

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
)
The SCO GROUP, INC., et al.,¹) Case No. 07-11337 (KG)
) (Jointly Administered)
Debtors.)

**DEBTORS' MOTION FOR AN ORDER UNDER SECTION 366 OF THE
BANKRUPTCY CODE (I) PROHIBITING UTILITY PROVIDERS FROM ALTERING,
REFUSING OR DISCONTINUING SERVICE, (II) DEEMING UTILITIES
ADEQUATELY ASSURED OF FUTURE PERFORMANCE, AND (III) ESTABLISHING
PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

The SCO Group, Inc. and SCO Operations, Inc. (collectively, "SCO" or the "Debtors"), move this Court for entry of an order (i) prohibiting the Utility Providers (defined below) from altering, refusing or discontinuing service; (ii) deeming the Utility Providers adequately assured of future performance; and (iii) establishing procedures for determining additional adequate assurance of future payment. In support of this motion (the "Motion"), the Debtors respectfully state as follows:

Jurisdiction

1. This Court has jurisdiction over this case under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding. 28 U.S.C. § 157(b)(2) (A) and (M).
2. The statutory bases for the relief requested herein are sections 105(a), 345(b), 363, 364(b)(1), 1107 and 1108 of title 11 of the Bankruptcy Code, 11 U.S.C. § 101-1532.

¹ The Debtors and the last four digits of each of the Debtors' federal tax identification numbers are as follows: (a) The SCO Group, Inc., a Delaware corporation, Fed. Tax Id. #2823; and (b) SCO Operations, Inc., a Delaware corporation, Fed. Tax ID. #7393. The address for both Debtors is 355 South 520 West, Lindon, UT 84042.

Background

3. On the date hereof (the “Petition Date”), the Debtors commenced these cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

4. The Debtors are in possession of their property and continue to operate and manage their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. The Debtors are a leading provider of software technology for distributed, embedded, network-based, and mobile systems, offering SCO OpenServer for small to medium business, UnixWare, and SCO Mobile Server for enterprise applications and digital network services.

6. The SCO Group, Inc. (“SCO”) is a Delaware corporation traded on the NASDAQ stock exchange under the ticker symbol “SCOX.”

7. SCO Operations, Inc. is a Delaware corporation that is wholly owned by SCO and operates the research, development, sales and implementation of technology owned by SCO.

8. For a detailed description of the Debtors and their operations, the Debtors respectfully refer the Court and parties in interest to the *Declaration of Darl C. McBride, Chief Executive Officer, in Support of First Day Pleadings* filed contemporaneously herewith and incorporated herein by reference.

9. In the normal course of their business, the Debtors have relationships with approximately 2 utility companies and other providers (each “Utility Provider” and, collectively, the “Utility Providers”) for the provision of natural gas, electricity and sanitation services (the

“Utility Services”) with respect to its offices in Utah and New Jersey. The Utility Providers include, without limitation, the entities set forth on the list attached hereto as Exhibit A.² The Utility Providers service the Debtors’ corporate headquarters in Lindon, Utah as well as the Debtors’ operations throughout the United States. The Debtors estimate that their average monthly payments to their Utility Providers aggregate no more than \$10,000.00.

10. The Debtors anticipate that the unencumbered cash flow from their ongoing operations will be sufficient to allow it to satisfy all administrative expenses, including postpetition utility bills, on a current and ongoing basis.

Relief Requested

11. Because uninterrupted Utility Services are critical to the Debtors’ ongoing operations, the Debtors, by this Motion and pursuant to sections 105(a) and 366 of the Bankruptcy Code, seek the entry of an order: (a) prohibiting the Utility Providers from altering, refusing or discontinuing services; (b) deeming Utility Providers adequately assured of future performance; and (c) establishing procedures for determining adequate assurance of future payment.

