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Memorandum

TO: NREA Managers

FROM: Dave Jarecke, Interim General Manager/General Counsel

DATE: June 17, 2020

RE: Bankruptcy Law

I. Introduction

As a result of the current COVID-19 crisis, some customers may be forced into bankruptcy. The purpose of this memorandum is to identify the issues related to bankruptcy law.

II. Issues.

(A) Background on bankruptcy.

(B) Whether PPDs can use their clients' deposits to pay their utility bills if there is an outstanding balance or for costs incurred while the bankruptcy is pending.

(C) If and when PPDs can disconnect a customer who has filed for bankruptcy.

(D) Whether PPDs can require additional deposits after bankruptcy has been declared.

III. Short Answers.

(A) Background on bankruptcy – including eligibility for each type of bankruptcy and definitions associated with bankruptcy law.

(B) Under a recoupment or setoff theory, PPDs can likely use their clients' deposits to pay their utility bills if there is an outstanding balance or for costs incurred while the bankruptcy is pending.

(C) Pursuant to 11 U.S.C. § 366(b), PPDs can discontinue service to a customer if adequate assurances of payment are not furnished within 20 days of the bankruptcy petition is filed.

(D) PPDs can require additional deposits after bankruptcy has been declared in the form of adequate assurances and for the post-petition continuation of services that is not subject to the automatic stay.

IV. Discussion.

A. Background on Bankruptcy

I. Types of Bankruptcy and Eligibility Criteria for Each Type

a. Chapter 7

The purpose of Chapter 7 bankruptcy is to liquidate the debtor's assets in order to satisfy the debtor's creditors. Kevin M. Lewis, U.S. Cong. Research Serv., R45137, *Bankruptcy Basics: A Primer* (2018). Individuals are eligible to file Chapter 7 bankruptcy and must complete a means test in order to determine whether an individual's Chapter 7 filing is presumed to be an abuse of the Bankruptcy Code (the "Code") requiring dismissal or conversion of the case to a different chapter. *See* 11 U.S.C. § 707(b)(2). Individuals may receive a discharge of outstanding debts with exceptions. *See* § 523(a). Non-individuals including corporations, limited liability companies, and other business entities are also eligible to file Chapter 7 bankruptcy. *See* §§ 101(41), 109(b). Non-individuals do not receive a discharge of outstanding debts and are usually expected to dissolve their business entity after the proceeding is complete. Lewis, *supra* at 10-11. In Chapter 7 cases, a case trustee is typically appointed to liquidate the debtor's nonexempt assets in the estate by selling all property that is free and clear of liens. § 704.

b. Chapter 11

The purpose of Chapter 11 bankruptcy is to reorganize the debtor's structure, so the debtor may continue to operate after the proceeding is complete. Lewis, *supra* at 12. Debtors who wish to avoid liquidation under Chapter 7 should consider filing under Chapter 11. *Id*. at 12. Corporations, limited liability companies, partnerships, and individuals who are ineligible to file under Chapter 13 are typically eligible to file Chapter 11 bankruptcy. *Id*. at 12-13. Chapter 11 bankruptcy involves a debtor-in-possession, unless a case trustee is appointed only in some rare cases. *Id*. at 13.

Chapter 11 bankruptcy involves formulating a comprehensive reorganization plan ("plan") that adjusts the rights and obligations among the debtor and its debt- and equity-holders, so as to render the reorganized debtor a viable economic entity in the end. *Id*. at 14. The plan is a product of negotiation between the debtor and its key stakeholders. The debtor may file a plan, and the creditor may do so after the initial exclusivity period ends. *See* § 1121(b)-(e) . The plan must divide similarly situated creditors into "classes" and must treat every member of a given class the same unless otherwise agreed upon. § 1123(a)(1). Creditors will vote in favor or against the plan and hold a hearing. § 1126(a). The plan must also provide an adequate means for implementation. § 1123(a)(5). A confirmed plan binds the debtor, creditors, and other relevant parties. § 1141(a). Further, confirmation of the plan discharges the debtor from its pre-petition debt. Lewis, *supra* at 18.

c. Chapter 12

Family farmers or fishermen with regular income are eligible to file Chapter 12 bankruptcy. § 109(f). Two categories of eligible individuals include (1) individuals or individual and spouse, and (2) corporation or partnership. Further, the two categories must meet separate criteria in order to be eligible. *See* §§ 101(18)-(19B).

