**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF NEW YORK**
**(SYRACUSE DIVISION)**

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| In re: | : | |
| | : | |
| THE NEW YORK CHOCOLATE | : | Case No. 10-_____ - (___) |
| & CONFECTIONS COMPANY | : | Chapter 11 Case |
| | : | |
| Debtor. | : | |

**DEBTOR'S MOTION PURSUANT TO SECTIONS 105(a) AND 366 OF THE BANKRUPTCY CODE FOR ENTRY OF AN INTERIM AND FINAL ORDER (I) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING, OR DISCONTINUING SERVICE; (II) DEEMING UTILITY PROVIDERS ADEQUATELY ASSURED OF FUTURE PAYMENT; AND (III) ESTABLISHING PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

The above-captioned debtor and debtor in possession (the "Debtor") hereby moves this Court, pursuant to sections 105(a) and 366 of title 11 of the United States Code (the "Bankruptcy Code"), for entry of an interim and final order (i) prohibiting the Utility Providers (as defined below) from altering, refusing or discontinuing service; (ii) deeming the Utility Providers adequately assured of future payment; and (iii) establishing procedures for determining adequate assurance of payment (the "Motion"). In support of the Motion, the Debtor respectfully represents as follows:

## JURISDICTION

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a) and 366 of the Bankruptcy Code.

## BACKGROUND

3. On the date hereof (the "Petition Date"), the Debtor commenced this case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code. No trustee, examiner or creditors' committee has been appointed in this case.

4. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. The factual background relating to the Debtor's commencement of this chapter 11 case and the facts and circumstances supporting the relief requested herein are set forth in greater detail in the Declaration of Richard F. McCormick, the Debtor's Chief Restructuring Officer, in Support of First Day Motions (the "McCormick Declaration") filed contemporaneously with this Motion and incorporated herein by reference.

## GENERAL BACKGROUND

### A. Formation of New York Chocolate

6. The Debtor, The New York Chocolate & Confections Company ("New York Chocolate"), is a Delaware corporation with its principal place of business in Fulton, New York. New York Chocolate's primary asset is its 39 acre chocolate production facility located at 555 South Fourth Street in Fulton (the "Chocolate Plant"). The Comité de Gestion de la Filière Café-Cacao (the "Comité"), a quasi governmental agency, is the 100% shareholder of the Debtor. The Comité was formed by the President of the Republic of Côte d'Ivoire in September 2008 to, among other things, succeed to the shareholder interests of the then sole shareholder of New York Chocolate – Fonds de Régulation et de Controle Café-Cacao (the "FRC") – after certain of the FRC's members were accused of mismanagement, among other allegations.

7. Côte d'Ivoire is a West African nation that is the world's leading producer and exporter of the cocoa beans used in the manufacture of chocolate. In general, West Africa collectively supplies nearly 70% of the world's cocoa crop, with Côte d'Ivoire leading production at 1.3 million tons. Historically, large chocolate producers such as Cadbury, Hershey's and Nestlé buy Ivorian cocoa futures and options through Euronext where world prices for cocoa beans are set.

8. The description of New York Chocolate's corporate history and the ownership of the Chocolate Plant reflects the difficulties encountered by the Debtor since its creation, but is integral to understanding the Debtor's decision to enter Chapter 11. The Chocolate Plant was initially owned and operated by Nestlé USA, Inc. ("Nestlé"); it was Nestlé's first United States chocolate production facility and was built in the late 1800's. In March 2003, Nestlé made the decision to close the Chocolate Plant. Jean Claude Amon ("Amon"), a special advisor to the President of the Republic of the Côte d'Ivoire, learned of the planned closing and commissioned Lion Capital Management, LLC ("LCM"), with the aid of its President and Chief Executive Officer, Hausmann-Alain Banet ("Banet"), to conduct an economic analysis on the feasibility of acquiring the Chocolate Plant. Amon and other representatives of the Côte d'Ivoire toured the Chocolate Plant and later met with LCM, through Banet, to discuss the economic study and the possible acquisition of the Chocolate Plant.

