

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

IN RE: *
*
*
PROPEX, INC., et al., * CASE NO. 08-10249, et al
* Chapter 11
*
Debtors. * Jointly Administered
*

MARCH 12, 2008

BEFORE: THE HONORABLE JOHN C. COOK
UNITED STATES BANKRUPTCY JUDGE

BE IT REMEMBERED, that the above-styled
cause came on to be heard on the 12th day of March, 2008,
before the Honorable John C. Cook, Judge of said Court, when
all parties announced ready to proceed, and the following
proceedings were had, to wit:)

* * * * *

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(Note: Unless provided by counsel to the court reporter, some names may be rendered as the best phonetic approximation.)

1 THE COURT: Be seated please.

2 Clerk, call the case.

3 THE COURTROOM DEPUTY: The chapter 11 case
4 of Propex Inc., and jointly administered other cases. We
5 have a debtor's motion for determination of adequate
6 assurance as to the Electric Power Board of Chattanooga, and
7 response by the power board; debtors' motion for entry of
8 agreed order modifying the automatic stay; debtors' motion
9 for order deeming pre-petition payments to certain vendors
10 as authorized under order; application for order under
11 sections 328(A) and 1103(A) in the Bankruptcy Code
12 authorizing employment and retention of FTI Consulting, Inc.
13 as financial advisors to the official committee of unsecured
14 creditors.

15 THE COURT: All right. Let us get an
16 announcement of appearances first.

17 MR. WEGE: Your Honor, Mark Wege here on
18 behalf of the debtors, Propex.

19 THE COURT: All right.

20 MS. RUCKER: Ms. Shelley Rucker, local
21 counsel for the debtors.

22 THE COURT: All right.

23 MR. BAILEY: Your Honor, Bruce Bailey for
24 the Electric Power Board.

25 THE COURT: All right.

1 MR. HAYNES: Your Honor, Michael Haynes,
2 Gardere, Wynne, Sewell in Dallas for Gundle/SLT Environment.

3 THE COURT: All right.

4 MR. SAVIN: Good morning, Your Honor.
5 James Savin with Akin, Gump, Strauss, Hauer & Feld on behalf
6 of the official committee of unsecured creditors.

7 THE COURT: All right.

8 MS. SWAFFORD: Kim Swafford from the
9 U.S. Trustee's office.

10 THE COURT: All right.

11 MR. HUMPHREYS: Your Honor, Gene Humphreys
12 on behalf of BNP Paribas, agent for the post-petition
13 lenders.

14 THE COURT: All right.

15 MR. WEGE: Mr. Wege, Your Honor. This
16 morning we have four matters before the Court. Three of
17 them are uncontested. I thought what we may do is just
18 proceed with the uncontested matters then save the power
19 board matter.

20 THE COURT: Very well.

21 MR. WEGE: Your Honor, two of the matters
22 that are uncontested are the debtors' motions. The first
23 one up is the motion for entry of agreed order modifying the
24 automatic stay. This is just an agreement between one of
25 the debtors' creditors of an agreed set off. There are

1 mutual obligations. This is a relationship between the
2 debtor and one of its customers and vendors, and we've
3 agreed to the numbers. The committee's had the opportunity
4 to review it. There are no objections.

5 THE COURT: The committee has no objection?

6 MR. SAVIN: No objection, Your Honor.

7 THE COURT: All right. That motion will be
8 granted.

9 MR. WEGE: Thank you, Your Honor.

10 The second matter of the debtors is a
11 motion that deem certain pre-petition payments that the
12 debtor wishes to make to seven vendors as authorized under
13 the order providing for the payment of pre-petition of
14 critical vendors. It's a little bit complicated but let me
15 explain what we're doing.

16 We have seven vendors in the amount or
17 payments which will be in the amount of approximately
18 \$125,000 to the vendors that are more or less in progress of
19 particular reports that are being produced for the debtors'
20 business. There were certain pre-petition payments that
21 weren't made, the seven we identified in the motion. We
22 want to go ahead and make the payments. In fact, we would
23 assume these contracts because they are reports that the
24 debtor needs.

