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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 11
Calpine Corporation, et al.,	)	
	)	Case No. 05-_____ (___)
Debtors.	)	Jointly Administered

MOTION OF THE DEBTORS FOR INTERIM AND FINAL ORDERS DETERMINING ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE UTILITY SERVICES

The above-captioned debtors (collectively, the "Debtors") hereby move the Court (the "Motion") for the entry of an interim order (the "Interim Order"), substantially in the form attached hereto as Exhibit A, and for entry of a final order (the "Final Order"), both under 11 U.S.C. §§ 105(a) and 366, determining adequate assurance of payment for future utility services. In support of this Motion, the Debtors respectfully state as follows:

Jurisdiction

1. The 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).

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief requested herein are sections 366 and 105(a) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Bankruptcy Code").

Background

4. On the date hereof (the "Petition Date"), the Debtors filed their voluntary petitions for relief (the "Chapter 11 Cases") under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

5. Calpine Corporation ("Calpine"), together with its direct and indirect subsidiaries (collectively, the "Company"), is involved in the development, construction, ownership and operation of power generation facilities and the sale of electricity and its by-product, thermal energy, primarily in the form of steam, predominantly in North America. It operates the largest fleet of natural gas-fired power plants in North America, and supplies approximately 3.5% of the electricity consumed in the United States, where the Company has ownership interests in, and operates, gas-fired power generation and cogeneration facilities, pipelines, geothermal steam fields and geothermal power generation facilities.

6. The Company owns, leases and operates 92 power plants in 21 states in the United States and three provinces in Canada. The Company also has interests in an additional five plants under active construction, including an interest in a natural gas-fired facility in Mexico. The Company markets electricity produced by its generating facilities to utilities and other third party purchasers while thermal energy produced by the gas-fired power cogeneration facilities is sold primarily to industrial users. The Company offers to third parties energy

procurement, liquidation and risk management services, combustion turbine component parts, engineering, and repair and maintenance services.

7. The Company is headquartered in San Jose, California, and employs approximately 3,302 people, of whom approximately 65 are represented by collective bargaining agreements.

8. The Company was founded in 1984 to manage energy projects and provide consulting services to power generators. The Company acquired its first megawatt in 1989 and completed its initial public offering in 1996. Since that time, the Company has ambitiously pursued its goal of acquiring and developing the energy industry's leading fleet of efficient, clean and reliable power generation facilities. To that end, between 2001 and 2004, the Company more than doubled the number of its power plants and can presently deliver more than 26,000 megawatts of electricity, with approximately 2,000 megawatts under active construction, or enough power altogether for approximately 28 million households.

9. The advanced technologies and cleaner fuel sources employed by the Company operate at significantly lower heat rates (a measure of efficiency), allowing for reduced fuel costs and strong competitive advantages, assuming free market-based competition. Within its major markets, the Company also seeks to locate its natural gas-fired plants in clusters, or "systems", to gain operational and supply-chain efficiencies.

10. One of the hallmarks of the Company's business model is its commitment to environmental responsibility. By focusing on the construction of modern, natural gas-fired and geothermal power plants – which emit significantly less carbon monoxide and other toxic substances than coal-fired facilities – the Company believes it currently has the largest, cleanest and most fuel-efficient fleet of power plants in the industry. The majority of the Company's

plants use “combined cycle” generation; *i.e.*, natural gas-fired combustion turbines and steam turbines that operate in tandem to generate power. This process requires up to 40% less fuel than older technologies and has a much lower environmental impact. The Company is also one of the world’s largest (if not the largest) producers of renewable and clean geothermal power, a natural energy source that burns no fossil fuels and thus has only negligible air emissions. Located in northern California at The Geysers, the Company has more than 350 active production wells providing steam that is piped into turbines to generate electricity.

11. Among the Company’s principal subsidiaries and affiliates are Calpine Energy Services, L.P., which offers to third parties energy procurement, liquidation and risk management services; Calpine Turbine Services, which sells combustion turbine component parts and repair and maintenance services;[1] Calpine Power Services, Inc., which provides engineering, procurement, construction management, commissioning and operations and management services; and Calpine Construct, which develops and builds new power facilities.

