Hearing Date: February 21, 2008
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Dyersburg Electric System,
City of Dyersburg, Tennessee,
Dickson Electric System,
Alcorn County Electric Power Association,
Clarksville Department of Electricity and
Northcentral Electric Power Association.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
QUEBECOR WORLD (USA) INC., et al.,	:	Case No: 08-10152 (JMP)
	:	Jointly Administered
Debtors	:	

OBJECTION TO MOTION OF THE DEBTORS FOR INTERIM ORDER DETERMINING ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE UTILITIES SERVICES

COME NOW Franklin Electric Plant Board, Cumberland Electric Membership Corporation, Memphis Light, Gas & Water Division of the City of Memphis, Tennessee, Covington Electric System, City of Covington, Tennessee (Gas, Water and Sewer), Nashville

Electric Service, Trenton Light & Water Department of the City of Trenton, Tennessee, Dyersburg Electric System, City of Dyersburg, Tennessee (Gas, Water & Sewer), Dickson Electric System, Alcorn County Electric Power Association, Clarksville Department of Electricity, and Northcentral Electric Power Association (collectively, the "Municipal and Cooperative Utilities"), by and through their undersigned counsel, and object to the relief requested by Quebecor World (USA) Inc., and those other entities that are debtors and debtors-in-possession in the above-entitled bankruptcy proceedings[1] (collectively, the "Debtors") in their Motion of the Debtors for Interim Order Determining Adequate Assurance of Payment for Future Utilities Services (the "Motion"). The Municipal and Cooperative Utilities, each a non-profit, municipal or political subdivision existing under the laws of the States of Tennessee, Mississippi or Kentucky, respectfully object to the relief requested in the Motion. In support of their Objection, the Municipal and Cooperative Utilities state as follows:

INTRODUCTION

1. On January 21, 2008 (the "Petition Date"), and without prior notice to the Municipal and Cooperative Utilities, the Debtors filed the Motion in which the Debtors requested entry of a proposed order providing, among other things: (i) that the Debtors post with each

[1] The Debtors are the following entities: Quebecor World (USA) Inc., Quebecor Printing Holding Company, Quebecor World Capital Corporation, Quebecor World Capital II GP, Quebecor World Capital II LLC, WCZ, LLC, Quebecor World Lease GP, Quebecor World Lease LLC, QW Memphis Corp., The Webb Company, Quebecor World Printing (USA) Corp., Quebecor World Loveland Inc., Quebecor World Systems, Inc., Quebecor World San Jose Inc., Quebecor World Buffalo Inc., Quebecor World Johnson & Hardin Co., Quebecor World Northeast Graphics Inc., Quebecor World UP/Graphics Inc., Quebecor World Great Western Publishing Inc., Quebecor World DB Acquisition Corp., WCP-D, Inc., Quebecor World Taconic Holdings Inc., Quebecor World Retail Printing Corporation, Quebecor World Arcata Corp., Quebecor World Nevada Inc., Quebecor World Atglen Inc., Quebecor World Krueger Acquisition Corp., Quebecor World Book Services LLC, Quebecor World Dubuque Inc., Quebecor World Pendell Inc., Quebecor World Fairfield, Inc., QW New York Corp., Quebecor World Dallas II Inc., Quebecor World Nevada II LLC, Quebecor World Dallas, L.P., Quebecor World Mt. Morris II LLC, Quebecor World Petty Printing Inc., Quebecor World Hazleton Inc., Quebecor World Olive Branch Inc., Quebecor World Dittler Brothers Inc., Quebecor World Atlanta II LLC, Quebecor World RAI Inc., Quebecor World KRI Inc., Quebecor World Century Graphics Corporation, Quebecor World Waukee Inc., Quebecor World Logistics Inc., Quebecor World Mid-South Press Corporation, Quebecor Printing Aviation Inc., Quebecor World Eusey Press Inc., Quebecor World Infiniti Graphics Inc., Quebecor World Magna Graphic Inc., Quebecor World Lincoln Inc., and Quebecor World Memphis LLC.

utility a cash deposit in an amount equal to only two (2) weeks of utility service, calculated by the Debtors as a historical average over the past twelve (12) months (the "Proposed Assurance"); (ii) that the Proposed Assurance will be furnished by the Debtors only upon the submission by each utility of a written request for the same, and, even then, only if such utility is not already holding a pre-petition deposit equal to or greater than the Proposed Assurance[2]; (iii) that the acceptance of the Proposed Assurance by a utility constitutes a waiver of the right of the utility to seek additional adequate assurance; (iv) that if the utility requests additional adequate assurance of payment beyond the Proposed Assurance, each utility must do so in writing and must provide various items of historical information relating to prior utility service provided to the Debtors; and (v) that any utility desiring additional adequate assurance is enjoined from terminating, altering or discontinuing service despite the fact that the Debtors have not furnished adequate assurance satisfactory to such utility within thirty (30) days of the filing of the Petitions commencing these cases.