25 We've talk to the committee about a motion

1 to assume these contracts in consultation with the
2 committee. They suggested it would be better at this point
3 not to assume contracts, instead we treat them under the
4 critical vendor order. The one distinction there, of
5 course, is that these are vendors that already have
6 contracts, so they won't be asking these vendors to sign a
7 critical vendor agreement. We will simply ask them to
8 perform under the contract under its term.

9 So that's the distinction. It's a little
10 bit of a complicated title in procedure but that's the
11 approach that we've taken, and the committee has no
12 objection.

13 THE COURT: That motion will be granted.

14 MR. WEGE: Your Honor, the final
15 uncontested matter, I'll leave to the committee. We have
16 reached, the debtor has reached, an agreement with the
17 committee on this one. This is FTI's employment
18 application. The biggest change, and obviously the
19 committee will address it, is a reduction from a million
20 dollars to \$500,000 of their --

21 THE COURT: Yes, I saw that.

22 MR. WEGE: We had requested that.

23 THE COURT: All right.

24 MR. SAVIN: Good morning, Your Honor.

25 Again, James Savin of Akin, Gump, Strauss, Hauer and Feld on

1 behalf of the committee of unsecured creditors. The
2 committee sought to retain FTI Consulting as its financial
3 advisor nunc pro tunc to when they would start working per
4 selected by the committee. We had filed the application.

5 Two parties have raised informal objections
6 to that. We had discussions with both parties, that is, the
7 debtors' pre-petition secured lenders, as well as the
8 debtor. And as a result of those conversations all parties
9 are now in agreement. We've also advised the U.S. Trustee
10 and I believe she has no objection to revise the
11 arrangement. The revised arrangement is set forth in the
12 revised one we filed with the Court last night.

13 Basically, there's two changes on them.
14 The first is that there was a back end or completion fee
15 that was subject to the committee's discretion. That would
16 be due upon consummation of the chapter 11 plan in the
17 amount of a million dollars. After discussion with the
18 parties, that has now been reduced to \$500,000. But it is
19 no longer subject to the committee's consent. It's just an
20 improved back-end fee, the completion fee amount due upon
21 consummation of the chapter 11 plan.

22 The second part is the debtors agree to the
23 issue of potential legal fees FTI may have in connection
24 with this applications that are in connection with this
25 case. We've agreed that those legal fees would be limited

1 to no more than \$20,000.

2 Those are the two changes from the
3 application that we filed, and we ask this Court to approve
4 the arrangement as revised.

5 THE COURT: All right.

6 MR. SAVIN: And someone from FTI is here in
7 case Your Honor has any questions.

8 THE COURT: All right. I have reviewed the
9 motion. And with those changes that you have just
10 mentioned, that application will be granted.

11 MR. SAVIN: Thank you very much,
12 Your Honor.

13 THE COURT: All right.

14 MR. WEGE: Your Honor, the last matter,
15 which is the contested matter, is the debtors' motion for
16 determination of adequate assurance as to the
17 Electric Power Board of Chattanooga. Your Honor, I can go
18 ahead and proceed on that. I would like to proceed and make
19 a proffer of Mr. McCarter's testimony. He is here in the
20 courtroom today, and it may simply save time to go through a
21 very short proffer what he would say.

22 THE COURT: All right. Go ahead.

23 MR. WEGE: All right. Your Honor,
24 Lee McCarter, Chief Financial Officer of Propex, would make
25 the following testimony, and it proffers his testimony

1 today.

2 Mr. McCarter would state that the Court has
3 approved a \$60 million DIP loan. He would also state that
4 the DIP loan provides for adequate funding for this case,
5 including the certain payments that are being made to
6 pre-petition lenders which are over and above the cost in
7 the budget that would pay operating costs of the company.

8 Mr. McCarter would also state that the
9 budget incorporates all operating costs expected by the
10 company and that the debtors, in fact, intend to pay on a
11 current basis all operating costs of the debtors, including
12 utility costs.

13 Mr. McCarter would state that the debtor is
14 current on all post-petition obligations to EPB.

15 Mr. McCarter would also state that the debtors deal with
16 over 25 utilities and none of those utilities have objected
17 to the original proposed adequate assurance of one-half
18 month's deposit.

19 Mr. McCarter would also testify that the
20 proposed one month's deposit, which is approximately
21 \$79,000, is offered by the debtors, would equal in the
22 average of the last three months usage of power by the
23 debtors with respect to EPB.

