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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
)	
Quebecor World (USA) Inc., et al.,)	Case No. 08-10152 (JMP)
)	
Debtors.)	(Jointly Administered)
)	

**OBJECTION OF CLEARWATER ENTERPRISES, L.L.C. TO THE MOTION OF
THE DEBTORS FOR INTERIM ORDER DETERMINING ADEQUATE
ASSURANCE OF PAYMENT FOR FUTURE UTILITY SERVICES**

Clearwater Enterprises, L.L.C. (“Clearwater”), by and through its counsel, Peter Axelrod & Associates, P.C., hereby (i) objects to the entry of an Order granting the relief requested by the above-captioned debtors (the “Debtors”) in their Motion for Interim Order Determining Adequate Assurance of Payment for Future Utility Services [Docket #20] (the “Utility Motion”); and (ii) objects to the application to Clearwater of the procedures set forth in the Court’s Interim Order Determining Adequate Assurance of Payment for Future Utility Services [Docket #43] (“Interim Order”); and (iii) seeks a determination of this Court that the Interim Order does not apply to Clearwater and that the rights set forth in 11 U.S.C. § 556 are applicable to Clearwater (collectively, Clearwater’s “Objection”). In support of this Objection, Clearwater respectfully represents as follows:

PRELIMINARY STATEMENT

1. Sections A and B of this Objection seek substantially the same relief based upon the same grounds and authorities as the Objection of BP Canada Energy Marketing Corp. BP Energy Company, and IGI Resources, Inc., filed January 23, 2007 by Kelley, Drye & Warren LLP [Docket #37] (“BP Objection”). The Base Contracts underlying the BP Objection were standard NAESB forms of agreement and the Base Contract underlying Clearwater’s Objection is similarly a standard NAESB form of agreement.

2. The Debtors seek to compel Clearwater to continue to provide natural gas to the Debtors’ Stillwater Oklahoma Facility under a certain Base Contract (defined below and attached at Exhibit 1) by deeming Clearwater as a utility. Such relief should not and cannot be granted for at least two reasons. First, Clearwater is not a utility and is thus not subject to section 366 of the Bankruptcy Code. Section 366 of the Bankruptcy Code was never intended to create rights for debtors against entities that do not operate as monopolies. Clearwater is only one of several marketers from which the Debtors can obtain natural gas, and thus Clearwater is not a monopoly.

3. Second, section 556 of the Bankruptcy Code expressly prohibits the application of the procedures set forth in the Interim Order that seeks to compel Clearwater to sell natural gas to the Debtors because the controlling Base Contract is a forward contract. Section 556 of the Bankruptcy Code provides, among other things, that neither the automatic stay nor an “order of a court in any proceeding under this title,” which includes granting the injunctive relief sought in the Utility Motion, apply to contracts between a debtor and a forward contract merchant under a forward contract. Therefore, it is inappropriate for Debtors to seek – by way of a utility order or otherwise

– an injunction prohibiting Clearwater from exercising its right to terminate the Base Contract.

4. Additionally, the Debtors' Utility Motion is further objectionable because, to the extent the Court finds and determines that Clearwater is a utility under Section 366, Debtors proposed assurances are insufficient and Debtor has failed to comply with the requirements of Section 366.

BACKGROUND

5. On or about April 7, 2006, Clearwater and Quebecor World (USA) Inc. entered into a Base Contract for Sale and Purchase of Natural Gas (the "Base Contract"). The Base Contract is a standard NAESB form of agreement used by Clearwater in connection with sales of natural gas to its customers. A copy of the Base Contract is attached hereto at Exhibit 1. The Base Contract sets forth the terms and conditions for future sales of natural gas by Clearwater to Debtor through written confirmations. The Base Contract specifically provides, at page 8, paragraph 10.5, that the transactions under the Base Contract constitute a forward contract and that Clearwater is a forward contract merchant.

6. On January 21, 2008 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On January 22, 2008, the Debtors filed the Utility Motion. Exhibit B to the Utility Motion lists Clearwater as a utility that must continue to provide goods and/or services to the Debtors in accordance with section 366 of the Bankruptcy Code.

OBJECTION

A. Clearwater Is Not A Utility

7. Clearwater is not a utility for purposes of section 366 of the Bankruptcy Code. Section 366 of the Bankruptcy Code provides:

(a) Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

(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. 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.

8. The Bankruptcy Code does not provide a definition of the term “utility.” However, the legislative history of section 366 of the Bankruptcy Code indicates that Congress intended section 366 to apply only to those “utilities” which have a special position with respect to the debtor.¹ Utilities may include, for example, “an electric company, gas supplier, or telephone company that is a monopoly in the area so the debtor cannot easily obtain comparable services from another utility.” *House Report No. 95-595 at 350.*

¹ The legislative history to section 366 of the Bankruptcy Code states, in relevant part:

This section gives debtors protection from a cut-off of service by a utility because of the filing of a bankruptcy case. This section is intended to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another utility. The utility may not alter, refuse, or discontinue service because of the nonpayment of a bill that would be discharged in the bankruptcy case.