<u>The United States Electricity Market</u>

12. The energy generation industry is one of the largest segments of the United States economy. Until recently, electricity providers consisted of relatively few utility monopolies operating aged, inefficient, expensive and high-pollution facilities. But various industry trends, including deregulation, have introduced greater competition into energy markets. Most significantly, for the past decade, at the deregulated wholesale level, electric power generators have been able to sell directly to public utilities, municipalities and electric cooperatives.

13. The majority of United States power plants are coal-fired or nuclear, although most new power plants are fueled by natural gas. Future environmental protection initiatives could force many of the oldest and dirtiest coal plants to install costly emission control devices

or close. Accordingly, the industry trend is likely to continue to be construction of cleaner and more efficient natural gas-fired facilities.

14. The Company's business model seeks to capitalize on these industry movements towards greater competition and cleaner fuel sources. But although the overall consumption rate of electricity continues to grow, the recent completion of many natural gas-fired combustion turbine projects has led to a sharp increase in power supplies and excess capacity in many of the Company's markets. During 2005, the Company operated at an average baseload capacity factor of approximately 45% through November. At the same time, the presently high cost of natural gas has made the operation of natural gas-fired plants more expensive. The combination of these two factors – an oversupply of electricity and the expensive price of natural gas fuel – has caused severe liquidity challenges for many of the power providers in the United States electricity markets, including the Company.

Summary of Prepetition Indebtedness

15. As set forth in the form 10-K filed by the Company on March 31, 2005, as of December 31, 2004, the Company's total consolidated funded debt was approximately $18.0 billion, consisting of secured construction/project financing, capital lease obligations, senior notes and institutional term loans, convertible senior notes, preferred interests, trust preferred securities, secured and unsecured notes payable and borrowings under lines of credit. Moreover, as of the Petition Date, the Company had accumulated approximately $3.9 billion of net operating loss carryforwards and other tax credits.

Events Leading to the Chapter 11 Cases

16. As noted above, the Company more than doubled its installed capacity between 2001 and 2004. This rapid expansion was funded primarily by incurring additional debt.

[1] Calpine Turbine Services in turn includes Power Systems Mfg., LLC, in Jupiter, Florida, Thomassen Turbine Systems America, Inc. and

Obligations to service this debt, coupled with challenging market conditions for electricity providers generally and in certain regional markets for the Company specifically, as well as other recent setbacks faced by the Company, have precipitated these Chapter 11 Cases.

17. The cost of natural gas – needed to fuel the Company's fleet of mostly natural gas-fired combustion plants – has risen to a historically high level while the cost of coal is relatively much lower. This persisting imbalance places the Company at a severe disadvantage as compared to its competitors that operate coal-fired facilities. The effect was exacerbated when the Company sold substantially all of its remaining oil and natural gas reserves in July 2005. Prior to the sale, the Company's cost to produce natural gas was significantly lower than natural gas prices in recent years and the sale left the Company in an unhedged, short fixed-price gas position.

18. In addition, excess capacity in the energy market resulted in the Company running at an average baseload capacity factor during the past year of approximately 45%. This has resulted in lower revenues than the Company is capable of generating were it to run at optimal capacity levels. Excess capacity in the energy market (including due to the continued operation of coal-burning facilities) over the past several years has also resulted in a sustained period of low spark spreads (the difference between the cost of fuel and electricity revenues), particularly in the Southeast as well as in certain other markets in which the Company operates. Furthermore, certain contract constraints and other obligations prevent the Company from shutting down facilities that are not generating sufficient power to cover costs.

19. One reason for the presently high cost of natural gas is constrained supplies from traditional drilling programs relative to demand. Although the high prices have led to initiatives to develop alternative supply options such as liquid natural gas or coal gasification, such

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Thomassen Turbine Systems B.V., in the Netherlands.

alternative sources of fuel are not currently available to the Company. So long as the price of natural gas remains high (or increases further), and the Company does not have access to significant sources of alternative fuel supplies, the Company will be adversely affected.

20. The inconsistent transition to deregulated energy markets in North America exposes the Company to varying competitive pressures. In deregulated, highly competitive markets, the Company's natural gas-fired or geothermal merchant capacity competes directly with all other sources of electricity, such as nuclear, coal, oil or gas-fired. In highly regulated, uncompetitive markets, however, a local utility relies largely on its own supply to satisfy its own demand before buying competitively provided power. It is a sizable challenge for the Company to operate within and among these varying environments.