24 Finally, Mr. McCarter would state that EPB
25 in their costs associated with their service as a utility

1 company comprises only 4 percent of the overall utility
2 charges of the debtors that are expected to be incurred in
3 this case. So it's a small percentage of the total power of
4 usage, the total power cost for the debtors.

5 Your Honor that is our post-testimony with
6 respect to Lee McCarter and his proffer.

7 THE COURT: All right.

8 MR. WEGE: And he is available for
9 cross-examination.

10 The only other evidence that we would offer
11 at this time is on file with the Court, the monthly
12 operating report which indicates a first month of 2008 EBDA
13 of \$7.3 million of earnings before income taxes. And then
14 it also indicates in the monthly operating report a total of
15 \$22.2 million of cash as of February 3. And that's
16 available on the monthly operating reports. I have copies
17 if the Court desires.

18 THE COURT: All right.

19 MR. WEGE: That is the evidence that the
20 debtor wishes to propose proffer for in support of the
21 motion. The debtor, of course, has an argument and we can
22 present that right now or save that.

23 THE COURT: All right. Mr. Bailey, do you
24 want to cross-examine this witness?

25 MR. BAILEY: Not at the this time,

1 Your Honor.

2 THE COURT: All right. Do you accept this
3 proffer then? I mean, this is just a way of quickly getting
4 in direct testimony.

5 MR. BAILEY: I don't have any objection
6 with this proffer.

7 THE COURT: All right. All right. Well,
8 do you want to go ahead then? Do you want to offer any
9 evidence?

10 MR. BAILEY: Yes, Your Honor. I would like
11 to offer a witness.

12 THE COURT: All right. What I will do, let
13 us have your opening statement so I can understand exactly
14 what the issue is. I will tell you, typically, in the past,
15 two month's deposit has been the amount that I have approved
16 in cases. Of course, you have to look at cases on a
17 case-by-case basis.

18 But the way, I understand the utilities
19 billing procedure, you use power a month, then you get
20 billed for it. And then there is a certain period of time
21 that goes by before utility cuts off power. And utilities
22 providing additional power, the argument is up to a month of
23 additional power. And then if there is no money at the end
24 of the day, they need that two month deposit to pay for the
25 power utilized. I mean we all know what the argument is.

1 How is this any different from any other case --

2 MR. WEGE: Well, Your Honor --

3 THE COURT: -- where that scenario would
4 take place?

5 MR. WEGE: Well, Your Honor, I would like
6 to address that. Your Honor, we have offered a couple of
7 sample orders in significant cases where a half-month
8 deposit has been approved by different courts, obviously,
9 not binding on this Court. But I believe the Court is
10 correct in saying it's a case-by-case analysis. You have to
11 exam each case and the merits of each case.

12 In this case, this is a case that is not
13 about whether the company can pay its power bill. This is a
14 case about financial restructuring of the company, you know,
15 and Mr. McCarter's proffer is quite clear about that, as
16 well as the evidence before the Court.

17 What I think Your Honor is seiging on is
18 the fact you have to look at each case, and you have to
19 determine what is really necessary for adequate assurance.
20 And that's the key word in the statute. It's not a
21 guarantee of payment. In the case we cited, which is the
22 FLYi, it states pretty clearly that in determining adequate
23 assurance, a bankruptcy court is not required to give a
24 utility company the equivalent of a guarantee of payment but
25 must only determine that the utility is not subject to an

1 unreasonable risk of nonpayment for post-petition services.
2 Your Honor, we believe that's the law. And the case goes on
3 to say that adequate assurance is not an absolute guarantee
4 of payment.

5 We believe that what the EPB is asking for
6 is a guarantee of payment. And I can assure you that there
7 is no possibility of loss. And that goes beyond really what
8 the statute is all about, which is to provide adequate
9 assurance of payment.

10 In this case, given the liquidity of the
11 debtor, given the credit worthiness of the debtor with
12 respect to his DIP loan, this case is different. This case,
13 there's no need to hamstring the debtor with a series of
14 deposits or an excessive amount of deposits when there isn't
15 an unreasonable risk of nonpayment in the utilities in this
16 case. And the facts are quite clear before the Court, given
17 the DIP loan, given the EBDA of the debtor, and the expected
18 EBDA of the debtor, there's simply no unreasonable risk of
19 loss.