9. Despite at least one offer to purchase the Chocolate Plant, Nestlé ultimately decided against selling the Chocolate Plant, but rather, decided to auction the equipment located at the Chocolate Plant (the "Equipment") and donated the factory and land to the County of Oswego Industrial Development Agency (the "IDA"). In September and October 2003, LCM purchased substantially all of the Equipment at the auction or, subsequently, from

other successful bidders after the auction. To purchase the Equipment, LCM used funds provided by the FRC and some of its own funds, which were later reimbursed by the FRC. In December, 2003, New York Chocolate acquired the factory and land from the IDA.

10. LCM incorporated New York Chocolate on October 30, 2003, and thereafter transferred the Equipment to it. LCM was the initial sole shareholder until November 17, 2003, when it transferred 80% of the shares in New York Chocolate to the FRC. The FRC was a quasi governmental agency formed under the laws of the Côte d'Ivoire and represented the interests of a collection of farmers' cooperatives in the Côte d'Ivoire that grew cacao. The goal of the FRC was to operate the Chocolate Plant so as to provide the farmers' cooperatives with an outlet for their cacao production. An initial board of directors was selected, which included Banet.

**B. The County Loan**

11. On April 21, 2005, New York Chocolate and Operation Oswego County, Inc., as subrecipient of Oswego County (the "County"), entered into a loan agreement (the "County Loan"). The County Loan was in the principal amount of $850,000 and was to be used to purchase certain equipment for the Chocolate Plant. Pursuant to the County Loan, New York Chocolate granted the County a security interest in certain of its equipment. The Debtor is obligated to make payments on the County Loan on a monthly basis of $8,207.66 through April 1, 2015.[1]

[1] In connection with the County Loan, New York Chocolate and the County also entered into a Loan Servicing Agreement dated April 21, 2005, pursuant to which New York Chocolate agreed to pay servicing fees to Operation Oswego County, Inc. in the amount of one-half of one percent of the outstanding principal balance due under the County Loan in two semi-annual installments.

12. On or about February 9, 2006, the County loaned the Debtor an additional $40,000, which was secured by certain items of office equipment. On or about March 2006, the County loaned the Debtor an additional $35,000. On or about March 27, 2006, the County was granted a lien on certain equipment and a blanket lien on all the Debtor's personal property. As of the Petition Date, only the County Loan remains outstanding.

**C. Litigation Involving New York Chocolate**

(i). The FCA Action

13. Fulton Cogeneration Associates, LP ("FCA"), which is owned and operated indirectly by Banet since September 2004, provided steam to New York Chocolate through June 2005. New York Chocolate fell behind in making its payments to FCA and, in July 2005, FCA sued New York Chocolate in New York state court for payments and other obligations owed. FCA won partial summary judgment against New York Chocolate in the amount of $1,332,874.40 plus interest (the "FCA Judgment"). The remainder of the claims asserted by FCA were dismissed with prejudice. In April 2009, the FCA Judgment was satisfied by New York Chocolate making a payment to the IDA, which had attached the FCA Judgment. The United States District Court for the Northern District of New York approved the settlement with the IDA and entered an order extinguishing the FCA Judgment.

(ii). The FRC Action

14. In 2005, a dispute arose between the FRC and LMC over the ownership of New York Chocolate. In July 2005, the FRC filed an action in the Court of Chancery of the State of Delaware (the "Court of Chancery") seeking a declaration as to the respective equity ownership interests of the FRC and LCM (the "FRC Action"). On January 22, 2007, the Court

of Chancery issued an opinion in which it found that the FRC owned 800 of the 1,000 issued then-outstanding shares of New York Chocolate, and LCM owned the remaining 200 shares.

(iii). The California Superior Court Action

15. In 2006, New York Chocolate filed an action in the Superior Court of California for the County of San Francisco (the "California Superior Court") against Banet and LCM, alleging that Banet and LCM had converted a tax refund check belonging to New York Chocolate. On September 17, 2007, judgment was entered in the California Superior Court in favor of New York Chocolate and against both LCM and Banet in the amount of $606,299.00 (the "Tax Judgment"). After domesticating the Tax Judgment in Delaware, on May 23, 2008, the 200 shares of New York Chocolate stock owned by LCM were sold to New York Chocolate at a sheriff's sale in partial satisfaction of the Tax Judgment against LCM. As a result, the FRC became the 100% shareholder of New York Chocolate.