2. On January 23, 2008, this Court entered its Interim Order approving the Motion on an interim basis, including the procedures prescribed by the Debtors (the "Interim Order"). Pursuant to the Interim Order, a final hearing to consider the Debtors' Motion is scheduled on February 21, 2008 at 10:00 a.m., beyond the 30-day period during which the Municipal and Cooperative Utilities must "receive" adequate assurance of payment that is "satisfactory" to the Municipal and Cooperative Utilities, 11 U.S.C. § 366(c)(2).

[2] The Debtors inexplicably propose to use any pre-petition security deposit as assurance of payment for post-petition utility services provided by the Municipal Utilities. This is contrary to the express terms of Section 366(c)(4) of the Bankruptcy Code which provides that "a utility may recover or set off against a security deposit provided to the utility by the debtor before the date of the filing of the petition without notice or order of the court." The Municipal and Cooperative Utilities with a security deposit have a right to and shall apply any pre-Petition Date security deposit to reduce or satisfy their respective pre-Petition Date claim.

3. The relief requested and procedures proposed by the Debtors in their Motion flagrantly disregard the significant changes made by Congress to 11 U.S.C. § 366 by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA"). The Debtors proposal of a nominal security deposit does not adequately assure the payment of post-petition utilities. Further, the Debtors' mere promise to pay and predications of future success in their Motion are not forms of "assurance of payment" prescribed by 11 U.S.C. § 366(c)(1)(A). The procedures proposed by the Debtors in the Motion and reflected in the Interim Order also ignore the BAPCPA amendments in many material respects. For the reasons discussed more fully herein, the Motion should be denied and, consistent with 11 U.S.C. § 366(c), the Municipal and Cooperative Utilities should be free to terminate utility service to the Debtors unless the Debtors furnish adequate assurance satisfactory to the Municipal and Cooperative Utilities prior to the conclusion of the thirty (30) day period beginning on the date of the filing of voluntary petitions by the Debtors, in full compliance with the terms of 11 U.S.C. § 366.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

5. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

6. On the Petition Date, the fifty-three (53) Debtors filed their individual voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

7. The Debtors collectively operate the second largest commercial printing business in the United States, printing magazines, advertising inserts, direct mail pieces, and books for a variety of customers.

8. In connection with the Debtors' business operations, the Debtors purchase utilities, including electricity, gas, water and sewer services, from the Municipal and Cooperative Utilities pursuant to contracts existing by and between the Debtors and the Municipal and Cooperative Utilities. The locations at which such utility services are provided by and the corresponding account numbers of the Municipal and Cooperative Utilities are as follows:

	Utility	Account Nos.	Service Locations
a.	Franklin Electric Plant Board	0780210023652	300 Brown Road Franklin, KY
b.	Cumberland Electric Membership Corporation	121775-1	451 Arcata Boulevard Clarksville, TN
c.	Memphis Light, Gas & Water Division	445314-1409685	4259 Air Trans Road Memphis, TN
		481326-1453245	828 E. Holmes Road Memphis, TN
d.	Covington Electric System	018-0100-0	4000 Highway 51N Covington, TN
e.	City of Covington	027-1126-01 027-1119-01	4000 Highway 51N Covington, TN
f.	Nashville Electric Service	0284283-0410946 0284283-0368976	2947 Brick Church Pk Nashville, TN
		028428300449958	2618 Brick Church Pk Nashville, TN
g.	Trenton Light & Water Department	202714-102769 202715-102770	1226 Mfgs. Row Trenton, TN

h.	Dyersburg Electric System	883-7541-01	2030 Sylvan Road Dyersburg, TN
i.	City of Dyersburg	880-07542-01 880-07540-01 880-07546-01 880-07545-01	2030 Sylvan Road Dyersburg, TN
j.	Dickson Electric System	099-0002	Industrial Park Dickson, TN
k.	Alcorn County Electric Power Association	0002097-0009304	2787 S. Harper Road Corinth, MS
		214579-112649	1 Golding Drive Corinth, MS
		214581-112651	1 Golding Drive Corinth, MS
		214582-112652	1 Golding Drive Corinth, MS
		214583-112653	1 Golding Drive Corinth, MS
		219573-117108	2787 S. Harper Road Corinth, MS
l.	Clarksville Department of Electricity	96248-004	Alfred Thun Road Clarksville, TN
m.	Northcentral Electric Power Association	6633-01	8649 Hacks Cross Rd. Olive Branch, MS

