms of the CSA, FES obtained a security deposit in this amount prepetition. However, that amount was not sufficient to cover the Debtors' $561,000 in unpaid prepetition charges.

Facts Concerning PSNH

38. PSNH provides electricity and related services to WEC pursuant to five accounts. For four of the accounts, the service is provided via applicable state law tariffs. On one account, electricity and related services are provided on an interruptible basis pursuant to the terms of a *Special Contract – Electricity* entered into as of November 20, 2014 (the "Interruptible Power Agreement"), which incorporates the Terms and Conditions and the specific provisions of Rates LG and DE of PSNH's state-approved tariffs (the "PSNH Tariffs"). PSNH has continued to provide WEC with electricity and related services pursuant to the terms of the Interruptible Power Agreement since the Petition Date, and the term of the Interruptible Power Agreement ends January 1, 2018.

39. Under the Interruptible Power Agreement and on the other four accounts, WEC is billed in accordance with the PSNH Tariff, which can be located at the web link set forth for PSNH on Exhibit "A" attached hereto. Pursuant to the terms of the PSNH Tariff, WEC receives approximately one month of service before PSNH issues a bill. Payment of a bill is due upon presentation, and PSNH may terminate service, upon notice, if payment of a bill becomes 30 days overdue. Accordingly, WEC could receive more than two months of service before PSNH

could terminate service after a post-petition payment default.

40. The estimated pre-petition debt owed by WEC to PSNH is approximately $65,704.56.

41. As its adequate assurance of payment request (the "PSNH Request") pursuant to section 366 of the Bankruptcy Code, PSNH is requesting a two-month cash deposit in the amount of $252,608, which is an amount that it is permitted to obtain pursuant to the PSNH Tariffs.

Facts Concerning the Utilities Other Than FES and PSNH

42. 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.

43. 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 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 its 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.

44. 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' web site links to the tariffs and/or state laws, regulations and/or ordinances are attached hereto as Exhibit "A."

45. 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' post-petition deposit requests are as follows (collectively with the FES Request and the PSNH Request, the "Requests"):

Utility	**No. of Accts.**	**Est. Prepet. Debt**	**Dep. Request**
ComEd	5	$12,413.37	$24,172 (2-month)
CL&P	2	$22,677.45	$29,005 (2-month)
MetEd*	2	$790.06	$772 (2-month)
Penn Power	6	$134,630.88	$220,918 (2-month)
West Penn**	4	$290,000.62	$371,346 (2-month)***
PECO*	7	$11,997.34	$61,190 (2-month)

* These Utilities were not included in Utility Motion.

** The estimated prepetition debt for the 2 large-rate West Penn accounts include third-party supplier charges that have not yet been separated from the final balances. Without these balances, West Penn's prepetition debt is $30,429.56. Although West Penn is not required to purchase third-party supplier receivables on these 2 large-rate accounts (as it must do with its other accounts), the Debtors' contract with their supplier terminates May 23, 2017 (*see* paragraphs 30-31 above).

*** If the Debtors do not return to West Penn for electric commodity on the two large-rate accounts upon termination of the CSA with FES, the deposit request for West Penn would decrease to $33,286.

46. ComEd holds a prepetition deposit in the amount of $9,550.98 that it will recoup against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code.

47. PECO holds a prepetition deposit in the amount of $20,970 that it will recoup against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. The excess deposit in the approximate amount of $8,972.66 (pending the processing of final prepetition bills) can be applied toward PECO's deposit request.

48. West Penn holds a prepetition deposit in the amount of $996 that it will recoup against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code.

Discussion

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

1. The Utility Motion and Proposed Utility Orders Improperly Seek To Enjoin the Utilities From Terminating Post-Petition Services for a Post-Petition Payment Default Pursuant to Applicable State Law.

49. Rule 7001 of the Federal Rules of Bankruptcy Procedure in part provides:

> An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:
>
> * * *
>
> (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
>
> * * *

50. Hence, Rule 7001 requires that all proceedings seeking to obtain injunctive or other equitable relief shall be brought as an adversary proceeding. *In re Best Products*, 203 B.R. 51 (Bankr. E.D. Va. 1996). In *Best Products*, the bankruptcy court, in the context of a chapter 11 bankruptcy case, held:

> The final issue which the court must address is the status of the injunction included in my September 24, 1996, order providing adequate assurance to utility companies. Fed.R.Bankr.P. 7001(7) plainly requires that any request for an

> injunction or other equitable relief must be sought in the context of an adversary proceeding. Since the debtor has not filed the requisite action, I cannot enjoin any utility from pursuing its rights under state law should the debtor default in its payments post-petition.