(iv). The Banet Action

16. On May 6, 2008, Banet filed a lawsuit in the Court of Chancery (the "Banet Action") in his capacity as an alleged stockholder and an alleged director of New York Chocolate against the FRC, the current and former directors and officers of New York Chocolate, and against New York Chocolate (collectively, the "Defendants"). New York Chocolate was named only as a nominal defendant. On October 19, 2008, Banet filed an amended complaint that added FCA and LCM as plaintiffs (collectively, the "Plaintiffs"), asserting claims in their capacity as creditors and LCM as an alleged former shareholder. The Banet Action alleged seven counts, including the following: a request for appointment of a receiver or custodian for New York Chocolate; breach of fiduciary duties, both derivative and direct; a demand for inspection of books and records; and requests to compel the holding of an

annual meeting of stockholders and a meeting of the board of directors on New York Chocolate. On November 26, 2008, Plaintiffs filed a motion for judgment on the pleadings, or, in the alternative, for summary judgment on their request for a receiver, which was denied. New York Chocolate subsequently filed a counterclaim seeking declarations that neither FCA nor LCM were creditors of New York Chocolate (Banet did not claim to be a creditor) and that neither LCM nor Banet was a stockholder of New York Chocolate. In August 2009, New York Chocolate filed a motion for summary judgment on the counterclaim.

17. On March 12, 2010, the Court of Chancery granted New York Chocolate's motion for summary judgment and found that (1) LCM is not a stockholder of New York Chocolate; (2) Banet is not a stockholder of New York Chocolate; (3) Banet is not a director of New York Chocolate; (4) FCA is not a creditor of New York Chocolate; and (5) LCM is not a creditor of New York Chocolate.

**D. Current Ownership and Management**

18. On September 19, 2008, the Comité replaced the FRC as the 100% shareholder of New York Chocolate by Ordinance No. 2008-259 and Decrees Nos. 2008-260 and 2008-261 of the President of the Côte d'Ivoire. On November 20, 2008, the Comité acted by written consent to remove all members of the board of directors of New York Chocolate. By separate written consent of the same date, the Comité elected the following new directors of New York Chocolate: Illa Ginette Donwahi, Léa Claudine Yapobi, N'Guessan Célestin and Atsé Kouassi Propser. At a meeting of the new board of directors on November 24, 2008, all officers of New York Chocolate were removed from office and Mike Malash was appointed President and Patrick Haney was appointed Secretary and Treasurer of New York Chocolate.

**E. Events Leading to Chapter 11 Filing**

19. The litigations against New York Chocolate, and the allegations against certain members of its prior board and management, saddled New York Chocolate with a significant financial burden right from the start. Partly because of such difficulties, the Debtor has not produced any products at the Chocolate Plant in over four years. Since the Comité took over for the FRC, it has funded all of New York Chocolate's expenses. After careful consideration and study of the realistic market opportunities for an independent manufacturer of chocolate products, projected capital requirements to restart New York Chocolate's operations, and faced with the accumulation of certain debts and other obligations, and the financial drain related to the numerous litigations, New York Chocolate determined that the most efficient way to preserve value for the creditors and other stakeholders was to commence an orderly wind down of its business under the protection of Chapter 11.

20. The Debtor is intent on working cooperatively with the Debtor's creditors, the City of Fulton and County officials to ensure an efficient and orderly Chapter 11 process.

**THE UTILITY PROVIDERS**

21. In the normal course of the Debtor's business, approximately three (3) utility companies and other service providers (each, a "Utility Provider" and, collectively, the "Utility Providers") provide electricity, natural gas, sewage, water, telephone, internet and/or other similar services (collectively, the "Utility Services"). The Utility Providers include, without limitation, the entities set forth on the list attached hereto as Exhibit A (the "Utility Service List"). The Debtor believes that its average monthly payments to the Utility Providers aggregate between approximately $30,000 and $75,000, depending on the month of the year and the outside temperature. The Debtor is using on a daily basis the services provided by the Utility Providers at the Chocolate Plant, such that any interruption, no matter how brief, of the Debtor's

Utility Services could irreparably damage the Debtor's business at the Chocolate Plant. While the Chocolate Plant is no longer operating, the services provided by the Utility Providers remain crucial because without the Utility Services, the integrity of Chocolate Plant and all property and equipment located therein may be jeopardized.