9. As of the Petition Date, the Debtors were indebted to the Municipal and Cooperative Utilities related to the Debtors' consumption of utilities prior to the Petition Date in the following estimated amounts:

	Utility	Estimated Pre-Petition Claim
a.	Franklin Electric Plant Board	$277,960.08

b.	Cumberland Electric Membership Corporation	$193,765.73
c.	Memphis Light, Gas & Water Division	$418,744.20
d.	Covington Electric System	$183,795.24
e.	City of Covington	$164,026.81
f.	Nashville Electric Service	$149,342.50
g.	Trenton Light & Water Department	$10,341.95
h.	Dyersburg Electric System	$199,930.86
i.	City of Dyersburg	$34,686.93
j.	Dickson Electric System	$148,500.23
k.	Alcorn County Electric Power Association	$218,507.90
l.	Clarksville Department of Electricity	$1,625.94
m.	Northcentral Electric Power Association	$82,257.19
	TOTAL	$2,083,485.56

10. The highest monthly utility consumption by the Debtors from the Municipal and Cooperative Utilities during the twelve (12) months preceding the Petition Date was as follows:

	Utility	Highest Monthly Consumption
a.	Franklin Electric Plant Board	$264,745.96
b.	Cumberland Electric Membership Corporation	$281,560.83
c.	Memphis Light, Gas & Water Division	$225,554.78
d.	Covington Electric System	$214,130.89

e.	City of Covington	$199,274.67
f.	Nashville Electric Service	$121,277.60
g.	Trenton Light & Water Department	$20,154.33
h.	Dyersburg Electric System	$353,642.66
i.	City of Dyersburg	$52,019.42
j.	Dickson Electric System	$192,264.37
k.	Alcorn County Electric Power Association	$312,100.25
l.	Clarksville Department of Electricity	$1,842.70
m.	Northcentral Electric Power Association	$168,964.54
	TOTAL	$2,407,533.00

11. During the twelve (12) months immediately preceding the Petition Date, the Debtors' average monthly utility consumption from the Municipal and Cooperative Utilities was as follows:

	Utility	Average Monthly Utility Consumption
a.	Franklin Electric Plant Board	$229,954.35
b.	Cumberland Electric Membership Corporation	$251,808.81
c.	Memphis Light, Gas & Water Division	$192,265.07
d.	Covington Electric System	$189,515.63
e.	City of Covington	$132,784.66
f.	Nashville Electric Service	$105,079.21
g.	Trenton Light & Water	

	Department	$16,867.24
h.	Dyersburg Electric System	$320,244.20
i.	City of Dyersburg	$38,595.08
j.	Dickson Electric System	$170,050.75
k.	Alcorn County Electric Power Association	$249,865.54
l.	Clarksville Department of Electricity	$1,692.72
m.	Northcentral Electric Power Association	$145,583.88
	TOTAL	**$2,044,306.85**

12. The monthly consumption figures noted above understate the credit exposure faced by the Municipal and Cooperative Utilities arising from the Debtors' post-petition consumption of utility services. First, the average consumption figures do not properly account for the seasonal fluctuation in utility consumption by the Debtors. Further, as to the Municipal and Cooperative Utilities that furnish the Debtors' electrical needs, these averages do not take into account rate increases which may be imposed by the Tennessee Valley Authority ("TVA"), or other marketers of electricity, as raw usage of energy continues to surpass previous peak levels.