The purpose of Chapter 12 bankruptcy is to give family farmers or fishermen a chance to reorganize their debts and keep their family farms, while preserving the fair treatment of creditors. Lewis, *supra* at 23. The benefit of Chapter 12 is that the farmer has the right to continue operation of the farm during pendency of the case. *Id*. Additionally, Chapter 12 bankruptcy is more streamlined, less complicated, and less expensive. *Id.* The end goal is the readjustment of the debtor's debts. *Id*. Chapter 12 bankruptcy includes a plan and is similarly structured Chapter 13 bankruptcy. *Id*. It also involves a case trustee who distributes funds to creditors according to the plan, but the debtor remains in control of its assets and operations during the case. *Id* at 29.

d. Chapter 13

Individuals with regular income who owe a total debt that does not exceed a maximum threshold established by statute are eligible for Chapter 13 bankruptcy. The dollar amount for eligibility adjusts automatically every three years. *See* § 109(e). The end goal of Chapter 13 bankruptcy is the adjustment of the debtor's debts. Lewis, *supra* at 19. Chapter 13 bankruptcy includes a plan and a case trustee. *Id*. at 20. Benefits of Chapter 13 bankruptcy include saving homes from foreclosure, the protection of co-signers, and that petitioners have no direct contract with creditors. *Id*. at 19. Chapter 13 debtors are discharged from nonexempt debts and the automatic stay stops future collection actions against the debtor. *Id*. at 21.

e. Chapter 9

Chapter 9 bankruptcy is only available for certain municipalities. *Id*. at 23. Pursuant to § 101(40), this includes cities, counties, townships, school districts, public improvement districts, and revenue-producing bodies that provide general services which are paid for by users rather than by general taxes. § 101(40). The end goal of Chapter 9 bankruptcy is to adjust the debtor's debts. Further, Chapter 9 bankruptcy includes a plan, but a case trustee is almost never appointed. Lewis, *supra* at 23-24.

f. Chapter 15

Chapter 15 bankruptcy is used for ancillary and other cross-border cases. *Id*. at 25. The purpose is to provide an effective mechanism for dealing with insolvency cases involving debtors, assets, claimants, and other parties in interest involving more than one country. *Id*.

II. Common Bankruptcy Terms and Definitions

a. The Automatic Stay

Pursuant to § 362, the automatic stay is an injunction that automatically stops lawsuits, foreclosures, garnishments, and all collection activity against the debtor the moment the

bankruptcy petition is filed. § 362. *See infra* Section B for the automatic stay in relation to setoff and recoupment in the bankruptcy context. *See infra* Section C for the automatic stay and § 366. *See infra* Section D for the automatic stay in relation to payment of post-petition service. *See* § 362(b) for exceptions to the automatic stay.

b. The "Estate" and Why it Matters

The estate consists of all legal or equitable interests of the debtor in the property as of the commencement of the case, including property owned or held by another person if the debtor has an interest in the property. § 541. Section 541 defines what property is included in the estate, with exceptions. § 541(b).

In a bankruptcy case, creditors are paid from the nonexempt property of the estate. Lewis, *supra* at 5. This process is usually facilitated by the case trustee. *Id*. The Code establishes a hierarchy of expenses and claims are entitled to payment before others, the result being that lower priority creditors cannot receive anything until higher priority creditors are paid in full. *See* § 726. Additionally, only those assets include in the estate are subject to the automatic stay. Lewis, *supra* at 7.

c. Exemptions

Exemptions allow debtors to remove certain categories of assets from the property of the estate and thereby insulating those assets from the claims of creditors. *Id*. at 28. The availability and amount of property the debtor may exempt depends on the state the debtor lives in. *See* § 522. Non-individual debtor's, such as corporation or other business entity, may not declare property as exempt. § 522(b)(1).