22. The Debtor anticipates that the proceeds of the postpetition financing will be sufficient to allow the Debtor to satisfy all administrative expenses, including postpetition utility bills, on a current and ongoing basis.

## 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 20 days of a chapter 11 case. However, after thirty days following 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 to such utility company.

24. Pursuant to sections 105(a) and 366 of the Bankruptcy Code, the Debtor seeks entry of an interim order (the "Interim Order") (i) determining that the 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 granting the relief sought herein (the "Final Order"); (ii) approving the Debtor's proposed offer of adequate assurance and procedures governing the Utility Providers' requests for additional or different adequate assurance; (iii) 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 Debtor's proposed adequate assurance pending entry of the Final Order; (iv) determining that the Debtor is not required to provide any additional adequate assurance beyond what is proposed by this Motion, pending entry of the Final Order; (v) establishing procedures for the Utility Providers to

seek to opt-out of the Debtor's proposed adequate assurance procedures; and (vi) scheduling a final hearing (the "Final Hearing") on the Motion to consider the relief requested herein on a final basis.

A. Adequate Assurance of Payment of Postpetition Charges

25. Pursuant to section 366(c)(2) of the Bankruptcy Code, a utility may alter, refuse or discontinue a chapter 11 debtor's utility service "if the utility does not receive from the debtor or the trustee, within 30 days of the commencement of the debtor's chapter 11 case, adequate assurance of payment for utility service that is satisfactory to the utility." 11 U.S.C. § 366(c)(2). Section 366(c)(1) of the Bankruptcy Code provides that "assurance of payment" of postpetition charges may consist of (i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a surety bond; (v) a prepayment of utility consumption; or (vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee. 11 U.S.C. § 366(c)(1)(A).

26. The Debtor intends to timely pay all postpetition obligations owed to the Utility Providers. The Debtor anticipates that the cash available under the proposed debtor in possession financing will be more than sufficient to pay all postpetition obligations owed to the Utility Providers.

27. The Debtor further proposes to provide a deposit equal to two (2) weeks of anticipated Utility Service based on one year historical average (the "Adequate Assurance Deposit") to any Utility Provider who requests such a deposit, provided that: (a) such request is made in writing no later than 5:00 pm EST on the day that is 20 days after the Petition Date, *i.e.*, on May 4, 2010; (b) such requesting Utility Provider does not already hold a deposit equal to, or greater than, two (2) weeks of anticipated Utility Services based on one year historical average; (c) such requesting Utility Provider is not currently paid in advance for its anticipated Utility

Services; and (d) such requesting Utility Provider receiving such Adequate Assurance Deposit agrees that it shall not exercise any rights of termination under any agreement or otherwise for Utility Services with the Debtor. As a condition of requesting and accepting an Adequate Assurance Deposit, and absent compliance with the Adequate Assurance Procedures (as defined below), the requesting Utility Provider shall be deemed to have (i) stipulated that the Adequate Assurance Deposit constitutes adequate assurance of payment to such Utility Provider within the meaning of section 366 of the Bankruptcy Code; and (ii) waived any right to seek additional or different adequate assurance during the course of this chapter 11 case.[2]

28. The Debtor submits that the Adequate Assurance Deposit, together with the Debtor's ability to pay for future Utility Services through the use of the postpetition financing (the "Proposed Adequate Assurance"), constitutes sufficient adequate assurance to the Utility Providers. In light of the severe consequences to the Debtor of any interruption 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 Debtor proposes that the Court approve and adopt the following procedures (the "Adequate Assurance Procedures"):

> Absent compliance with the following Adequate Assurance Procedures, the Utility Providers are forbidden to alter, refuse or discontinue service on account of any prepetition charges, or require additional adequate assurance of payment other than the Proposed Adequate Assurance pending entry of the Final Order:
>
> a. Within two (2) business days after entry of the Interim Order, the Debtor will mail a copy of the Interim Order to the Utility Providers on the Utility Service List.
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> b. If a Utility Provider is not satisfied with the Proposed Adequate Assurance and seeks additional assurances of payment in the form of deposits, prepayments, or otherwise, it must serve a request (an "Additional

[2] The Debtor further requests that any Adequate Assurance Deposit required by, and provided to, any Utility Provider pursuant to the procedures described above be returned promptly to the Debtor at the conclusion of its chapter 11 case, if not returned or applied sooner.