13. Similarly, respecting the Municipal and Cooperative Utilities which distribute or transport gas to the Debtors, the historical consumption figures do not account for fluctuations in the market price of natural gas or the risks associated with either a positive or negative imbalance in these Municipal and Cooperative Utilities' systems caused by the Debtors' failure to properly nominate purchases of natural gas from their suppliers. The City of Covington, Tennessee, the City of Dyersburg, Tennessee, and Memphis Light, Gas & Water Division of the City of Memphis, Tennessee, (collectively the "Gas Transporters"), each transport and deliver, through

their respective gas piping and storage infrastructures, natural gas to the Debtors pursuant to the terms of certain natural gas transportation agreements. Under such transportation agreements, the Debtors agree to directly purchase supplies of natural gas required to serve their facilities from third-party merchants and suppliers. Pursuant to these gas transportation agreements, the Debtors agree to and are solely responsible for nominating or purchasing on a daily basis sufficient natural gas from their suppliers to insure that the Debtors have neither a positive or negative imbalance of natural gas in the Gas Transporters' system. Despite their express contractual obligations, the Debtors have historically failed to purchase or nominate accurate and sufficient supplies of natural gas from their third-party suppliers. Further, the Debtors have not promptly adjusted their practices to eliminate the natural gas imbalances caused by the Debtors' gas purchasing practices, also a direct violation of the transportation agreements with the Gas Transporters. The Debtors' inability or refusal to balance their nominations and usage of natural gas present significant risks to the Gas Transporters that are not accounted for by the historical consumption figures noted above or the Proposed Assurance reflected in the Debtors' Motion. For example, the Debtors' failure to purchase sufficient natural gas may cause the Gas Transporters to incur: (i) overrun charges, (ii) increased expenses associated with purchases of natural gas from merchants, (iii) penalties for violation of operational flow requirements, and (iv) imbalance penalties. These very real risks are only heightened by the Debtors' admitted liquidity crises and respective bankruptcies, as their relationships with their suppliers of natural gas may be strained. With the demand for crude oil and natural gas at an all time high, it is anticipated that the price of natural gas will sharply increase as the nation's economic forecast becomes more turbulent over the coming months, further increasing the risk faced by the Gas Transporters.

AUTHORITIES REGARDING ADEQUATE ASSURANCE OF PAYMENT

14. Prior to the 2005 BAPCPA amendments to the Bankruptcy Code, Congress provided very little guidance to bankruptcy courts when making a determination of "adequate assurance of payment" under Section 366 of the Bankruptcy Code. Many courts, including courts within the Second Circuit, held that the determination of "adequate assurance" was within the discretion of the bankruptcy court. Virginia Electric & Power Co. v. Caldor, Inc. – New York, 117 F.3d 646, 650 (2d Cir. 1997) (internal citations omitted) ("[B]ankruptcy courts must be afforded reasonable discretion in determining what constitutes 'adequate assurance' of payment for continuing utility services.") Prior to 2005, bankruptcy courts routinely determined that the amount of adequate assurance or collateral required in a particular case was zero. These determinations were based on the premise that the utilities had adequate assurance of payment through other means, such as the availability of administrative expense priority status for the post-petition invoices.[3] With the enactment of the BAPCPA in 2005, however, Congress established strict guidelines for what would constitute adequate assurance of payment pursuant to Section 366 of the Bankruptcy Code, effectively, if not purposefully, rejecting these decisions.

15. In the 2005 BAPCPA amendments to Section 366 of the Bankruptcy Code, Congress for the first time defined "assurance of payment" as:

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

[3] Ironically, the bankruptcy case at issue in Caldor was ultimately converted to a Chapter 7 and post-petition trade creditors holding administrative expense priority claims were not paid in full.

11 U.S.C. § 366(c)(1)(A). Accordingly, the "assurance of payment" for future utility service must take the form of one of the prescribed forms of liquid security. Affording a utility a post-petition claim with "administrative expense priority **shall not** constitute an assurance of payment." 11 U.S.C. § 366(c)(1)(B) (emphasis added).

16. Section 366 of the Bankruptcy Code further requires that the prescribed form of "assurance of payment" be "adequate". The Debtors contend that, in its revision of Section 366 of the Bankruptcy Code, Congress had the opportunity to establish a minimum adequate assurance amount that would be required in each case, but instead vested discretion in the courts to determined the appropriate level of adequate assurance required in each case. The Debtors urge this Court, exercising its discretion, to essentially continue the practice prevailing before the BAPCPA amendments and find that any nominal assurance of payment, however inadequate, will satisfy the requirements of Section 366. The Debtors' contention directly contravenes the intent of Congress in enacting the 2005 BAPCPA amendments in the first place.

17. In any case of statutory construction, this Court's analysis should begin by looking to the plain or ordinary meaning of the words used by Congress. It is well established that "when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) (citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989)). In turn, "[i]n determining the ordinary meaning of statutory terms, [courts] often find guidance in dictionary definitions." In re James, 406 F.3d 1340, 1343 (11th Cir. 2005) (internal citations omitted). See also In re Stoltz, 315 F.3d 80, 89 (2d Cir. 2002).