20 Your Honor, the cases that have been cited
21 by the utility in their brief are quite distinguishable in
22 that they involve, in most cases, cases that deal with
23 individual chapter 7 debtors, small debtors or debtors that
24 on a post-petition basis they defaulted and then there was a
25 question of what adequate assurance was.

1 In this case the evidence is clear that the
2 debtor is making its payments, that it intends to make its
3 payments. It's made its post-petition payments to the EPB.
4 So there's really no question that it intends to make these
5 payments and has the ability to do it. In fact, we would
6 suggest that one month is more than adequate security under
7 those circumstances. And the cases that the utility board
8 cites refer to the fact that if somehow circumstances
9 change, the board's got the ability to come back and
10 petition this Court to change the amount of adequate
11 assurance.

12 So we believe that under the circumstances
13 of this case, there is no need to hamstring the debtor with
14 an additional month's security deposit and take liquidity
15 out of the debtor for really no real risk to the utility of
16 their ability to get paid in this case. And we think that's
17 why these cases are distinguishable in the cases they cite.
18 And we believe that the cases we have cited, the FLYi case,
19 as well as orders, they're in many, many cases across the
20 country supporting a half-month's deposit or, in fact, put
21 out to control in this circumstance in this case.

22 THE COURT: All right. Mr. Bailey, what
23 about that? I have approved a \$60 million loan in this
24 case. This is a huge case. Why is this not adequate
25 assurance? Why is this not different from the typical

1 chapter 11 case where a debtor is just struggling by and has
2 not paid the utility before filing? And now the debtor has
3 got \$60 million in cash?

4 MR. BAILEY: Your Honor, Mr. Wege put his
5 hands on it when he said the case is about a financial
6 restructuring. Yes, they have \$60 million. What chapter 11
7 is not about a financial restructuring with a post-petition
8 financing availability? The question in this case
9 ultimately is, is there going to be some kind of a deal
10 worked out and arranged with these bond holders? That's
11 what Ms. Rucker yesterday in the 341 was asked about, the
12 debtors' intentions about filing a plan, is it going to be
13 filed quickly or not? Well, we've got nine months to work
14 out a deal with the bond holders. If no deal is feasible,
15 no deal is worked out, they may need an extension of time to
16 file a plan.

17 That's no different than any other case.
18 If you can't work something out with your secured creditor,
19 what's the likelihood of this case succeeding going forward?
20 The risk is that Your Honor described and our witness,
21 Jan Lowrey, credit manager for the power board, would
22 explain, is the risk to the power board is just what
23 Your Honor described, that is, they bill in arrears.

24 So they read the meter and they're already
25 thirty days -- they read the meter monthly and they're

1 already thirty days past due at that point. And then there
2 is, and she would testify to this, Your Honor, there's a
3 time to get a bill out. That's typically three days. After
4 the three days, they have fifteen days to make a payment as
5 an industrial customer. This is the standard operating
6 procedure, fifteen days after the three days additional for
7 billing. After that, they get a notice that you haven't
8 paid the bill and it's a disconnect notice. That typically
9 take three to five days after that fifteen days. That
10 notice says you've got seven days to pay or they'll be a
11 disconnect. So you're possibly out already to sixty days.
12 And that notice says -- I'm sorry. The notice does not say
13 but the proof would be that on the sixth of those seven days
14 on the disconnect, there's a phone call placed. Either in
15 response to the disconnect notice or the phone call, if they
16 call and say anything, check's in the mail, we would like to
17 talk about, we would like to work something out, they have a
18 right, a due process right, to come in and be heard. So
19 you're actually, potentially, out past sixty days at that
20 point. And if it is, at that point, the debtor fails, then
21 the power board is out sixty days or more than sixty days of
22 payment they've been providing the services and not being
23 paid. The risk is that, and that's what we're asking
24 adequate assurance for.