Assurance Request") upon the Debtor and its counsel at the following addresses: (i) The New York Chocolate & Confections Company, 555 South Fourth Street, Fulton, New York 13069, Attn: Patrick Haney and (ii) McDermott Will & Emery LLP, 340 Madison Avenue, New York, New York 10173-1922, Attn: Geoffrey T. Raicht and Nava Hazan (together, the "Notice Parties").

c. Any Additional Assurance Request, must (i) be made in writing, (ii) set forth the type of Utility Services and the location for which such services are provided, (iii) include a summary of the Debtor's payment history relevant to the affected account(s), including any deposits and other security held by the Utility Provider, (iv) set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment, and (v) be actually received by the Debtor and its counsel within 20 days after the entry of the Interim Order granting this Motion.

d. Upon the Debtor's timely receipt of an Additional Assurance Request at the addresses set forth above, the Debtor shall have the greater of (i) 14 days from the receipt of such Additional Assurance Request or (ii) 45 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 Debtor may, in its discretion, resolve any Additional Assurance Request by mutual agreement with the requesting Utility Provider without further order of the Court and may, in connection with any such agreement and in its 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 to the extent the Debtor believes such additional assurance is reasonable in the exercise of its business judgment.

f. If the Debtor determines that a timely received Additional Assurance Request is not reasonable and it is not able to reach an alternative resolution with the Utility Provider during the Resolution Period, the Debtor will promptly file a motion with the Court seeking a hearing to determine the adequacy of assurances of payment with respect to a particular Utility Provider (the "Determination Motion") pursuant to section 366(c)(3) of the Bankruptcy Code.

g. Pending resolution of any such Determination Motion, any such Utility Providers shall be prohibited from altering, refusing, or discontinuing service to the Debtor on account of unpaid charges for prepetition services, the filing of this chapter 11 case, or any objections to the adequacy of the Proposed Adequate Assurance.

h. The Proposed Adequate Assurance shall be deemed adequate assurance of payment for any Utility Provider that fails to make a timely Additional Assurance Request and so long as the Utility Provider has timely requested (and otherwise qualifies for) the Proposed Adequate Assurance unless otherwise determined pursuant to a Procedures Objection (as defined below).

B. Process for Opting-Out of Adequate Assurance Procedures

29. It has been suggested that, contrary to historical practice, the recent amendments to section 366 of the Bankruptcy Code could be read to shift to the Debtor the burden to provide such adequate assurance as the Utility Providers find satisfactory and to seek court review if the Utility Providers rejects the proposed adequate assurance. Under such a reading of revised section 366, a Utility Provider arguably could, on the twenty-ninth day following the Petition Date, notify the Debtor that the Adequate Assurance Procedures are not acceptable, make unreasonable demands for an excessive deposit or other form of assurance, and threaten to terminate its services the very next day unless that Utility Provider's demands are met. While the Debtor does not believe this is an accurate reading of section 366, to obviate the possibility of that scenario, it is prudent to require the Utility Providers to raise any objections to the Adequate Assurance Procedures prior to the running of the thirty-day period following the Petition Date. Therefore, the Debtor proposes that if a Utility Provider wishes to opt-out of the Adequate Assurance Procedures set forth above, the Court should schedule a hearing within 30 days of the Petition Date and issue a ruling on the amount of adequate assurance to be provided to that specific Utility Provider.