12. In order to provide adequate assurance of payment for future services to the Utility Providers, the Debtors propose to make a deposit (a “Utility Deposit”) equal to 50% of the Debtors’ estimated cost of their monthly utility consumption to each Utility, which totals approximately \$6,000 in aggregate deposits for the Utility Providers listed on Exhibit A hereto (or such amount otherwise negotiated by the Debtors and the Utility). The Debtors propose to

² The listing of any entity on Exhibit A hereto is not an admission that any listed entity is a utility within the meaning of section 366 of the Bankruptcy Code. The Debtors reserve the right to assert at any time that any entity listed on Exhibit A is not entitled to adequate assurances pursuant to Bankruptcy Code section 366. The Debtors further reserve the right to terminate the services of any Utility Provider at any time and to seek an immediate refund of any Utility Deposit without effect to any right of setoff or claim asserted by a Utility Provider against the Debtors.

make Utility Deposits to each of the Utility Providers within 10 days after the entry of an interim order granting this Motion, pending further order of the Court, for the purpose of providing each Utility Provider with adequate assurance of payment of their postpetition date services to the Debtors.

13. In addition, the Debtors seek to establish reasonable procedures (the “Procedures”) by which a Utility Provider may request additional adequate assurance of future payment, in the event that such Utility Provider believes that its Utility Deposit does not provide it with satisfactory adequate assurances. Such Procedures, in particular, would provide that:

a. If a Utility Provider is not satisfied with the assurance of future payment provided by the Debtors, the Utility Provider must serve a written request (the “Request”) upon the Debtors setting forth the location(s) for which Utility Services are provided, the account number(s) for such location(s), the outstanding balance for each account, a summary of the Debtors’ payment history on each account, and an explanation of why the Utility Deposit is inadequate assurance of payment;

b. The Request must be actually received by Debtors’ counsel, Laura Davis Jones, Esquire, Pachulski Stang & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box 8705, Wilmington, Delaware 19899-8705 (Courier 19801) and Arthur J. Spector, Esq., Berger Singerman, P.A., 350 East Las Olas Blvd., Ste. 1000, Fort Lauderdale, FL 33301 within 45 days after the date of the order granting this Motion (the “Request Deadline”);

c. Without further order of the Court, the Debtors may enter into agreements granting additional adequate assurance to a Utility Provider serving a timely Request, if the Debtors, in their discretion, determine that the Request is reasonable;

d. If the Debtors believe that a Request is unreasonable, then they shall, within 30 days after the Request Deadline date, file a motion pursuant to section 366(c)(2) of the Bankruptcy Code (a “Determination Motion”), seeking a determination from the Court that the Utility Deposit, plus any additional consideration offered by the Debtors, constitutes adequate assurance of payment. Pending notice and a hearing on the Determination Motion, the Utility Provider that is the subject of the unresolved Request may not alter, refuse, or discontinue services to the Debtors nor recover or setoff against a pre-Petition Date deposit; and

e. Any Utility Provider that fails to make a timely Request shall be deemed to be satisfied that the Utility Deposit provided to it supplies adequate assurance of payment.

14. In addition, the proposed form of Order also allows the Debtors to supplement the list of Utility Providers. The Debtors reserve the right, without further order of the Court, to supplement the list if any Utility Provider has been inadvertently omitted. If the Debtors supplement the list subsequent to the filing of this Motion, the Debtors will serve a copy of this Motion, and the signed order granting the Motion (the “Order”), on any Utility Provider that is added to the list by such a supplement (the “Supplemental Service”). In addition, the Debtors will also provide a Utility Deposit in the amount of 50% of the estimated cost of monthly utility consumption for the added Utility Provider. Concurrently with the Supplemental Service, the Debtors will file with the Court a supplement to Exhibit A adding the name of the Utility Provider so served. The added Utility Provider shall have 30 days from the date of service of this Motion and the Order to make a Request.

15. Finally, the Debtors request that the Order provide that Utility Providers must immediately refund any Utility Deposit in the event that the Debtors terminate the services of any Utility Provider. The Debtors believe that the immediate refund of a Utility Deposit by a Utility Provider whose services are terminated is fair and appropriate under the circumstances because the Utility Provider would no longer require adequate assurances of future performance by the Debtors.

