

HEARING DATE: FEBRUARY 21, 2008 AT 10:00 A.M.  
OBJECTION DEADLINE: FEBRUARY 13, 2008

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ATTORNEYS FOR SCANA ENERGY MARKETING, INC.

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

In re:

QUEBECOR WORLDWIDE (USA), INC., *et al.*  
  
Debtors.

Chapter 11

Case No. 08-10152 (JMP)  
Jointly Administered

Honorable James M. Peck

**OBJECTION OF SCANA ENERGY MARKETING, INC. TO  
UTILITY MOTION, INCLUDING ADEQUATE ASSURANCE PROCEDURES  
REGARDING PAYMENT FOR FUTURE UTILITY SERVICES, ETC.**

SCANA Energy Marketing, Inc. (“SEMI”), by and through its undersigned attorneys, hereby objects to the Motion of the Debtors for Interim Order Determining Adequate Assurance of Payment for Future Utility Services (the “Motion”) filed by Quebecor World (USA) Inc., et al. (“Debtors”) and to the Adequate Assurance Procedures set forth in the subsequently entered

Interim Order Under 11 U.S.C. §§ 105(a) and 366, etc. SEMI disputes that it should be included within the scope of the Motion, and it objects to the layers of procedures Debtors seek to impose upon utility providers, *e.g.*, the Adequate Assurance Procedures. These procedures contravene 11 U.S.C. §366. SEMI sets forth its position more fully below.<sup>1</sup>

### **STATEMENT OF FACTS**

1. SEMI and Quebecor World (USA) Inc. are parties to a Base Contract for Sale and Purchase of Natural Gas dated April 19, 2006 (the “Base Contract”). The Base Contract provides that SEMI will sell, and Quebecor World (USA) Inc. will buy, natural gas on a firm or interruptible basis for future delivery; it is a “forward contract” as defined under §101(25). The general terms and conditions of the Base Contract incorporate the general terms and conditions for all contracts entered into under the North American Energy Standards Boards, Inc. (“NAESB”). A copy of the Base Contract is attached as Exhibit “A” and is incorporated herein by reference.

2. Under the Base Contract, SEMI has delivered natural gas to Quebecor World (USA) Inc. through the Southern Natural Gas Company pipeline with delivery points of Atlanta, Georgia and Augusta, Georgia. The Base Contract further provides for early termination in the event of default, including the commencement of a bankruptcy proceeding. See Base Contract §10.

3. The payment terms of the Base Contract provide that Debtors shall pay SEMI for natural gas on the twentieth day of the month following the month in which delivery is made. See Base Contract §7.2. Information relative to the services provided to Debtors, as required by paragraph 13 of the Interim Order, is attached hereto as Exhibits “B” and “C”.

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<sup>1</sup> Further references to the Bankruptcy Code shall be by section number only.

4. As security of performance under the Base Contract, Debtors, prepetition, posted a letter of credit issued by Royal Bank of Canada in the amount of \$500,000.00.

5. Debtors filed their Voluntary Petitions seeking chapter 11 bankruptcy relief on January 21, 2008. As a result of such filings, and in accordance with the terms of the Base Contract, the Debtors were in default of the Base Contract. In addition, pursuant to the terms of the Base Contract and §556 of the Bankruptcy Code, SEMI was entitled to terminate the Base Contract and otherwise proceed with its default remedies.

6. As part of their first day motions, Debtors filed the Motion. Therein, they requested an order (i) prohibiting utilities from altering, refusing, or discontinuing utility services; (ii) determining that their offer of a deposit equal to two weeks of the average amount of utility service is adequate assurance of payment and that acceptance of this deposit results in a utility provider being deemed to have waived any right to seek additional adequate assurance of payment during the course of these chapter 11 cases; (iii) establishing procedures for utilities to request additional adequate assurance of payment (*i.e.*, “Adequate Assurance Procedures”); and (iv) establishing procedures for utilities to opt out of the Adequate Assurance Procedures. Debtors attached to the Motion a schedule of purported utility providers to whom the relief sought should apply. In this schedule, SEMI is listed as a utility provider.