Relevant bankruptcy exemptions in Nebraska include: Neb. Rev. Stat. § § 23-2322 (county pension); 24-710.02 (legislators retirement benefits); 25-1553 (income tax credit); -1556(1)(b) (clothing); -1556(1)(c) (household goods, electronics, books, etc.); -1556(1)(d) (tools of trade); -1556(1)(e) (motor vehicles); -1556(1)(f) (health aids); -1556(1)(a) (personal possessions); -1558 (unpaid wages); -1559 (military disability); -1563.01 (IRAs); -1563.02 (personal injury); 40-101 (homestead); 44-1089 (fraternal benefits); -371 (life insurance); 48-1401 (deferred compensation of public employees); -149 (workers compensation); -647 (unemployment compensation); 68-1013 (disabled, blind, aged; public assistance); -148 (general assistance to poor persons); 79-948 (school pension); 81-2032 (state institutions retirement benefits); 84-1324 (state employees); 25-1552 (wildcard).

Nebraska has opted out of the federal exemptions provided in 11 U.S.C. § 522(d). Neb. Rev. Stat. § 25-15,105.

d. Administrative Expense Claim

The administrative expense claim is usually related to costs that are "necessary costs and expenses of preserving the estate…" § 503(b)(1)(A). The District of Nebraska noted § 366 of the code did not bar a utility creditor from an administrative expense claim. *In re Statmore*, 177 B.R. 312, 315 (Bankr. D. Neb. 1995). Utility providers that supply services to the debtor "within 20

days before the date of commencement of a case" may benefit from the administrative expense priority during the bankruptcy proceeding if a court holds that the utility is a "good" for purposes of §503(b)(9). Courts are split on the question of whether utilities, like electricity, are considered goods. *See e.g., GFI Wisconsin, Inc. v. Reedsburg Utility Com'n*, 440 B.R. 791, 802 (Bankr. W.D. Wis. 2010) (holding electricity debtor received from utilities within 20 days prior to petition date qualified as "good," for which utilities were entitled to assert administrative expense claim); *In re Pilgrim's Pride Corp.*, 421 B.R. 231, 239 (Bankr. N.D. Tex. 2009) (holding electricity is not a "good" under § 503(b)(9)).

e. Pre-Petition & Post-Petition Debt

Pre-petition debt is all debt incurred prior to a bankruptcy case being filed and is expected to be discharged as part of the bankruptcy case. Lewis, *supra* at 26. Post-petition debt is all debt incurred after a bankruptcy case is filed. Post-petition debt is not part of the bankruptcy case and cannot be discharged, therefore debtor is still liable for this debt and must pay for it. Post-petition debt is not subject to the automatic stay. *See* § 362; *infra* Section D.II.

f. Adequate Assurances

Pursuant to § 366(b), a debtor must furnish adequate assurances of payment in the form of a deposit or other security within 20 days after the date of the petition, in order for post-petition utility services to continue. §366(b). *See infra* Sections C and D below for information on adequate assurances in the utility bankruptcy context.

B. PPDs can use their clients' deposits to pay outstanding utility bills while bankruptcy is pending

The District of Nebraska recognizes the right of recoupment by creditors, therefore PPDs can likely use their clients' pre-petition deposits to pay outstanding pre-petition utility bills while bankruptcy is pending based on a recoupment theory. Alternatively, utilities may seek court approval to use clients' deposits to pay outstanding utility bills under the "setoff" view.