21. The Company relied heavily on debt financing to fund its rapid growth. Satisfying its obligations under its indebtedness, while funding anticipated capital expenditures and working capital requirements during what has been a period of low average baseload capacity factors and depressed spark spreads has left the Company with liquidity shortfalls. Accordingly, the Company launched a strategic initiative to reduce debt in May 2005 that included the possible sale or monetization of certain of the Company's assets. But covenant restrictions in the Company's debt (and certain equity) instruments preclude the Company from undertaking certain of these transactions or restrict the use of proceeds therefrom. Thus, the Company has been prevented from raising the necessary money to fund its debt service and operational needs or, even if such transactions could be completed, using the proceeds to reduce its debt.

22. A number of recent setbacks to the Company's liquidity position culminated in the filing of the Chapter 11 Cases. Most significantly, the Company's use of certain asset sale

proceeds to purchase fuel for its power plants resulted in litigation with the trustees representing the holders of the Company's First- and Second-Lien Notes, who alleged that the use of the asset sale proceeds violated the terms of the indentures governing those Notes. Within the last month, the Delaware Chancery Court ruled that the Company's fuel purchases violated those indentures and ordered the Company to repay into a collateral account $313 million plus interest by January 22, 2006. The Company appealed this decision but, on December 16, 2005, the Delaware Supreme Court affirmed the decision of the Chancery Court requiring that those funds be repaid. The prospect of having to satisfy such a sizable judgment in such a short period of time – along with the other factors described above – have made it necessary for the Company to commence reorganization cases under the Bankruptcy Code.

Relief Requested

23. Section 366(a) of the Bankruptcy Code prevents utility companies from discontinuing, altering or refusing service to a debtor during the first twenty (20) days of a bankruptcy case. However, thirty (30) days from the Petition Date, a utility company has the option of terminating its services, pursuant to section 366(c)(2) of the Bankruptcy Code if a debtor has not furnished adequate assurance of payment.

24. By this Motion the Debtors seek entry of the Interim Order (a) determining that their Utility Providers (as defined below) have been provided with adequate assurance of payment within the meaning of section 366 of the Bankruptcy Code, pending the entry of the Final Order (as defined below); (b) approving the Debtors' proposed offer of adequate assurance and procedures whereby Utility Providers may request additional or different adequate assurance; (c) prohibiting the Utility Providers from altering, refusing or discontinuing services on account of prepetition amounts outstanding or on account of any perceived inadequacy of the

Debtors' proposed adequate assurance, pending entry of the Final Order; (d) establishing procedures for the Utility Providers to seek to opt out of the Debtors' proposed adequate assurance procedures; (e) determining that the Debtors are not required to provide any additional adequate assurance, beyond what is proposed by this Motion, pending entry of the Final Order; and (f) setting a final hearing (the "Final Hearing") on the Debtors' proposed adequate assurance.

25. Uninterrupted utility services are essential to ongoing operations and, therefore, to the success of the Debtors' reorganization. Should the Utility Providers refuse or discontinue service, even for a brief period, the Debtors' business operations would be severely disrupted. The impact on the Debtors' business operations, customer relationships, revenue and profits would be extremely harmful and would jeopardize the Debtors' reorganization efforts. It is therefore critical that utility services continue uninterrupted.

The Utility Providers

26. In connection with the operation of their businesses and management of their properties, the Debtors obtain gas, water, sewer, electric, telephone and other similar utility services provided by over 350 utility companies (the "Utility Providers"). Attached hereto as Exhibit B is a list of the Utility Providers who rendered services to the Debtors as of the Petition Date (the "Utility Service List")[2]. The Debtors pay the Utility Providers, on average, approximately $34 million per month for services rendered.[3]

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[2] The Debtors reserve all rights to argue that any entity listed on the Utility Service List is not a utility company within the meaning of section 366 of the Bankruptcy Code, and to argue that any such entity is compelled by contractual obligation, state or local law, or otherwise, to continue to furnish services to the Debtors notwithstanding the filing of these Chapter 11 Cases.

[3] The Debtors believe that a substantial portion of the monthly amounts paid to the Utility Providers are for services that may not qualify as "utility" services for purposes of section 366 of the Bankruptcy Code, but that may constitute utility services under the Federal Power Act or other state or local regulations. The Debtors reserve the right to argue that some or all of the services provided by any given Utility Provider do not properly constitute "utility" services under section 366 of the Bankruptcy Code, and that, as such, section 366 of the Bankruptcy Code does not entitle such Utility Provider to adequate assurance with respect to such services.