7. On January 23, 2008, the Court entered the Interim Order Under 11 U.S.C. §§105(a) and 366 Determining Adequate Assurance of Payment for Future Utility Services (the “Interim Order”). The Interim Order provides, among other things, (a) that the Motion was preliminarily granted, (b) that utility providers are forbidden to discontinue, alter, or refuse service on account of any unpaid prepetition charges or require additional adequate assurance of payment other than the two week deposit proposed by Debtors pending entry of a final order, and

(c) that utility providers must follow certain procedures in order to request additional adequate assurance of payment or to object to the Motion.

8. Neither the Motion nor the Interim Order makes provision for energy or utility service provided pursuant to a forward contract.

### **LEGAL ARGUMENT**

9. Under the Base Contract, SEMI is not a utility provider as contemplated in §366. Instead, SEMI is a forward contract merchant as defined under §101(26), whose business consists, in part, of entering into forward contracts in natural gas that are the subject of dealing in the forward contract trade. In addition, SEMI is not a monopoly-like utility provider whom Debtors are dependent upon for utility services in order to continue operations. SEMI therefore submits that it should not be included within the ambit of the Motion or covered by the Interim Order. Accordingly, it requests that it be excluded from the adequate assurance procedures set forth in the Motion as preliminarily approved by the Interim Order.

10. It is unclear whether SEMI's Base Contract is the only forward contract pursuant to which natural gas is furnished to the Debtors. The Motion, however, ignores the special attributes of a forward contract under the Bankruptcy Code, including the statutory right of a counter-party to terminate, liquidate or accelerate a forward contract. Specifically, §556 provides that the right of a forward contract merchant to cause the "liquidation, termination, or acceleration of a ...forward contract because of a condition of the kind specified in §365(e)(1) of this title [an *ipso facto* clause] ... shall not be stayed, avoided or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title." As such, any order issued by the Court limiting SEMI's rights under the Base Contract would be in strict derogation of §556.

11. To the extent the Court finds that SEMI should be included as a utility provider within the context of the Motion and/or covered by the Interim Order, SEMI objects to same on the grounds that they are inconsistent with the clear dictates of §366(c). Under new §366(c)(2), adequate assurance is measured by what is satisfactory to the utility, not the debtor-in-possession. Once the utility receives this adequate assurance, the debtor or any interested party can seek to modify the adequate assurance by making a modification request, and, after proper notice, the court will consider the request. See §366(c)(3).

12. In contrast with, and contrary to, these parameters, Debtors (not the utilities) have proposed both a form and amount of adequate assurance of payment. The Debtors have also sought, and preliminarily obtained, the Court's involvement with respect to adequate assurance prematurely, before learning what adequate assurance is satisfactory to utilities and furnishing same to these providers. The Debtors have also restrained utilities from exercising their rights under §366(c)(2), which provides that, if a utility does not receive satisfactory adequate assurance within thirty days of the petition date, it can alter, refuse, or discontinue utility services to Debtors. Finally, the Debtors have imposed procedures on utility providers that seek to obtain additional adequate assurance or to object to the establishment of adequate assurance procedures. In short, the Debtors turn §366 upside down and ignore its new starting point: adequate assurance of payment must be satisfactory to the utilities, not to Debtors.

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## CONCLUSION

Based upon the foregoing, SEMI respectfully requests that it be excluded from the scope of the Motion and the Interim Order, as well as any subsequently entered final order with respect to the Motion, on the basis that the Base Contract is a forward contract. Alternatively, SEMI objects to the relief sought pursuant to the Motion and provided pursuant to the Interim Order on the grounds that Debtors' Motion and the Adequate Assurance Procedures provided for in the Interim Order contravene §366(c), contorting it into a series of elaborate procedures rather than abiding by the straight-forward dictates of the Bankruptcy Code.

Dated: February 13, 2008  
New York, New York

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