There are two theories regarding the issue of using pre-petition deposits to pay outstanding utility bills after bankruptcy is filed: "setoff" and "recoupment." If a debtor successfully argues that the application of a pre-petition utility deposit is construed as a "setoff" under § 553, utilities must seek court approval before offsetting the prepetition debt against the amount it is owed in order to avoid violation of the automatic stay. Gary E. Sullivan, *In Defense of Recoupment: Why "Setoff" of Prepetition Utility Deposits Against Prepetition Debt is not Subject to the Automatic Stay*, 15 Bankr. Dev. J. 63, 64. (1998). Conversely, in jurisdictions that subscribe to the "recoupment" view, utilities are allowed to apply the pre-petition deposit to pre-petition debt not subject to the automatic stay and without approval from the bankruptcy court. *Id*. Therefore, PPDs can likely use their clients' pre-petition deposits to pay outstanding utility bills while bankruptcy is pending under a theory of recoupment. Alternatively, PPDs may be able to use the pre-petition deposits to pay off debts under a setoff theory, subject to court approval. The Code explicitly recognizes setoff in § 553, and does not mention recoupment, therefore it is necessary to analyze both theories.

I. Parameters of "Setoff"

In jurisdictions that characterize the act of applying the deposit on file as a "setoff," the utility must seek approval by the bankruptcy court or may have to refund the deposit to the debtor. *Id*. at 65. The applicable Code provision provides:

> (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to *offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case* under this title against a claim of such creditor against the debtor that arose before the commencement of the case.

§ 553(a) (emphasis added). While the Code preserves the creditor's right to setoff a mutual pre-petition debt, the Code also includes a potential hurdle in § 362(a)(7), which subjects creditor's setoff rights within the realm of the automatic stay. Sullivan, *supra* at 68. Pursuant to § 362(a)(7), creditors are required to seek approval from the bankruptcy court for relief from the automatic stay prior to exercising their setoff rights. *Id*. at 69. Failure to do so can result in the debtor's recovery of actual damages. *See* § 362(h).

The leading case supporting the setoff view and rejecting the "recoupment" view is *In re Village Craftsman, Inc*., 160 B.R. 740 (Bankr. D. N.J. 1997), where the court held the utility's application of debtor's pre-petition security deposit to outstanding utility bills was considered setoff, not recoupment under New Jersey law, and therefore was subject to the automatic stay. *Id*. at 746; *see also In re Cole*, 104 B.R. 736, 740 (Bankr. D. Md. 1989) (holding the application of the pre-petition utility deposit should be treated as a setoff rather than recoupment).

II. The "Recoupment" View

In jurisdictions where courts view the application of the pre-petition deposit to pre-petition debt as "recoupment," the utility may apply the deposit to the outstanding bill without approval by the bankruptcy court. Sullivan, *supra* at 65. Congress's use of the term "setoff" (and failure to mention recoupment) in § 362(a)(7), is consistent with the use in bankruptcy courts holding that the rights of recoupment are not subject to the automatic stay. *Id.* at 68.

The doctrine of recoupment, in general, requires that it arise out of the "same transaction or matter upon which the plaintiff bases his claim." *Id*. at 70. Similarly in the context of bankruptcy, the creditor must possess a right against the debtor that arose out of the "same transaction." *Id*. at 71. Successful recoupment by a creditor results in preferential treatment over other creditors without involving the bankruptcy court. *Id*. Recoupment is a defensive doctrine, however, a creditor may assert this right without waiting for the debtor to bring a suit. *Id*.

The leading case in support of the "recoupment" view is *In re McMahon*, 129 F.3d 93 (2nd Cir. 1997), where the court held the utility's post-petition application of pre-petition utility deposit to debtor's pre-petition utility obligation was recoupment and not subject to the automatic stay. *Id*. at 99; *see also Brooks Shoe Mfg. Co. v. United Tel. Co.*, 39 B.R. 980, 982-84 (Bankr. E.D. Pa. 1984) (holding the offset of a pre-petition utility deposit against pre-petition debt as recoupment)*;*

In re Norsal Indus., Inc., 147 B.R. 85, 88-89 (Bankr. E.D. N.Y. 1992) (holding utility company did not violate the automatic stay when it recouped debtor's pre-petition deposits).