27. The Debtors own, lease and operate integrated systems of approximately 92 power plants in 21 states in the United States and three provinces in Canada. The majority of the Debtors' Utility Providers provide what could be described as traditional utility services, related to the day-to-day operation of the Debtors' various facilities. The Debtors also rely on an extensive network comprised of pipelines, rail, and electrical transmission grid operators to obtain the gas and electricity necessary to operate their power generating facilities. The Debtors included such service providers on the Utility Service List when the Debtors determined that they could not reasonably arrange for alternative providers of such services.

28. Additionally, the Debtors utilize a number of gas suppliers (the "Major Gas Suppliers") for the fuel necessary the electricity generating assets at their natural gas power plants. While the Major Gas Suppliers may arguably be utility providers, these suppliers typically deliver fuel pursuant to "forward contracts", as defined at section 101(25) of the Bankruptcy Code, and are therefore treated in the Debtors' *Emergency Motion (A) for Interim and Final Orders Authorizing the Debtors to (I) Continue to Honor Prepetition Trading Contracts; (II) Enter into New Postpetition Trading Contracts and (III) Pledge Collateral Under Prepetition and Postpetition Trading Contracts;(B) for a Final Order Authorizing the Assumption of Prepetition Trading Contracts; and (C) for an Ex Parte Bridge Order Authorizing Interim Relief Pending the "First Day" Hearing* (the "Safe Harbor Motion")[4], filed contemporaneously herewith.

<u>The Proposed Adequate Assurance</u>

29. The Debtors fully intend to pay all postpetition obligations owed to the Utility Providers in a timely manner. The Debtors expect that unencumbered cash and borrowings

[4] The Debtors reserve the right to subsequently argue whether any given entity is properly deemed a Utility Provider for purposes of this Motion, or whether such entity is a party to a "safe harbor" contract for purposes of the Safe Harbor Motion.

under the Debtors' proposed postpetition credit facility will be more than sufficient to pay all postpetition utility obligations.

30. Additionally, given the Debtors' low credit ratings in the years preceding the filing of these Chapter 11 Cases, the Debtors have already posted significant deposits with many of the Utility Providers, thereby obviating the need for any additional adequate assurance measures for those entities.

31. The Debtors propose to provide a deposit equal to two (2) weeks of utility service, calculated as a historical average over the past twelve (12) months, to any Utility Provider who requests such a deposit in writing (the "Adequate Assurance Deposit"), provided that such requesting Utility Provider does not already hold a deposit equal to or greater than two (2) weeks of utility services, and provided further that such Utility Provider is not currently paid in advance for its services. As a condition of requesting and accepting an Adequate Assurance Deposit, the requesting Utility Provider shall be deemed to have stipulated that the Adequate Assurance Deposit constitutes adequate assurance of future payment to such Utility Provider within the meaning of section 366 of the Bankruptcy Code, and shall further be deemed to have waived any right to seek additional adequate assurance during the course of these Chapter 11 Cases.

32. The Debtors submit that the Adequate Assurance Deposit, in conjunction with the Debtors' ability to pay for future utility services in the ordinary course of business (collectively, the "Proposed Adequate Assurance"), constitutes sufficient adequate assurance to the Utility Providers. If any Utility Provider believes additional assurance is required, they may request such assurance pursuant to the following procedures.

The Proposed Adequate Assurance Procedures

33. In light of the severe consequences to the Debtors of any interuption in services by the Utility Providers, but recognizing the right of the Utility Providers to evaluate the

Proposed Adequate Assurance on a case-by-case basis, the Debtors propose that the Interim Order approve and adopt the following procedures (the "Adequate Assurance Procedures"):

a. Absent compliance with the Adequate Assurance Procedures, the 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 Proposed Adquate Assurance pending entry of the Final Order.

b. Any Utility Provider desiring additional assurances of payment in the form of deposits, prepayments or otherwise must serve a request (an "Additional Assurance Request") so that it is received by the Debtors at the following addresses: (i) Calpine, 4160 Dublin Blvd., Dublin, CA 94568-7755; Attn: Nancy L. Murray and (ii) Kirkland & Ellis LLP, Citigroup Center, 153 East 53rd Street, New York, NY 10022-4611, Attn: Robert G. Burns.