House Report No. 95-595, 95th Cong., 1st Sess. 350 (1977); see Senate Report No. 95-989, 95th Cong., 2d Sess. 60 (1978).

9. Courts have generally held that section 366 of the Bankruptcy Code only applies to traditional “utilities.” See *One Stop Realtour Place, Inc. v. Allegiance Telecom, Inc.*, 268 B.R. 430, 436 (Bankr. E.D. Pa. 2001) (telephone company is within the meaning of a utility); *Kiriluk v. Chester Water Auth.*, 76 B.R. 979 (Bankr. E.D. Pa. 1987) (a provider of sewer service is a utility); *In re Gehrke*, 57 B.R. 97 (Bankr. D. Or. 1985) (an electric co-op association is a utility); *Good Time Charlie’s Ltd. v. Black*, 25 B.R. 226 (Bankr. E.D. Pa. 1982) (shopping mall that supplied debtor with electricity was a utility). In each case, the debtor was dependent on the services provided by the utility and such services were unavailable from any other source. In other words, the utility enjoyed a monopolistic position.

10. Clearwater does not have a monopoly over the sale of natural gas to the Debtors. There are numerous other providers of natural gas that are available to the Debtors, including the distribution company, Oklahoma Natural Gas. Because Clearwater is not a utility under section 366 of the Bankruptcy Code, the Court should exempt Clearwater from the relief sought in the Utility Motion and the procedures set forth in the Interim Order.

B. The Base Contract Is A ‘Forward Contract’ that Clearwater May Terminate at Will Under the Terms of the Contract and Section 556 of the Bankruptcy Code

11. The Base Contract is an NAESB standard form of agreement. It is a “forward contract” under the Bankruptcy Code. This is expressly acknowledged by the Debtors at section 10.5 of the Base Contract. Section 10.5 specifically states that the transactions under the contract constitute a “‘forward contract’ within the meaning of the United States Bankruptcy Code and that Buyer and Seller are each ‘forward contract

merchants' within the meaning of the United States Bankruptcy Code." Therefore, there should be no dispute over whether the Base Contract is a forward contract under the Bankruptcy Code and Section 556.

12. The characterization of the Base Contract as a "forward contract" is also supported by the language of the Bankruptcy Code. 11 U.S.C. § 101(25) defines a forward contract. The Base Contract falls within said definition. The Base Contract covers purchases of natural gas, a freely traded commodity that is dealt both on the New York Mercantile Exchange and numerous private exchanges or marketplaces, with the underlying transactions having a maturity date more than two days into the future. Pursuant to the Base Contract, the Debtor purchases natural gas from Clearwater upon written confirmations of specified price and quantity, for delivery more than two days from the date of such agreement.

13. Further, in a "forward contract," the parties usually expect to make actual delivery. *In re Borden Chemicals and Plastics*, 336 B.R. 214, 218 (quoting *In re Olympic Natural Gas Co.*, 294 F.3d 737, 741 (citing *Nagel v. ADM Investor Servs., Inc.*, 217 F.3d 436, 441 (7th Cir. 2000)) (holding that when eventual delivery of commodity is reasonably assured, the contract is a forward); *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 579 (9th Cir. 1982) (stating that forward contract is "predicated upon the expectation that delivery of the actual commodity by the seller to the original contracting buyer will occur in the future"); *Grain Land Coop v. Kar Kim Farms, Inc.*, 199 F.3d 983, 990 (8th Cir. 1999) ("[I]t is the contemplation of physical delivery of the subject commodity that is the hallmark of an unregulated cash-forward contract."). As such, the Base Contracts are contracts for the "purchase, sale, or transfer of a commodity," with the

underlying transactions having a maturity date more than two days into the future. Because the Base Contracts fit squarely within the definition of a “forward contract,” the safe harbor provisions of section 556 automatically apply and inquiry into extrinsic evidence is neither necessary nor appropriate. *See, e.g., Calyon New York Branch v. American Home Mortgage Corp. (In re American Home Mortgage Corp.)*, ___ B.R. ___, 2008 WL 60292, *8 (Bankr. D. Del. Jan. 4, 2008) (“[I]f the definition of [the financial transaction] is met, the . . . safe harbor provisions apply, period.”).

14. Similar contracts for the future sales of natural gas have been recognized in bankruptcy as being within the Bankruptcy Code’s definition of “forward contracts” because they contain a hedging component. *See, e.g., In re Borden Chemicals and Plastics*, 336 B.R. 214, 221-22 (quoting the House Report: “the principal purpose [sic] a forward contract is to hedge against possible fluctuations in the price of a commodity,” H.R. Rep. No. 101-484, at 4 (1990)).