III. Nebraska's Application of Setoff and Recoupment

The Eighth Circuit recognizes setoff "with approval of the court." *In re Houdashell*, 7 B.R. 901, 902 (Bankr. W.D. Mo. 1981). Consistent with the mutuality requirement of § 553, the Eighth Circuit noted in order to establish a right of setoff, the creditor must establish three elements:

> (1) A debt exists from the creditor to the debtor and that debt arose prior to the commencement of the bankruptcy case. (2) The creditor has a claim against the debtor which arose prior to the commencement of the bankruptcy case. (3) The debt and the claim are mutual obligations.

In re Sauer, 223 B.R. 715, 724 (Bankr. D. N.D. 1998). Additionally, the court in *In re Shields*, 586 B.R. 315 (Bankr. W.D. Mo. 2018) noted that the Code does not create a right of setoff, and the right must stem from some non-bankruptcy source. *Id*. at 324-25. Most directly, in *Houdashell*, the Eighth Circuit decided the question of whether post-petition setoff against unpaid utility bills was allowed or prohibited under the Code. *Houdashell*, 7 B.R. at 903. Plaintiffs contended the use of pre-petition deposit against outstanding utility bills was barred by the automatic stay of § 362(a)(7). *Id*. However, the court approved of the post-petition setoff against unpaid utility balance where creditors debtors neither stated nor showed any prejudice, harm, or injury. *Id*. at 904.

The District of Nebraska has also narrowly recognized the theory of recoupment in *Lecuona v. McClinton*, 2007 WL 2932898, at *2 (Bankr. D. Neb. 2007), and noted that despite not appearing in the Code, recoupment "comes into bankruptcy law through the common law, rather than by statute, and is not subject to the limitations of § 553 or the automatic stay." *In re O'Neil*, 408 B.R. 823, 830 (Bankr. D. Neb. 2008) (quoting *In re Malinowski*, 156 F.3d 131, 133 (2nd Cir. 1998)). Additionally, the creditors' right to recoupment must arise under the same "same transaction" rule as stated above. *See e.g., McClinton*, 2007 WL 2932898, at *4 (noting recoupment in bankruptcy is only justified when "both debts…arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations"); *United States v. Dewey Freight Sys. Inc.*, 31 F.3d 620, 623 (8th Cir. 1994). ("The Eighth Circuit Court of Appeals recognizes recoupment in the bankruptcy setting as an equitable principle…because of matters arising out of the transaction sued on."); *In re NWFX, Inc.*, 864 F.2d 593, 597 (8th Cir. 1989) (noting that in order for recoupment to apply, the creditor must have a claim against the debtor arising out of the same transaction as the debtor's claim against the creditor). However, the courts have not precisely defined "same transaction" standard, instead focusing on the facts and equities of each case. *Id.*

Because the Eighth Circuit recognizes the setoff and recoupment rights of creditors and considering decisions in other circuits that are more directly on point in the context of utilities, the PPDs likely can use their clients' deposits to pay outstanding utility bills while bankruptcy is pending through either setoff with court approval or a recoupment theory.

C. PPDs can disconnect a customer if adequate assurances are not furnished with 20 days after the bankruptcy petition is filed

Pursuant to § 366(b), utilities can discontinue service to a customer if adequate assurances of payment are not furnished within 20 days after the bankruptcy petition is filed. § 366. In bankruptcy cases, courts attempt to strike a balance between the interests of the debtor and the utility service provider. Bertrand Pan & Jennifer Taylor, *Sustaining Power: Applying 11 U.S.C. § 366 in Chapter 11 Post-BAPCPA*, 22 Emory Bankr. Dev. J. 371, 372 (2006). On one hand, utility services are essential to the continued operation of bankruptcy debtors and courts have come to view utility services as a "necessary minimum for rehabilitation" during the bankruptcy proceeding. *Id*. at 373. Conversely, the "utility has a legitimate business concern if forced to provide service to the debtor while prevented from obtaining overdue payments or future security from the debtor." *Id*.