c. Any Additional Assurance Request must (i) be made in writing; (ii) set forth the location for which utility services are provided, (iii) include a summary of the Debtors' payment history relevant to the affected account(s), including any security deposits, and (iv) set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment.

d. Upon the Debtors' receipt of any Additional Assurance Request at the addresses set forth above, the Debtors shall have the greater of (i) fourteen (14) days from the receipt of such Additional Assurance Request or (ii) thirty (30) days from the Petition Date (collectively, the "Resolution Period") to negotiate with such Utility Provider to resolve such Utility Provider's request for additional assurance of payment.

e. The Debtors may, in their discretion, resolve any Additional Assurance Request by mutual agreement with the Utility Provider and without further order of the Court, and may, in connection with any such agreement, in their discretion, provide a Utility Provider with additional adequate assurance of future payment, including but not limited to cash deposits, prepayments and/or other forms of security, without further order of this Court if the Debtors believe such additional assurance is reasonable.

f. If the Debtors determine that the Additional Assurance Request is not reasonable and are not able to reach an alternative resolution with the Utility Provider during the Resolution Period, the Debtors, during or immediately after the Resolution Period, will request a hearing before this Court to determine the adequacy of assurances of payment with respect to a particular Utility Provider (the "Determination Hearing") pursuant to section 366(c)(3) of the Bankruptcy Code.

g. Pending resolution of any such Determination Hearing, such particular Utility Provider shall be restrained from discontinuing, altering, or refusing service to the

Debtors on account of unpaid charges for prepetition services or on account of any objections to the Proposed Adequate Assurance.

<u>Process for Opting Out of Adequate Assurance Procedures</u>

34. Historically, Chapter 11 debtors were able, under section 366 of the Bankruptcy Code, to put the onus on utility providers to argue that whatever form of adequate assurance proposed by the debtor was insufficient. The recent modifications to section 366 of the Bankruptcy Code arguably shift the burden onto debtors to provide adequate assurance the utility provider finds satisfactory, and to seek court review if the utility provider does not accept the proposed adequate assurance. Under this reading of revised section 366, a Utility Provider could, on the 29th day following the Petition Date, announce that the proposed adequate assurance is not acceptable, demand an extortionary deposit or prepayment from the Debtors and threaten to terminate utility service the next day unless the demand was complied with. While the Debtors do not concede that this is a correct reading of revised section 366, the Debtors nonetheless believe it is prudent to require Utility Providers to raise any objections to the Adequate Assurance Procedures so that such objections may be heard by the Court prior to the running of the thirty-day period following the Petition Date.

35. To avoid a potential hostage situation, the Debtors propose the following procedures:

a. Any Utility Provider who objects to the Adequate Assurance Procedures outlined above must file an objection to such procedures (a "Procedure Objection") so that it is actually received within twenty (20) days of entry of the Interim Order by the Debtors at the following addresses: (i) Calpine, 4160 Dublin Blvd., Dublin, CA 94568-7755; Attn: Nancy L. Murray and (ii) Kirkland & Ellis LLP, Citigroup Center, 153 East 53rd Street, New York, NY 10022-4611, Attn: Robert G. Burns.

b. Any Procedure Objection must (i) be made in writing; (ii) set forth the location for which utility services are provided, (iii) include a summary of the Debtors' payment history relevant to the affected account(s), including any security deposits, (iv) set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment and (v) set forth why the Utility Provider believes it should be exempted from the Adequate Assurance Procedures.

c. The Debtors may, in their discretion, resolve any Procedure Objection by mutual agreement with the Utility Provider and without further order of the Court, and may, in connection with any such agreement, in their discretion, provide a Utility Provider with additional adequate assurance of future payment, including but not limited to cash deposits, prepayments and/or other forms of security, without further order of this Court if the Debtors believe such additional assurance is reasonable.

d. If the Debtors determine that the Procedure Objection is not reasonable and are not able to reach a prompt alternative resolution with the Utility Provider, the Procedure Objection will be heard at the Final Hearing.

e. All Utility Providers who do not timely file a Procedure Objection are deemed to consent to the Adequate Assurance Procedures and shall be bound by the Adequate Assurance Procedures. The sole recourse of all Utility Providers who do not timely file a Procedure Objection shall be to submit an Additional Assurance Request pursuant to the Adequate Assurance Procedures, and shall be enjoined from ceasing performance pending any Determination Hearing that may be conducted pursuant to the Adequate Assurance Procedures.