25 Two other points I think I would like to

1 make here in this regard. First, before the bankruptcy
2 filing, actually back in the fall, at that time Propex
3 qualified for -- TVA is the power board supplier. And under
4 the TVA arrangements, Propex, as a sufficiently large
5 industrial customer, qualified for an assurance program with
6 TVA where no deposit was required because TVA would ensure
7 up to a certain amount that the power board was paid by that
8 customer. And the proof will show that amount was basically
9 two months, the highest two consecutive months. It was
10 \$170,000.

11 The power board got notice in, I think it
12 was October or it may have been November, Ms. Lowrey could
13 testify to that, that TVA was cutting Propex off of that
14 program. They would no longer be eligible. And, so, at
15 that point there was no deposit. The power board went to
16 Propex and was in the process of negotiating for a deposit
17 when, in fact, this bankruptcy was filed. So at that point
18 and currently, the power board is at risk for at least the
19 sixty days that I've just described to Your Honor.

20 The other point I think is the risk is
21 genuine and real. And what the debtor is asking is that
22 that risk be shifted from Propex to the rate payers of
23 Hamilton County and surrounding environments that the power
24 board serves. Because as a nonprofit utility, the only way
25 that the power board has of making up a loss, should they

1 incur this loss, is raise rates. And so they're asking to
2 shift the risk from the debtor to the rate payers. And
3 that's not what 366(c) or 366(b) is about. It does afford
4 the Court the opportunity to review a utilities request for
5 a deposit. Your Honor understands 366 compels utility to
6 provide the utility service to the debtor. The trade off
7 for that is the utility is entitled adequate assurance.
8 And, in this instance, the adequate assurance would be at
9 least two months. And, Your Honor, that two months could be
10 in the form of a letter of credit. It could be a cash
11 deposit. It could be a bond letter of credit or a bond
12 acceptable to the power board, of course.

13 The one other thing I guess I should say
14 here, Your Honor, is that Mr. McCrory, of course, filed a
15 brief and wanted to be here today. He could not be here
16 because he is in Nashville in front of a legislature over
17 there about other rate related matters and called the
18 debtors' counsel last night and said he had been asked to
19 reappear today for a hearing there. So he couldn't be here
20 and asked that this hearing be continued to the next two
21 week regularly scheduled hearing date, and that request was
22 refused so he called us and asked me to appear today for
23 him.

24 One other thing I guess that I should say,
25 in the 366(c) determination, in addition to considering

1 adequate assurance and what is the risk that is being
2 adequately assured, again, the Court is supposed to consider
3 a reasonable request, the reasonableness of that request. I
4 thought it was interesting -- and I got the briefs last
5 night and I read them -- that the debtors' counsel is at
6 pains to try to distinguish the Spencer case that was cited
7 in the brief. So both parties have cited that and I'm sure
8 the Court has read them. The New York legislature
9 determined, by and after a study and legislative degree in
10 that case, had set two months as a reasonable period of
11 time.

12 The TVA requires that the power board treat
13 all of its industrial customers equally. That point was
14 made by Mr. McCrory in his brief. That is not binding as
15 the debtors pointed out and the Court, the Bankruptcy Code,
16 would trump that, but it certainly is indicative of what is
17 reasonable as adequate assurance. That is exactly what the
18 power board requires of all of its other customers in the
19 same classification, two months security deposit. That's an
20 indication, I think, the power board is doing what TVA
21 requires, treating everybody equally. They're all in that
22 same class. And everybody in that class is required to post
23 a two month's security deposit. That's all --

24 THE COURT: When could you cut off power if
25 they failed to pay their utility bill? When could you cut

1 off the power? You said you gave them three days? Well,
2 you send the bill out?

3 MR. BAILEY: Right.

4 THE COURT: That takes three days.

5 MR. BAILEY: That takes three days.

6 THE COURT: And then there is another --

7 MR. BAILEY: They have fifteen days to pay
8 that bill from --

9 THE COURT: Then you can cut the power off?

10 MR. BAILEY: Well, then the established
11 procedure is to send a disconnect notice. And that is sent
12 within five days of -- after the fifteenth day, there is
13 three-to-five-day period when a disconnect notice goes out.
14 But the disconnect notice says we'll disconnect seven days
15 from this notice. So they have an additional seven days
16 then. And on the sixth of those seven days, the power board
17 actually makes a phone call to the customer, residential or
18 industrial, to say tomorrow is D-Day and we're going to cut
19 the power off before they do it.