18. "Assurance" is commonly defined as "the act of assuring: as a: Pledge, Guarantee . . ." Merriam-Webster Online Dictionary, http://www.m-w.com (last visited January 28, 2008). "Assuring", in turn, is defined to mean "to make certain the coming or attainment of : Guarantee . . ." Id. Consequently, applying the plain meaning of "assurance" to Section 366 of the Bankruptcy Code, the amount of the deposit or other prescribed form of security that must be afforded a utility provider as a condition of continued service is "adequate" only if such deposit makes certain or guarantees the payment to the utility provider for post-petition utility service.

THE PROPOSED ADEQUATE ASSURANCE IS INADEQUATE

19. The Proposed Deposit Does Not Assure Payment.

A. The Debtors arbitrarily propose to provide a deposit to the Municipal and Cooperative Utilities purportedly equal to less than fifty percent (50%) of the Debtors' average monthly utility consumption. The Debtors offer no justification for the adequacy of the nominal Proposed Assurance.

B. The contracts and course of dealing between the Debtors and the Municipal and Cooperative Utilities evidence the inadequacy of the Proposed Assurance. Each of the Municipal and Cooperative Utilities bill the Debtors in arrears in the ordinary course of business. Specifically, the Municipal and Cooperative Utilities mail an invoice to the Debtors for utility consumption after the calculation of the usage for the immediately preceding month. Following the billing, the Debtors are then afforded approximately twenty (20) days within which to satisfy the invoice. Assuming the Debtors do not pay an invoice for services by the applicable due date, the Debtors may be afforded additional time from the due date within which to cure the default or face termination. Finally, the Debtors may have rights to administratively appeal any disputes concerning the amount of any invoice as a condition of termination.

Accordingly, in the ordinary course of business, the Municipal and Cooperative Utilities may supply the Debtors service for more than two (2) months for which they may not be paid prior to the termination of service. See, e.g., In re Begley (Begley v. Philadelphia Electric Co.), 760 F.2d 46, 49 (3d Cir. 1985) (adequate assurance protects a utility for the period between one billing cycle and termination).

C. In order to assure or make certain the payment to the Municipal and Cooperative Utilities for post-petition services and address the risks presented by: (i) the parties' billing practices, (ii) market conditions, (iii) the uncertainty associated with the Debtors' reorganization efforts, (iv) the fluctuations in the prices for electricity and natural gas, and (v) the Debtors' inability or refusal to balance their purchase and usage of natural gas, the Municipal and Cooperative Utilities are each requesting a deposit **at least** equal to two-and-a-half (2.5) times the Debtors' highest monthly consumption during the 12-month period preceding the Petition Date totaling, in the aggregate, approximately $6,018,832.50.

D. The Debtors' proposal of posting deposits in an amount less than fifty percent (50%) of one (1) month's average power usage is patently unreasonable. Respecting the Municipal and Cooperative Utilities, the Proposed Assurance is, in the aggregate, only $1,022,153.43. Under the existing billing procedures and payment practices, the nominal deposit proposed by the Debtors will assure, make certain or guarantee payment of only a fraction of the credit exposure presented by the Debtors' continued use of utility services. If the Debtors' proposal of adequate assurance is accepted, the Debtors render the Municipal and Cooperative Utilities involuntary, unsecured creditors contrary to Section 364 of the Bankruptcy Code. In the Matter of Security Inv. Properties, Inc., 559 F.2d 1321 (5th Cir. 1977) (holding that a utility does not have a duty to provide unsecured service to a debtor). The Municipal and Cooperative

Utilities should not be made to finance the Debtors' attempt to reorganize. This is certainly not the result Congress intended when it prescribed the forms of "assurance of payment" with the 2005 BAPCPA amendments to the Bankruptcy Code.[4]

20. The Debtors' Purported Ability to Pay for Future Utility Service is Irrelevant.

A. In the Motion, the Debtors contend their proposed adequate assurance deposit, "in conjunction with the Debtors' ability to pay for future utility services in the ordinary course of business", constitutes sufficient adequate assurance of future payment. (Debtors' Motion at p. 14.) Although vague, presumably the Debtors are contending that the Municipal and Cooperative Utilities are adequately assured of payment because the Debtors may have historically satisfied utility bills or because invoices arising from the post-petition provision of utility services by the Municipal and Cooperative Utilities are entitled to administrative expense priority status pursuant to Sections 503(b) and 507 of the Bankruptcy Code. Again, the Debtors have ignored the plain meaning of new Section 366(c) of the Bankruptcy Code.