Section 366 was enacted by Congress to address the particular issues arising out of the unique debtor-utility relationship in bankruptcy cases. *Id*. at 374. Section 366(a) provides:

> (a) Except as provided in subsections (b) and (c), 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 the case under this title or that a debt owed by a debtor to such utility for service rendered before the order for relief was not paid when due.

§ 366(a). However, section (b) requires a debtor to furnish adequate assurance of payment to the utility within 20 days after the filing of the petition in order for post-petition service to continue. Section (b) provides in relevant part:

> (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 assurances of payment, in the form of a deposit or other security, for service after such date.

§ 366(b). The definition of "adequate assurances" has been heavily debated. Pan, *supra* at 376. Generally, courts have discretion and "what constitutes adequate assurance of payment in one case, for example, may be insufficient or more than adequate in another case." *Id*. at 377 (listing several factual considerations informing the adequate assurance of payment). Most courts look at the totality of the facts and circumstances of each case. *See generally* John F. Wagner, *Debtor's Protection Under 11 U.S.C.A. § 366 Against Utility Service Cutoff,* 83 A.L.R. Fed. 207 Art. 2 (1987); *see e.g., Houdashell*, 7 B.R. at 902 ("…the court can consider the past payment record in determining what amount of security deposit constitutes adequate assurance of payment.").

In 2005, subsection (c) was added to § 366, which provides "…the term 'assurance of payment' means – a cash deposit, a letter of credit, a certificate of deposit, a surety bond, a prepayment of utility consumption, or another form of security that is mutually agreed upon by the utility and the debtor or the trustee." § 366(c). Additionally, for cases filed under Chapter 11, subsection (c)(2), requires that the debtor "must produce assurance of payment '*satisfactory to the*

utility.'" § 366(c)(2) (emphasis added). Subsection (c) appears to weigh in favor of utilities and with the addition, "Congress removed the typical arguments that debtors used in asserting that the utility provider did not need a cash deposit or its equivalent." Pan, *supra* at 380.

The Eighth Circuit recognizes the ability of utility providers to discontinue services if adequate assurances are not furnished within 20 days post-petition, pursuant to § 366. For example, in *In re Spence*, 545 B.R. 280 (Bankr. W.D. Mo. 2016), a Chapter 7 debtor brought adversary proceeding against a condominium homeowner's association (acting as a utility) asserting that the association violated the automatic stay by refusing to restore water to debtor's condominium unit. *Id*. at 293. The court held the association did not violate the automatic stay by refusing to restore water, given that the debtor did not make adequate assurance of payment within 20 days post-petition or furnish such adequate assurance within 30 days post-petition. *Id*. The court in *In re Abraham*, No. BK01-41713, 2002 Bankr. LEXIS 1788, at *9 (Bankr. D. Neb. 2002), similarly noted a utility is only required to provide service for the 20 days after the order for relief in order to allow the debtor to make arrangements for future utility service and if after that period the debtor has not provided adequate assurance of payment, the utility is not obligated to provide service for which it is not receiving payment. *Id*.; s*ee also In re Lanford*, 10 B.R. 129, 131 (Bankr. D. Minn. 1981); *Houdashell*, 7 B.R. at 904. Other jurisdictions also recognize the utilities' right to disconnect users after failing to provide adequate assurances. *See e.g., In re Cole*, 104 B.R. 736, 737 (Bankr. D. Md. 1989); *In re Deiter*, 33 B.R. 547, 548-59 (Bankr. W.D. Wis. 1983); *In re Astle*, 338 B.R. 855, 857-58 (Bankr. D. Idaho 2006); *In re Woodland Corp*., 48 B.R. 623, 624 (Bankr. D. N.M. 1985).

Therefore, the PPDs can discontinue service to a customer if adequate assurances of payment are not furnished within 20 days after the bankruptcy petition is filed, pursuant to § 366.

D. PPDs can require additional deposits after bankruptcy has been declared

PPDs can require additional deposits from customers after bankruptcy has been declared in the form of adequate assurances and also for the post-petition debt incurred for utility services.