Basis For Relief

16. Section 366(c)(2) of the Bankruptcy Code protects a debtor against the immediate termination of utility services after it files for bankruptcy. Pursuant to this section, a utility may not, during the first 30 days of the case, alter, refuse, or discontinue services to a debtor in a chapter 11 case solely because of unpaid prepetition amounts. However, the utility may do so thereafter unless the debtor (as the Debtors are doing pursuant to this Motion) furnishes “adequate assurance” of payment, in the form of a deposit or otherwise, for postpetition services in a form “satisfactory” to the utility within 20 days of the Petition Date.³

³ Section 366 states in pertinent part:

(a) Except as provided in subsection (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.

(c)(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. 11 U.S.C. § 366.

17. Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, courts, commentators, and legislative history had all confirmed that section 366 does not require, in every case, that the debtor provide a deposit or other security to its utilities as adequate assurance of payment. In *Virginia Electric & Power Co. v. Caldor, Inc.*, 117 F.3d 646, 648-49 (2d Cir. 1997), the United States Court of Appeals for the Second Circuit (the “Second Circuit”) affirmed the *bankruptcy* court’s ruling that the debtor’s prepetition payment history, its postpetition liquidity, and the administrative expenses afforded postpetition invoices constituted adequate assurance of future performance. The Second Circuit rejected the argument that section 366(b) nevertheless requires a “deposit or other security.”

[A] bankruptcy court’s authority to “modify” the level of the “deposit or other security,” provided for under section 366(b), includes the power to require no “deposit or other security” where none is necessary to provide a utility with “adequate assurance of payment.”

Id. at 650. See also: *In re Pacific Gas & Elec. Co.*, 271 B.R. 626, 644-45 (N.D. Cal. 2002) (upholding the bankruptcy court’s finding that the debtor’s likelihood of performance and availability of resources provided adequate assurance); *Shirley v. Philadelphia Elec. Co. (In re Shirley)*, 25 B.R. 247, 249 (Bankr. E.D. Pa. 1982) (“section 366(b) ... does not permit a utility to request adequate assurance of payment for continued services unless there has been a default by the debtor on a prepetition debt owed for services rendered”).

18. Under the recently enacted section 366(c) of the Bankruptcy Code, however, in a chapter 11 case, a utility company may alter, refuse, or discontinue utility service if within 30 days after the commencement of the chapter 11 case the utility company does not receive adequate assurance in a form that is “satisfactory” to the utility company, subject to the Court’s ability to modify the amount of adequate assurance. Furthermore, under section 366(c),

in making a determination of whether an assurance of payment is adequate, the Court may not consider (i) the absence of security before the petition date, (ii) the debtor's history of timely payment or (iii) the availability of an administrative expense priority to the utility company.

19. While the form of adequate assurance of payment may be limited under new subsection 366(c) to the types of security enumerated in subsection 366(c)(1)(A), the amount of the deposit or other form of security, however, remains fully within the reasonable discretion of the Court. It is well established that the requirement that a utility receive adequate assurance of payment does not require a guarantee of payment. Instead, the protection granted to a utility is intended to avoid exposing the utility to an unreasonable risk of nonpayment. In *Adelphia Business Solutions, Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002), the Bankruptcy Court for the Southern District of New York stated that “[i]n determining adequate assurance, a bankruptcy court is not required to give a utility company the equivalent of a guaranty of payment, but must only determine that the utility is not subject to an unreasonable risk of nonpayment for postpetition services.” The essence of the Court’s inquiry is an examination of the totality of the circumstances in making an informed judgment as to whether utilities will be subject to an unreasonable risk of nonpayment. *Id.* at 82-83. *See also In re Magnesium Corp. of America*, 278 B.R. 698, 714 (Bankr. S.D.N.Y. 2002) (“In deciding what constitutes adequate assurance in a given case, a bankruptcy court must focus upon the need of the utility for assurance, and to require that the debtor supply no more than that, since the debtor almost perforce has a conflicting need to conserve scarce financial resources.”)

20. Here, the Debtors propose to make Utility Deposits in order to provide adequate assurance to their Utility Providers. Under the circumstances of these cases, the

Debtors believe that the proposed Utility Deposits constitute adequate assurance of payment under section 366(c) of the Bankruptcy Code. Continued and uninterrupted utility service is critical to the Debtors' reorganization.