In re Best Products, 203 B.R. at 54.

51. The Proposed Utility Orders provide for the following injunctive relief: the Bank Account "shall be deemed adequate assurance of payment, and any Utility Company that does not make a Request or otherwise comply with the Objection Procedures shall be prohibited from altering, refusing, or discontinuing Utility Services, ***including*** as a result of the Debtors' failure to pay charges for prepetition Utility Services or to provide adequate assurance of payment in addition to the Proposed Adequate Assurance." Proposed Interim Utility Order, p. 4 (emphasis added); Proposed Final Utility Order, p. 5 (emphasis added). In addition, the Interim and Final Utility Orders provide as follows:

> If the Debtors, in consultation with the DIP Lenders, determine that a Request is unreasonable, then they will, within 30 days after receipt of such Request, or such longer period as may be agreed to between the Debtors and the Utility Company, file a motion (the "**Determination Motion**") pursuant to section 366(c)(3) of the Bankruptcy Code seeking a determination from the Court that the Proposed Adequate Assurance, plus any additional consideration offered by the Debtors, constitutes adequate assurance of payment. ***Pending notice and a hearing on the Determination Motion, the Utility Company that is the subject of the unresolved Request may not alter, refuse, or discontinue services to the Debtors***.

Proposed Interim Utility Order, p. 4, ¶ d. (italicized emphasis added); Proposed Final Utility Order, pp. 4-5, ¶ g (italicized emphasis added).

52. The Debtors have not filed an adversary proceeding seeking the foregoing injunctive relief, which precludes the utilities from terminating service to the Debtors for a post-petition payment default even if the utility complies with applicable state laws and/or regulations.

In addition to the Debtors not seeking the proposed injunctive Relief via an adversary proceeding, the injunctive relief is also not authorized by Section 366 of the Bankruptcy Code. "The restriction on termination in section 366(a) bars only those terminations which issue 'solely on the basis' that a debt incurred *prior* to the bankruptcy order, was not paid when due. Thus, by implication, termination for failure to pay post-petition bills would not seem to be barred by section 366(a)." *In re Begley*, 760 F.2d 46, 49 (3d Cir. 1985) (emphasis in original). *See also In re Robinson v. Michigan Consolidated Gas Co., Inc.*, 918 F.2d 579, 588 (6th Cir. 1990) (holding that "it is well established that section 366(b) does not, by itself, bar a utility from terminating service to a debtor or trustee who has posted adequate assurance but fails to make a post-petition payment," but noting that state laws and procedures for terminating service still apply and may limit or bar the utility's ability to do so); *In re Weisel*, 428 B.R. 185, 189 (W.D. Pa 2010); *In re Jones*, 369 B.R. 745, 751-52 (1st Cir. BAP 2007); *In the Matter of Deiter*, 33 B.R. 547, 548 (Bankr. W.D. Wis. 1983). Therefore, this Court should deny the Utility Motion to the extent it seeks the injunctive relief provisions set forth in the Proposed Utility Orders.

2. The Utility Motion Improperly Seeks To Shift the Focus of the Debtors' Obligations Under Section 366(c)(3).

53. 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).

54. 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 (2004) (*quoting Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (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. 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).

55. 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 deny the Utility Motion as to the Utilities.

3. 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.

56. 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 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:

(i) 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.

(ii) In order to access the Bank Account, the Utilities may 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.

(iii) 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 used at least 45 to 60 days of commodity or service.

(iv) The Bank Account, unlike the Carve Out for the Debtors' professionals, may be subject to the DIP lender's liens.

(v) The monies contained in the Bank Account would be returned to the Debtors before all post-petition utility charges are paid in full.

57. Accordingly, the Court should not approve the Bank Account as adequate assurance of payment 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.

4. 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.

58. In the Utility Motion, the Debtors fail to address why this Court should modify the amount 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 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.

59. 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 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.

60. 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).

61. Although the billing cycles for each of the Utilities are slightly different, they all bill the Debtors on a monthly basis for the charges already incurred by the Debtors in the prior month. Each Utility then provides the Debtors with a certain period of time to pay the bill, the timing of which is set forth in applicable state laws, tariffs, regulations and/or contracts. Based on the foregoing state or contract-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 45 to 60 days based on their billing cycles. Furthermore, the amounts of the Utilities' deposit requests are the amounts that the applicable public service commission, which is a neutral third-party entity, or applicable contract, permits the Utilities to request from their customers. The Utilities are not taking the position that the deposits that they are entitled to obtain under applicable state law are binding on this Court, but, instead are introducing those amounts as evidence of amounts that their regulatory entities or contracts permit them to request from their customers.