Final Hearing Date

36. In order to resolve any Procedure Objections within thirty (30) days following the Petition Date, the Debtors request that the Court schedule the Final Hearing approximately twenty-five (25) days after the Petition Date.

Subsequent Modifications of Utility Service List

37. The Debtors have made an extensive and good faith effort to identify their Utility Providers and include them on the Utility Service List. Nonetheless, it is possible that certain Utility Providers have not yet been identified by the Debtors or included on the Utility Service List. To the extent that the Debtors identify additional Utility Providers, the Debtors will file amendments to the Utility Service List, and shall serve copies of the Interim Order and Final Order (when and if entered) on such newly-identified Utility Providers. The Debtors request that

the Interim Order and Final Order be binding on all Utility Providers, regardless of when such Utility Provider was added to the Utility Service List.

Applicability to Subsequent Debtors

38. The Debtors further request that, for judicial economy and administrative convenience, the relief requested hereon continue to apply to any of the Debtors' affiliates and their respective estates that subsequently commence Chapter 11 cases without the need for any further requests or motions.

Authority for the Requested Relief

39. The Debtors submit that the Court should use its powers under section 105 of the Bankruptcy Code in these Chapter 11 Cases because the issuance of the Interim Order is necessary to preserve the Debtors' orderly restructuring of their businesses.

40. In particular, this Court has the authority to grant the relief requested herein pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." The purpose of section 105(a) of the Bankruptcy Code 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).

41. Determinations of "adequate assurance" within the meaning of section 366 of the Bankruptcy Code are fully within this Court's discretion. See In re Marion Steel Co., 35 B.R. 188, 198 (Bankr. D. Ohio 1983). In this regard, bankruptcy courts are not bound by state or local regulations governing what constitutes adequate assurance of payment for postpetition utility

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services. Id. at 199; In re Begley, 41 B.R. 402, 405-06 (Bankr. E.D. Pa. 1984), aff'd, 760 F.2d 46 (3d Cir. 1987).

42. Whether utilities are subject to an unreasonable risk of nonpayment for postpetition services must be determined from the facts of each case. See In re Keydata Corp., 12 B.R. 156 (Bankr. D. Mass. 1981). "Section 366(b) requires the Bankruptcy Court to determine whether the circumstances are sufficient to provide a utility with 'adequate assurance' of payment. The statute does not require, however, an 'absolute guarantee of payment.'" In re Caldor, Inc., 199 B.R. 1, 3 (Bankr. S.D.N.Y. 1996) (citations omitted); In re Adelphia Bus. Solutions, Inc., 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002).

43. The Bankruptcy Abuse and Consumer Protection Act of 2005, effective October 17, 2005, (the "BACPA"), included several modifications to section 366 of the Bankruptcy Code. Notably, the revised section 366 defines "assurance of payment" to mean several enumerated forms of security, and specifically ecludes the availability of an administrative expense claim from the definition of assurance of payment. Furthermore, section 366(c)(3)(B) provides that a court may not consider certain facts in determining the amount of assurance that is adequate.

44. While revised section 366 does clarify what constitutes adequate assurance of payment and what factors the courts should consider when deciding whether such assurance is adequate, Congress still instructs the courts to determine what amount, if any, is necessary to provide adequate assurance of payment. Under section 366(c), there is nothing to prevent a court from deciding that, on the facts of the case before it, the amount required of the Debtors to adequately assure payment to utility providers is zero or nominal.

45. Under section 366 prior to the BACPA, courts had the discretion to determine that the amount of adequate assurance payments or collateral required in a particular case was zero. See Virginia Elec. & Power Co. v. Caldor, Inc., - N.Y., 117 F. 3d 646, 650 (2d Cir. 1997) ("Even assuming that 'other security' should be interpreted narrowly, we agree with the appellees that a bankruptcy court's authority to 'modify' the level of the 'deposit or other security,' provided for under § 366(b), includes the power to require no 'deposit or other security' where none is necessary to provide a utility supplier with 'adequate assurance of payment.'") Since the revised section 366(c)(3) still allows the courts to order the modification of the amount of an assurance of payment, the courts remain free to require no deposit or security where none is necessary to ensure adequate assurance of payment in any particular case.