20 They are -- again, it's quasi governmental
21 in the way that TVA is their primary power supplier.
22 They're required to give due process rights to their
23 customers, and that's what they're trying to do. And on
24 that disconnect period, if there is a protest, a checks in
25 the mail, an excuse, a we want to come in and be heard

1 about, you know, we're not able to make the payment, they
2 actually are entitled to allow another seven days to come in
3 and have a hearing and get it resolved. So that gets us
4 past the sixty days total before they would disconnect
5 service.

6 THE COURT: If Propex failed to make a
7 payment, could you not come into bankruptcy court on very
8 short notice and demand an increase in the deposit or,
9 alternatively, you're going to cut their service off
10 immediately? I mean, we are having hearings in this case
11 every two weeks. This is not like the typical case where
12 you have to get a hearing date that may be a month off.

13 MR. BAILEY: Well, yes, Your Honor. If, if
14 then, and I suppose, assuming the worst case that the
15 thirtieth day when the meter is read and the bill is sent,
16 was two weeks before the two-weeks-later hearing, it would
17 be thirty days in arrears from the time they read the bill
18 and three days to send the bill. If they're not paid in the
19 next few days, the next fifteen days, they could come to
20 court and say we have not been paid, can we now cut it off?

21 THE COURT: Right. Yes. Okay.

22 MR. BAILEY: So we would be at the
23 forty-five days.

24 THE COURT: All right. All right. Do you
25 wish to offer testimony?

1 MR. BAILEY: I would like to offer
2 Ms. Lowrey to put into the record what I've testified to
3 myself, but, you know, suit the Court's pleasure on that.

4 THE COURT: You can make a proffer as well.
5 I think what you have said during your argument,
6 essentially, is what she would testify to as far as the
7 billing procedures are concerned.

8 MR. BAILEY: That billing procedure.
9 Your Honor, if I could, let me offer the
10 Propex contract and explain again what I'm talking about and
11 the calculation of how the board arrived at the dollar
12 figure that we've asked for.

13 THE COURT: All right.

14 (Whereupon, a brief pause was held.)

15 THE COURT: All right. Exhibit 1.

16 MR. BAILEY: Your Honor, what I have
17 premarked as Exhibit 2 --

18 THE COURT: Oh, Exhibit 2?

19 MR. BAILEY: -- is the contract for
20 electrical service under the general power rate schedule for
21 Propex. And if you will look about five or six lines down,
22 the amount of deposit \$170,000, and to the right of that the
23 type deposit, enhanced security deposit?

24 THE COURT: Yes.

25 MR. BAILEY: If Ms. Lowrey testified she

1 would advise the Court that \$170,000 is the figure agreed
2 with TVA as a two-month's deposit. The enhanced security
3 deposit means that TVA basically ensures that amount to the
4 power board from Propex and no money is actually required
5 from Propex. That is the deposit that I mentioned was
6 canceled. Ms. Lowrey and the proof would show that was
7 canceled in the fall before the bankruptcy filing. And they
8 were in the process of negotiating a deposit to replace that
9 when, in fact, the bankruptcy was filed.

10 The second document I've handed Your Honor,
11 which we premarked as Exhibit 6, is the calculations. The
12 proof would show, Your Honor, that Propex actually has one
13 large and eighteen small accounts, a total of nineteen
14 accounts. So the calculation involved is the 12 months
15 prior, the two highest consecutive months of usage, which is
16 the standard operating procedure, the proof would show, in
17 calculating the deposit to look at 12 months, the two
18 highest consecutive months, because that's the risk that the
19 power board has. And that's what was done in each of these
20 nineteen separate accounts. It's all totalled on the first
21 page. And the actual amount requested as a deposit, it's
22 the \$176,450 that's shown there on that page.

23 I think, Your Honor, with that, I would be
24 glad defer the Court to not put Ms. Lowrey on the stand.
25 But she is here and available for cross-examination.

1 THE COURT: All right. Well, you heard the
2 proffer, do you want to cross-examine Ms. Lowrey?

3 MR. WEGE: Your Honor, of course, I have
4 not seen this before. But I don't think we have any
5 objection to the figures or the procedure. I think that's
6 the procedure.