62. The Debtors claim that the $800 million DIP Facility, which it will in part lend to its non-debtor foreign affiliates, will provide them with "sufficient liquidity to operate their business and administer their estates during these chapter 11 bankruptcy cases" (DIP Financing Motion, ¶ 18) and that they "intend to pay all postpetition obligations owed to the Utility Companies in a timely manner and have sufficient funds to do so" (Utility Motion, ¶ 11). It, however, is not clear that the proposed DIP financing is in fact sufficient, and the events of the past couple of months strongly suggest otherwise. WEC and one of its non-debtor foreign

affiliates obtained emergency funding in an amount totaling $900 million from Toshiba in February 2017. Nevertheless, Westinghouse's overall liquidity crisis deepened over the next several weeks and began to spill over from WEC U.S. to WEC EMEA, and Westinghouse required additional funding just one month later. Further, although the Debtors claim that their liquidity crisis stems primarily from delays and overruns associated with their AP1000 construction projects, it is difficult to imagine that the over 20% decline in assets and more than doubling of liabilities of their business enterprise, on a consolidated basis, over the 11-month period ending February 28, 2017 was caused entirely by the problems encountered with those projects. Even if it was, it is unknown how much damage those liquidity issues, which have already negatively affected the businesses of the WEC EMEA entities, upon whom the Debtors rely heavily for business support, have had on Westinghouse's business enterprise as a whole.

63. Moreover, given that the DIP financing lenders can terminate further credit extensions under the DIP Facility and immediately block the Debtors' access to and withdrawals from their bank accounts (including presumably the Bank Account the Debtors are proposing as adequate assurance of payment) upon an event of default, the Debtors' proposed segregated Bank Account does not really provide any protection at all to the Utilities upon a default under the DIP Facility. Significantly, several of the events that constitute events of default under the DIP Facility are not under the Debtors' control.

64. Finally, in contrast to the improper treatment proposed to the Debtors' Utilities, in addition to the nearly $2 million retainer Debtors' counsel obtained in connection with their representation of the Debtors in these bankruptcy proceedings, Debtors' counsel have made certain that their post-petition bills/expenses will be paid, even in the event of a post-petition DIP Facility default, by seeking an $8 million carve-out for the payment of professionals' fees after a

default and an unlimited carve-out for professionals' postpetition "pipeline" expenses. If Debtors' counsel, who have in-depth knowledge of the Debtors' finances, felt the need to obtain such an extensive carve-out for payment of their fees and expenses, the Debtors' claims that they will have sufficient liquidity to pay their post-petition expenses, including utility expenses, as they come due is suspect at best, and the Utilities clearly need more than a segregated Bank Account they do not control containing only 2-weeks worth (or less) of the Debtors' utility expenses as adequate assurance of payment.

65. Under these circumstances, it is necessary for the Utilities to obtain adequate assurance of payment in a form that they can control and in an amount that protects them from their actual exposure in these cases. Thus, it is reasonable for the Utilities to seek and be awarded the full adequate assurance of payment deposits they have requested herein.

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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, which are the form and amounts of the Requests set forth herein; and

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

Dated: Garden City, New York
April 18, 2017

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

By: */s/ Michael Kwiatkowski*
Thomas R. Slome
Michael Kwiatkowski
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, New York 11530-9194
(516) 741-6565
tslome@msek.com
mkwiatkowski@msek.com

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
russj4478@aol.com

Co-Counsel for Commonwealth Edison Company, Public Service Company of New Hampshire, Connecticut Light and Power Company, FirstEnergy Solutions Corp., Metropolitan Edison Company, Pennsylvania Power Company, West Penn Power Company, and PECO Energy Company

EXHIBIT "A"

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

CL&P:
https://www.eversource.com/Content/ct-c/residential/my-account/billing-payment/rates-tariffs/electric-tariffs-rules

PSNH:
https://www.eversource.com/Content/docs/default-source/rates-tariffs/electric-delivery-tariff.pdf?sfvrsn=20

MetEd:
https://www.firstenergycorp.com/content/customer/customer_choice/pennsylvania/pennsylvania_tariffs.html

Penn Power:
https://www.firstenergycorp.com/content/customer/customer_choice/pennsylvania/pennsylvania_tariffs.html

West Penn:
https://www.firstenergycorp.com/content/customer/customer_choice/pennsylvania/pennsylvania_tariffs.html

PECO:

Electric:
https://www.peco.com/MyAccount/MyBillUsage/Pages/CurrentElectric.aspx

Gas:
https://www.peco.com/MyAccount/MyBillUsage/Pages/CurrentGas.aspx