I. PPDs can require additional deposits in the form of adequate assurances of payment post-bankruptcy petition

As discussed in Section C above, utilities may demand adequate assurances of payment, "*in the form of a deposit* or other security, for service after such date" so long as the deposit is not for the purpose of attempting to force the payment of pre-petition debt. § 366(b) (emphasis added). Collecting deposits pursuant to § 366(b) after bankruptcy has is not subject to the automatic stay in § 362. Wagner, *supra* at 31.

Typically, utility companies have in-house policies governing the amount of adequate assurances, which is usually twice the dollar amount of the highest service period, and the bond will generally have to be in cash. 2 *Bankruptcy Practice Handbook* § 8:57 (2d ed.) (2019). Further, the court in *In re Countryside Inv. Co.*, 1988 WL 1571631 (Bankr. S.D. Iowa 1988) noted, "The amount of security deposit should bear a reasonable relationship to expected or anticipated utility consumption by a debtor." *Id*. at *1 (quoting *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D. N.Y. 1986).

The Eight Circuit has regularly recognized utilities' right to collect additional deposits in the form of adequate assurances after bankruptcy has been filed, pursuant to § 366. *See e.g.*, *Houdashell*, 7 B.R. at 902-03 (requiring debtor to pay security deposit in the amount of two times debtor's highest bill as adequate assurance of payment after bankruptcy had been filed); *Spence*, 545 B.R. at 294 (noting the utility was entitled to adequate assurances in the amount representing the utility usage, pursuant to § 366); *Countryside*, 1988 WL 1571631, at *1 (holding the debtor shall provide adequate assurance in the form of a monthly installment security deposit).

II. PPDs can require additional deposits for post-petition utility services

Second, utilities are entitled to payment for any post-petition debt incurred for services and are not required to provide unrecompensed service to debtors for the duration of the bankruptcy proceeding. *Abraham*, 2002 Bankr. LEXIS 1788, at *10-11; *See also Spence*, 545 B.R. at 293 ("…although a creditor cannot take any action to collect a pre-petition claim…most creditors do not have an affirmative obligation to continue providing post-petition services to a debtor, either."). Like the adequate assurances deposit, the payment for post-petition service is also not subject to the automatic stay. § 362. The court in *Abraham* noted, "The automatic stay that goes into effect upon a bankruptcy filing will protect a debtor from *pre-petition* creditors, but it does not allow that debtor to remain immune while he continues to incur debt for services such as those provided under the debtor's contract with [utility]." *Abraham*, 2002 Bankr. LEXIS 1788, at *11 (emphasis added). The court went on to hold that utility did not violate the automatic stay by terminating post-petition services after the debtor failed to pay the post-petition debt. *Id.; see also* Wagner, *supra* at 10 ("…the Bankruptcy Code's 'automatic stay' provision in no way affects a utility's right to security for the provision of post-petition service.").

As another example, after filing for bankruptcy a utility company closed the debtor's pre-petition account and opened a new post-petition account with a balance of zero. *In re Weisel*, 428 B.R. 185, 186 (Bankr. W.D. Pa. 2010). The utility requested adequate assurance of payment pursuant to § 366(b) in the form of a deposit, which the customer paid. *Id*. Then, after subsequently failing to pay their post-petition bill the utility terminated service to the debtor. *Id*. The court held the utility was permitted to terminate service to debtors based on unpaid post-petition utility bills, which is not subject to relief from the automatic stay. *Id*.

V. Conclusion.

NREA Members have several options when navigating a bankruptcy resulting from the current COVID-19 crisis, or otherwise. Under the theory of recoupment, electric utilities can likely utilize the customers' pre-petition deposits to offset the account balance. Electric utilities also have the right to discontinue service to a customer if adequate assurances of payment are not furnished within 20 days after the bankruptcy petition is filed. Finally, electric utilities can also require additional deposits after bankruptcy has been declared in the form of adequate assurances and for post-petition utility services – neither of which are subject to the automatic stay.