7 THE COURT: The exhibits are admitted then.
8 (Whereupon, Exhibit Nos. 1 and 2 were
9 received into evidence.)

10 THE COURT: And you say you do not want to
11 cross-examine Ms. Lowrey?

12 MR. BAILEY: No, Your Honor.

13 THE COURT: All right. Anything further as
14 far as your argument is concerned?

15 MR. WEGE: Your Honor, just, if I may
16 briefly reply. Again, we note that the Court has wide
17 latitude, obviously, with respect to this determination. We
18 note a couple of things. One, the fact that even in the
19 cases cited by the utility board, for example, the
20 Stagecoach case, the court there says that the court gives
21 little weight to the utilities tariff or its rules. As
22 well, the case cited by the utility board, in re
23 Coastal Dry Dock, was actually a case where one month
24 utility deposit was found to be adequate assurance of
25 performance in that case.

1 Again, we believe that the facts are very
2 clear that the company is currently make its payments, has
3 made its post-petition payments. We believe that in this
4 case one month is adequate assurance. The argument of EPB
5 essentially says that in every case there must be a
6 guarantee of payment for the utility board. We think that
7 that's not what Congress intended as the rule. We believe
8 that the rule was intended to be adequate assurance. And
9 under the circumstances of this case, given the fact that
10 Propex is making its payments, intends to make its payments,
11 has got the ability to do so under its DIP loan, that it's
12 not appropriate to set as a deposit two months.

13 We can revisit that issue if there's a
14 problem. But we simply think that this whole discussion of
15 when they might cut off service is very hypothetical, and,
16 frankly, it's not realistic. This is power to the debtors'
17 facilities as well as their headquarters and they're simply
18 not going to let this bill go unpaid. None of the lenders
19 in this case are going to let that bill go unpaid. It would
20 be highly disruptive in the operations of the company. The
21 company is simply going to make the payments.

22 And so we believe at this time it's
23 appropriate to set a one month deposit. If there are any
24 problems with that, the Court can revisit it at a subsequent
25 time and consider it later.

1 THE COURT: All right.

2 MR. BAILEY: Your Honor, I won't repeat
3 everything I've said to you. I think I've already said all
4 the important things. But one point that I did think of
5 that I wanted to say in response to what Mr. Wege just said
6 about the adequate assurance against the risk of not being a
7 guarantee. Economically, the determination of the amount
8 for the twelve months prior to the two highest consecutive
9 months in order to determine what is an appropriate deposit,
10 already puts the power board or any utility making that same
11 position at risk because, the proof would show, the rates
12 increase year over year. They don't go down, unfortunately.
13 They increase over year over year. And the cost actually
14 goes up year over year, whether its inflation or your
15 suppliers cost or whatever, every year the dollar needed to
16 pay that year's utility usage is actually higher than the
17 prior year. So using the prior twelve months to determine
18 the two months already creates an additional risk to the
19 power board.

20 Thank you.

21 MR. WEGE: Your Honor, may I make just a
22 brief reply because that's --

23 THE COURT: Yes. Yes.

24 MR. WEGE: Okay. Your Honor, if called to
25 testify, Mr. McCarter would state that he expects the power

1 to actually drop over the coming twelve months from the
2 prior twelve months. So he anticipates that the cost of
3 power from EPB will actually be lower during the next twelve
4 months. And he would proffer that testimony today.

5 THE COURT: Do you wish to cross-examine
6 him on that?

7 MR. BAILEY: No. Thank you.

8 THE COURT: All right. What I am going to
9 do in this case based upon the proffer of testimony and the
10 argument is order one and a half months based on the last
11 twelve months, the average of the last twelve months rather
12 than the two highest months. If the EPB needs a quick
13 hearing, due to a change of circumstances, of course we are
14 having hearings in this case every other week. I think one
15 and a half months deposit would certainly be adequate to
16 assure that the utility payments will be made, especially
17 considering the \$60 million loan that has been approved in
18 this case.

19 So just figure out what that amount is and
20 you can submit an order providing one and a half month's
21 deposit based on the last twelve month's average.

22 MR. WEGE: We'll do so.

23 THE COURT: Anything further?

24 If nothing further, court is adjourned.

25 (Proceedings adjourned.)