Section 366(c)(3)(B) of the Bankruptcy Code expressly states:

> In making a determination . . . whether an assurance of payment is adequate, the court may *not* consider
>
> (i) the absence of security before the date of the filing of the petition;

[4] The federal bankruptcy statutes cannot be used to, in effect, facilitate a taking of the property of the Municipal and Cooperative Utilities. The Court should not establish assurance of payment in an amount less than the maximum amount needed to protect the Municipal and Cooperative Utilities from loss in the event the Debtors' promise to pay is breached. Such a circumstance, should it happen, would cause a taking of the private property of one person for the benefit of another private person, without a valid public purpose and without compensation. As noted by the United States Supreme Court in Kelo v. City of New London, Conn., 545 U.S. 469, 478 (2005):

> [T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See [Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984)] ('A purely private taking could not withstand the scrutiny of the public use requirement; and it would serve no legitimate purpose of government and would thus be void'); Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403 (1896). Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.

> (ii) *the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition*; or
>
> (iii) *the availability of an administrative priority expense*.

11 U.S.C. § 366(c)(3)(B) (emphasis added). With enactment of the 2005 BAPCPA amendments to the Bankruptcy Code, Congress determined that the administrative expense priority status of a debtor's obligations to a utility provider for utility consumption following the petition date and the fact that a debtor may have historically satisfied invoices owing to a utility provider timely provided no measure of adequate assurance of payment. As stated previously, the "assurance of payment" must be one of the cash equivalent forms of security specified by Congress and be sufficient to assure or make certain the payment of post-petition utility consumption by the Debtors. Consequently, the Debtors' purported "ability to pay for future utility services in the ordinary course of business" is irrelevant and immaterial to a determination of the adequacy of the Proposed Assurance. The Debtors' purported ability to pay is nothing more than a promise. A promise to pay is not one of the forms of "assurance of payment" prescribed by Section 366(c)(1)(A) of the Bankruptcy Code.

B. Ignoring the 2005 BAPCPA amendments to the Bankruptcy Code and assuming that the administrative expense priority status remains relevant to a determination of the adequacy of the Debtors' proposed "assurance of payment", it is questionable whether such status would provide any assurance to the Municipal and Cooperative Utilities. On the Petition Date the Debtors filed a motion seeking entry of interim and final orders authorizing them to, among other things, obtain post-petition financing pursuant to section 364 of the Bankruptcy Code (The "Financing Motion") (Docket No. 12). With the Financing Motion the Debtors seek authority under Section 364 of the Bankruptcy Code to obtain debtor-in-possession financing of up to $1,000,000,000.00 secured by priming liens encumbering all of the Debtors' assets and

affording the secured lenders superpriority claims pursuant to Section 364(c) of the Bankruptcy Code. Consequently, in the event the Debtors' attempt to reorganize fails or the Debtors otherwise default on their post-petition loans, the Debtors' promise to pay and the administrative expense status of the Debtors' post-bankruptcy indebtedness to the Municipal and Cooperative Utilities provide no assurance of payment. The Debtors' lenders will certainly contend that the Municipal and Cooperative Utilities' administrative expense claims are subordinate to the post-petition lenders' secured and superpriority claims.

C. The Debtors' own words in its Motion suggest that the Debtors' promise to pay for post-petition utility services provides no "assurance of payment." In the Motion, the Debtors admit that they are facing a severe liquidity crisis. (Debtors' Motion at p. 10.) The Debtors admit that they are unable to service their financial obligations by cash flow. This poor liquidity is likely to continue to be a factor during these bankruptcy proceedings. If the Debtors are unable to satisfy their operational and financial obligations post-petition from cash flow, the Debtors' mere promise to pay the Municipal and Cooperative Utilities for post-petition utility consumption provides no assurance that the Municipal and Cooperative Utilities will, in fact, be paid. The fact that the causes of the Debtors' liquidity problems, namely declining prices and sales volume, are outside of the control of both this Court and the Debtors renders any reliance on the Debtors' financial projections and mere promise to pay the Municipal and Cooperative Utilities problematic. Again, the Debtors' predications of future success and promises to pay reflected in their first day Motion are not forms of "assurance of payment" prescribed by Section 366(c)(1)(A) of the Bankruptcy Code.