21. Moreover, the Debtors propose to protect the Utility Providers further by establishing the Procedures provided for herein, whereby any Utility Provider can request additional adequate assurance in the event that it believes there are facts and circumstances with respect to its providing postpetition services to the Debtors that would merit greater protection.

22. As set forth above, the Debtors cannot continue to operate without continued Utility Services. If any of the Utility Providers alter, refuse or discontinue service, even for a brief period, the Debtors' business operations would be severely disrupted. Such disruption could have a devastating impact on the Debtors' business operations, revenues and ultimately affect the Debtors' ability to reorganize. In contrast, the Utility Providers will not be prejudiced by the continuation of their services and will be paid all postpetition utility charges. It is therefore critical that Utility Services continue uninterrupted.

23. This Court has the authority to grant the relief requested herein pursuant to section 105(a) of the Bankruptcy Code which provides that the Court "may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The purpose of section 105(a) is "to assure the bankruptcy courts [sic] power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction." 2 Collier on Bankruptcy ¶ 105.01, at 105-5 to 105-6 (15th rev. ed. 2001). Because the proposed Procedures protect the Debtors without materially prejudicing the Utility Providers, they carry

out section 366 in a manner fully consistent therewith and are an appropriate exercise of this Court's authority under section 105(a) of the Bankruptcy Code.

24. This Court has granted relief similar to that requested herein after the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. *See, e.g., In re Mortgage Lenders Network USA, Inc*, Case N. 07-10146 (PJW) (Bankr. Feb. 28, 2007) [Docket No. 168] (two-week deposit for utilities constituted adequate assurances of future performance under Bankruptcy Code § 366); *In re Dura Automotive Systems, Inc.*, Case No. 06-11202 (KJC) (Bankr. Nov. 21, 2006) [Docket No. 274] (same); *In re Werner Holding Co. (DE), Inc.*, Case No. 06-10578 (KJC) (Bankr. D. Del. July 14, 2006) [Docket No. 194] (same); *In re Global Home Products LLC*, Case No. 06-10340 (KG) (Bankr. D. Del. May 5, 2006) [Docket No. 203] (same). Moreover, the rights of the Utility Providers will not be prejudiced should the relief requested herein be granted, because the Utility Providers are permitted to come before this Court and seek relief according to the Procedures established herein.

Notice

25. Notice of this Motion has been given to the Office of the U.S. Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801. Following the first day hearing in this case, this Motion will be served on (a) creditors holding the 20 largest unsecured claims against the Debtors on a consolidated basis as identified in Debtors' petitions, or their legal counsel (if known); (b) those persons who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure and (c) the Utility Providers. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtors respectfully request that this Court enter an Order, substantially in the form attached hereto, granting the relief requested herein and such other and further relief as this Court deems appropriate.

Dated: September 14, 2007

PACHULSKI STANG ZIEHL & JONES LLP



Laura Davis Jones (Bar No. 2436)

James E. O'Neill (Bar No. 4042)

Rachel Lowy Werkheiser (Bar No. 3753)

919 North Market Street, 17th Floor

P.O. Box 8705

Wilmington, DE 19899-8705 (Courier No. 19801)

Telephone: (302) 652-4100

Facsimile: (302) 652-4400

Email: ljones@pszjlaw.com

joneill@pszjlaw.com

rwerkheiser@pszjlaw.com

and

BERGER SINGERMAN, P.A.

Paul Steven Singerman

Arthur J. Spector

Grace E. Robson

200 South Biscayne Blvd., Suite 1000

Miami, FL 33131

Telephone: (305) 755-9500

Facsimile: (305) 714-4340

and

350 E. Las Olas Boulevard, Suite 1000

Fort Lauderdale, FL 33301

Telephone: (954) 525-9900

Facsimile: (954) 523-2872

Email: singerman@bergersingerman.com

aspector@bergersingerman.com

grobson@bergersingerman.com

[Proposed] Co-Counsel for the Debtors and
Debtors-in-Possession