46. In revising section 366 of the Bankruptcy Code, Congress had the opportunity to establish a minimum adequate assurance amount that would be required in each case. Congress did not set a minium adequate assurance amount, but rather vested discretion in the courts to determine the appropriate level of adequate assurance required in each case. Therefore, it is clear that the revised section 366 does not give utility companies a blank check or the right to extract from debtors whatever amound of adequate assurance they might desire.

47. The Debtors submit that on the facts of this case, the Proposed Adequate Assurance is sufficient. By way of comparison, the United States Bankruptcy Court for the Southern District of New York determined, in another large case filed after the BACPA became effective, that a deposit equal to 50% of the debtors' monthly utility expenses was sufficient to constitute adequate assurance. See In re Refco, Inc., et al., Case No. 05-60006 (RDD) Bankr. S.D.N.Y. December 9, 2005. A copy of the Refco interim utilities order is attached hereto as Exhibit C. In the Refco case, the two-week deposit was approved even though (a) the debtors

did not seek approval of a DIP credit facility at the outset of the case; (b) the debtors were experiencing a meltdown of their core business operations; and (c) the debtors faced a severe credibility crisis, including widespread allegations of fraud and mismanagement and the recent indictment of the company's former chief executive. The Debtors, in comparison, have stable business operations, a significant proposed postpetition financing facility, and represent a much safer credit risk than Refco. Therefore, the two-week deposit approved in Refco is more than sufficient in these Chapter 11 Cases.

48. Given the unique nature of the Debtors' businesses, which include the operation of approximately 92 power plant facilities, the Debtors' utility costs are substantial, and greatly exceed the costs of the average Chapter 11 debtor. Requiring a substantial deposit or other consideration at the outset of these Chapter 11 Cases would be unduly burdensome. Based on the foregoing facts, the Debtors submit that granting the relief requested is both necessary and appropriate. The Debtors submit that, based on the facts of this case, no deposits should be required in addition to the Proposed Adequate Assurance. Such relief will help the Debtors to successfully reorganize and thus fulfill the purposes of section 105 of the Bankruptcy Code and will not prejudice the rights of the Utility Providers under section 366 of the Bankruptcy Code.

Memorandum of Law

49. This Motion includes citations to the applicable authorities and a discussion of their application to this Motion. Accordingly, the Debtors respectfully submit that such citations and discussion satisfy the requirement that the Debtors submit a separate memorandum of law in support of this Motion pursuant to Rule 9013-1 of the Local Bankruptcy Rules for the Southern District of New York.

Notice

50. No trustee, examiner or creditors' committee has been appointed in these Chapter 11 Cases. Notice of this Motion has been provided to: (a) the United States Trustee for the Southern District of New York; (b) the Debtors' 80 largest unsecured creditors on a consolidated basis, as identified in their Chapter 11 petitions; (c) counsel to the administrative agents for the Debtors' prepetition secured lenders; (d) counsel to the Ad Hoc Committees; (e) the indenture trustees pursuant to the Debtors' secured indentures; (f) counsel to the Debtors' proposed postpetition lenders; (g) the Securities and Exchange Commission; (h) the Internal Revenue Service; and (i) the United States Department of Justice. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required. A copy of the Motion is also available on the website of the Debtors' notice and claims agent, Kurtzman Carson Consultants LLC, at http://www.kccllc.net/calpine.

No Prior Request

51. No prior motion for the relief requested herein has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter an Order, substantially in the form attached hereto, (1) determining that their Utility Providers have been provided with adequate assurance of payment within the meaning of section 366 of the Bankruptcy Code, pending the entry of the Final Order; (2) approving the Debtors' Proposed Adequate Assurance and the Adequate Assurance Procedures whereby Utility Providers may request additional or different adequate assurance; (3) prohibiting the Utility Providers from altering, refusing or discontinuing services on account of prepetition amounts outstanding, pending entry of the Final Order; (4) establishing procedures for the Utility Providers to seek to opt out of the Debtors' proposed adequate assurance procedures; (5) determining that the Debtors are not required to provide any additional adequate assurance, beyond what is proposed by this Motion, pending entry of the Final Order; and (6) providing the Utility Providers with notice of the hearing on the Proposed Adequate Assurance before entering the Final Order.

Dated: December 20, 2005
New York, New York

Respectfully submitted,

/s/ Richard M. Cieri

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