21. The Proposed Nominal "Assurance" Frustrates the Purpose of The Tennessee Valley Authority Act.

A. The Municipal and Cooperative Utilities providing electricity to the Debtors own no power generation facilities. Instead of generating electricity, the Municipal and Cooperative Utilities that distribute electricity to citizens in their service districts purchase all the electricity they distribute to their customers (i.e., individual residents, farmers, schools, local governments and businesses) from TVA, a corporation of the United States of America created and existing under and by virtue of the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831 (the "TVA Act"). Consequently, if the Municipal and Cooperative Utilities do not receive a deposit or other "assurance of payment" sufficient to make certain the payment for the Debtors' post-petition power consumption, the Municipal and Cooperative Utilities lose both revenue and suffer an out-of-pocket loss associated with the Municipal and Cooperative Utilities' purchase of electricity from TVA for distribution.

B. The Municipal and Cooperative Utilities' losses must, in turn, be passed on to and absorbed by their customers, most likely in the form of an electrical rate increase. In other words, if the "assurance of payment" proves inadequate, the Debtors will have received a windfall at the expense of the remaining customers of the Municipal and Cooperative Utilities. This result is tantamount to a rebate or rate concession to the Debtors. Such a rebate or rate concession frustrates the purposes of the federal statutory provisions of the TVA Act which prohibits discrimination, 16 U.S.C. §§ 831(i) and (j), and the rules and regulations of the Municipal and Cooperative Utilities prohibiting discrimination promulgated by TVA pursuant to the TVA Act. See, generally, Allen v. Elec. Power Bd. of Metro. Gov't of Nashville & Davidson County, 422 F.Supp. 4 (M.D. Tenn. 1976) (holding that billing procedures and rate schedules adopted by TVA and its distributors under the TVA Act are not subject to judicial review and are

not discriminatory in violation of the TVA Act). See also, generally, Ferguson v. Elec. Power Bd. of Chattanooga, 378 F.Supp. 787 (E.D. Tenn. 1974), aff'd., 511 F.2d 1403 (6th Cir. 1975); Mobil Oil Corp. v. Tenn. Valley Authority, 387 F.Supp. 498 (N.D. Ala. 1974); Carborundum Co. v. Tenn. Valley Authority, 518 F.Supp. 1260 (E.D. Tenn. 1981), aff'd., 705 F.2d 451 (6th Cir. 1982). Consequently, to the extent the Debtors' proposal of a "nominal" deposit fails to make certain and assure the payment of the Municipal and Cooperative Utilities' post-petition claims, approval of the proposal by this Court frustrates the intent of Congress as reflected in the TVA Act and, thus, runs afoul of otherwise applicable federal law.

OBJECTION TO ADEQUATE ASSURANCE PROCEDURES

22. The Debtors' Proposed Procedures Conflict with Section 366(c) of the Bankruptcy Code.

A. The 2005 BAPCPA amendments to the Bankruptcy Code provide that a utility "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 the utility service that is **satisfactory to the utility**." 11 U.S.C. § 366(c)(2) (emphasis added). This section requires a debtor, in the first instance, to provide the utility with assurance of payment which is satisfactory to the utility or risk termination of services after 30 days from the date of the filing of the petition. Only after the utility has received from the debtor the prescribed form of assurance of payment that is "satisfactory to the utility" may the debtor petition the Court to modify the amount of the assurance of payment pursuant to Section 366(c)(3). In re Lucre, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005) (holding that a bankruptcy court does not have discretion to continue the Section 366 injunction past the 30-day period provided in Section 366(c) unless the debtor first agrees to provide adequate assurance satisfactory to the utility).

B. Section 366(c)(3) of the Bankruptcy Code authorizes the bankruptcy court to "order modification of the amount of an assurance of payment under [Section 366(c)(2)]." Discussing the interplay between Section 366(c)(2), requiring that the utility receive assurance of payment "satisfactory to the utility", and Section 366(c)(3), the court in Lucre correctly stated that:

> [S]ubsection (c)(3) does give the trustee or debtor in possession the right to have the adequate assurance payment modified by the court. However, the right arises only after the adequate assurance payment has been agreed upon by the parties. In other words, the trustee or debtor in possession has no recourse to modify the adequate assurance payment the utility is demanding until the trustee or debtor in possession actually accepts what the utility proposes.

In re Lucre, 333 B.R. at 154.