15. Clearwater is also a “forward contract merchant” as defined by section 101(26) of the Bankruptcy Code. As held by the *Mirant* court, “a forward contract merchant is a person that, in order to profit, engages in the forward contract trade as a merchant or with a merchant.” *In re Mirant*, 310 B.R. 548, 568. Clearwater, in order to profit, engages in the forward contract trade, as a merchant and with other merchants. In fact, the Debtors specifically acknowledge in the Base Contract that the parties are each “forward contract merchants” as such term is defined in the United States Bankruptcy Code. *See, e.g.,* Base Contract, Section 10.5.

16. Since the Base Contract is a forward contract entered into by forward contract merchants, special creditor protections mandated by Congress apply. Namely,

Clearwater is free to terminate the Base Contracts if it so desires. Under section 556 of the Bankruptcy Code, “[t]he contractual right of a ... forward contract merchant to cause the liquidation of a ... forward contract because of a condition of the kind specified in section 365(e)(1) of this title [conditions relating to filing bankruptcy, insolvency or financial condition] . . . shall not be stayed, avoided, or otherwise limited by operation of any provision under this title or by the order of a court in any proceeding under this title.” 11 U.S.C. § 556. Accordingly, section 556 dictates that the right of Clearwater to terminate the Base Contract remains undisturbed by either (i) the automatic stay or (ii) an “order of a court in any proceeding under this title,” which includes any interim or final order granting the relief sought in the Utility Motion, that by its terms forbids Clearwater “from altering, refusing or discontinuing services” to the Debtors. Because Clearwater may elect to terminate the Base Contract – as it is permitted to do without a court order under section 556 of the Bankruptcy Code – it is critical that the utility order not interfere with this right. Clearwater respectfully requests an Order of the Court determining that the Interim Order and the restrictions and procedures therein do not apply to Clearwater and further determining that the rights set forth in 11 U.S.C. § 556 are applicable to Clearwater.

C. The Utility Motion Should Further Be Denied Because Debtors Have Failed to Comply with Section 366 of the Bankruptcy Code

17. This portion of Clearwater’s Objection should only be considered if the Court refuses to sustain Clearwater’s Objection on the grounds that Clearwater is not a utility under section 366. This portion of Clearwater’s Objection seeks denial of Debtor’s Utility Motion on substantially the same grounds and authorities as the Objection of Certain Utility Companies to [the Utility Motion] filed February 7, 2008 [Docket #128].

Although asserting these arguments in the alternative, Clearwater continues to assert that it is not a 'utility' for purposes of Section 366.

18. The relief requested by the Debtors in the Utility Motion is contrary to the express requirements of section 366 of the Bankruptcy Code, as amended, and should be rejected by this Court. Through the Utility Motion, the Debtors seek to avoid the procedural and substantive requirements of section 366 of the Bankruptcy Code. Instead of responding to adequate assurance requests of the Debtors' respective utility companies as is required, the Debtors have instead elected to file the Utility Motion and seek procedures and deposit amounts that fail to provide adequate assurance of payment as required by section 366 of the Bankruptcy Code. Specifically, in the Utility Motion, the Debtors propose to provide a security deposit equal to two-weeks of utility service based upon the Debtors' calculated historical average of these costs during the past twelve months, presumably January 1, 2007, through December 31, 2007 (the "Adequate Assurance Deposit").

19. In addition to completely ignoring the Section 366 rights afforded to utilities, the proposed two-week deposit would be an inadequate amount to secure Clearwater's provision of post-petition accounts to the Debtors.² Clearwater regularly provides natural gas to the Debtor in which Debtor is approximately two months in arrears in payment. The contract provides for payment on the twenty-fifth (25th) of the month following the month of delivery. Gas delivered on the first of the month is not paid until approximately two months later. Accordingly, one-half of one-month's service

² Clearwater's notice to Debtors that Debtors' offer of a cash deposit equal to two weeks of service is insufficient is attached hereto at Exhibit 2 and incorporated by reference herein. Pages 2 through 4 of the attached Exhibit 2 contain the specific information requested in paragraph 13 of the Interim Order.

is insufficient to cover the payment of the Debtor's post-petition invoices. Moreover, Debtors' methodology fails to take into account steadily rising energy and gas prices due to changes in market conditions well beyond the control of Clearwater and whether any of the twelve months contain off-peak billing compared to other months of the year wherein more utility service is consumed by Debtors. For these additional reasons, Clearwater requests that the Court deny the Utility Motion and require the Debtors to comply with the requirements of Section 366.

WHEREFORE, Clearwater respectfully requests that the Court deny Debtors' Utility Motion and determine that relief sought in the Utility Motion and the procedures set forth in the Interim Order are not applicable to Clearwater, and further determine that the rights set forth in section 556 are applicable to Clearwater, and/or grant such other relief as may be just and proper.

Dated: New York, New York
February 8, 2008

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