C. The procedures proposed in the Motion and Interim Order are contrary to Section 366 of the Bankruptcy Code in at least five (5) respects.

i. The proposed procedures relieve the Debtors of the duty to furnish the Municipal and Cooperative Utilities assurance of payment "satisfactory" to the Municipal and Cooperative Utilities. Instead, under the Motion and Interim Order, the Municipal and Cooperative Utilities are enjoined from terminating service even though they have not received a deposit or other form of assurance of payment which they, in good faith and reasonably, contend is "satisfactory."

ii. The Interim Order affords the Debtors more than thirty (30) days following the Petition Date within which to supply the Municipal and Cooperative Utilities with adequate assurance of payment. The February 21, 2008 final hearing date is beyond the 30-day period prescribed by Section 366(c) of the Bankruptcy Code.

iii. The procedures reflected in the Motion and Interim Order are flawed because they place the burden upon the Municipal and Cooperative Utilities to prove that the Proposed Assurance is inadequate. Under Section 366(c) of the Bankruptcy Code it is incumbent upon the Debtors to provide adequate assurance of payment "satisfactory to the utility" during the 30-day period beginning on the Petition Date. Only after the Municipal and Cooperative Utilities receive from the Debtors satisfactory assurance of payment may the Debtors seek a modification of such assurance before this Court, 11 U.S.C. § 366(c)(3)(A). With the Motion the Debtors' are attempting to saddle the Municipal and Cooperative Utilities with the burden of proof regarding assurance of payment.

iv. Contrary to Section 366(c)(3)(A), affording parties in interest a right to seek a modification of an assurance of payment, the Interim Order provides that any utility provider that accepts the nominal security deposit proposed by the Debtor is "deemed to have waived any right to seek additional adequate assurance during the course of these Chapter 11 cases."

v. Although made irrelevant by Section 366(c)(3)(B) in any determination as to whether an assurance of payment is adequate, the procedures reflected in the Interim Order as promulgated by the Debtors require that any request for additional assurance of payment include a summary of the Debtor's payment history, including any security deposit.

D. The Municipal and Cooperative Utilities object to all of the adequate assurance procedures proposed by the Debtors. The Debtors have ignored the letter and spirit of the 2005 BAPCPA amendments to Section 366 of the Bankruptcy Code and attempt to render the Municipal and Cooperative Utilities and other utility providers involuntary, unsecured, post-petition lenders.

MEMORANDUM OF LAW

23. This Objection includes citations to statutory and judicial authorities and contains a discussion of their application to this contested matter. Consequently, the Municipal and Cooperative Utilities respectfully submit that such citations and discussion satisfy Rule 9013-1 of the Local Bankruptcy Rules for the Southern District of New York requiring the submission of a separate memorandum of law.

CONCLUSION

24. The Debtors' proposal to post a nominal deposit provides inadequate assurance of payment to the Municipal and Cooperative Utilities. The Debtors, though acknowledging the 2005 BAPCPA amendments to Section 366 of the Bankruptcy Code, nevertheless ignore such amendments and argue that a nominal deposit coupled with a questionable promise to pay provides "adequate assurance of payment" to utility providers. Through enactment of BAPCPA, Congress mandated that utility providers be afforded a deposit or other prescribed form of liquid security in an amount sufficient to make certain or guarantee payment to utility providers for post-petition service. Without timely and adequate assurance of payment, the Municipal and Cooperative Utilities should be free to terminate service rather than become an involuntary, unsecured creditor.

WHEREFORE, for the foregoing reasons, the Municipal and Cooperative Utilities respectfully requests that:

1. This Court set this matter for hearing on February 21, 2008 at 10:00 a.m.;

2. This Court deny the relief requested by the Debtors in their Motion; and

3. This Court require the Debtors to post a security deposit within thirty (30) days of the Petition Date satisfactory to the Municipal and Cooperative Utilities in an amount not

less than two-hundred-fifty percent (250%) of the highest month's usage for each of the Municipal and Cooperative Utilities during the twelve month period preceding the Petition Date, as adjusted by an additional proportionate increase associated with the anticipated increases in the cost of supplying electricity and natural gas; or, in the alternative, that

4. This Court allow the Municipal and Cooperative Utilities to discontinue utility services to the Debtors, consistent with or pursuant to Section 366(c)(2) of the Bankruptcy Code.

This 12th day of February, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2008, a copy of the foregoing **OBJECTION TO MOTION OF THE DEBTORS FOR INTERIM ORDER DETERMINING ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE UTILITIES SERVICES** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, including the Debtors' Counsel and the United States Trustee's Office. Simultaneously, a true and exact copy of the aforesaid Objection was served via Federal Express delivery on the following:

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