30. Accordingly, the Debtor proposes the following opt-out procedures (the "Opt-Out Procedures"):

a. Any Utility Provider who objects to the Adequate Assurance Procedures described above must file a written objection to such procedures (a "Procedures Objection") so that it is actually received at least 5 business days before the Final Hearing. The Procedures Objection must be served

on counsel for the Debtor at McDermott Will & Emery LLP, 340 Madison Avenue, New York, New York 10173-1922, Attn: Geoffrey T. Raicht and Nava Hazan.

b. Any Procedures Objection must (i) be made in writing; (ii) set forth the amount and form of additional assurance of payment requested, (iii) set forth the location(s) for which the Utility Services are provided, (iv) include a summary of the Debtor's payment history to such Utility Provider relevant to the affected accounts, including any security deposits, (v) set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of payment, and (vi) set forth why the Utility Provider believes it should be exempted from the Adequate Assurance Procedures.

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

d. If the Debtor determines that the Procedures Objection is not reasonable and is not able to reach a prompt consensual resolution with the Utility Provider, the Procedures Objection will be heard at the Final Hearing.

e. All Utility Providers who do not timely file a Procedures 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 that do not timely file a Procedures Objection shall be to submit an Additional Assurance Request pursuant to the Adequate Assurance Procedures, and such Utility Provider shall be prohibited from discontinuing, altering, or refusing service to the Debtor, including on account of unpaid charges for prepetition services, pending any hearing (a "Determination Hearing") that may be conducted pursuant to the Adequate Assurance Procedures.

31. In order to resolve any Procedures Objection within 30 days following the Petition Date, the Debtor requests that the Court schedule the Final Hearing on any unresolved Procedures Objections no later than May 14, 2010.

C. Subsequent Modifications of the Utility Service List

32. Although the Debtor has made good-faith efforts to identify all Utility Providers, certain companies that currently provide Utility Services to the Debtor may have been inadvertently omitted from Exhibit A. To the extent that the Debtor identifies additional Utility Providers, the Debtor will promptly file amendments to the Utility Service List, and shall serve copies of the Motion, the Interim Order and Final Order (when and if entered) on such newly identified Utility Providers and on any Utility Provider that commences the provision of Utility Services after the date hereof, if any.

33. The Debtor further requests that the Court make the Interim Order and Final Order binding on all Utility Providers, regardless of when such Utility Provider was added to the Utility Service List, provided that any such newly identified Utility Provider shall have until the later of 14 days from the date of such service and 30 days from the date of the order granting this Motion to serve an Additional Assurance Request in compliance with the proposed Adequate Assurance Procedures. Any such request must actually be received by the Notice Parties. The Debtor shall have the periods specified in the proposed Adequate Assurance Procedures to seek to resolve any such request by mutual agreement with the Utility Provider without further order of the Court or to file a Determination Motion with the Court to determine the adequacy of assurance of payment with respect to such Utility Provider in accordance with such procedures.

**BASIS FOR RELIEF**

34. The relief requested herein will ensure that the Debtor can preserve the value of the Chocolate Plant and the property and equipment located therein. If a disruption occurs, the impact on the Debtor's affairs and its ability to preserve the value of the Chocolate Plant and the equipment located therein would be extremely harmful. The Debtor will not be

able to easily find replacement services if the Utility Providers cease to provide the Utility Services. Therefore, it is essential that the Utility Services continue uninterrupted. The relief requested provides the Utility Providers with a fair and orderly procedure for determining requests for additional or different adequate assurance. Without the Adequate Assurance Procedures, the Debtor could be forced to address numerous requests by Utility Providers in a disorganized manner at a critical period in this chapter 11 case and during a time when the Debtor's efforts could be more productively focused on other issues in this case for the benefit of all parties in interest.

35. Section 366 of the Bankruptcy Code protects a debtor against the immediate termination of utility services after commencing its case. Under that section, a utility company may not, during the first 20 days of a chapter 11 case, alter, refuse, or discontinue services to a debtor solely because of unpaid prepetition amounts. A utility company may however do so if, during the 30-day period following the petition date, the debtor does not provide "adequate assurance" of payment for postpetition services in a form "satisfactory" to the utility.[3]

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[3] Section 366 of the Bankruptcy Code provides, in relevant part, as follows:

(a) Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

* * *

(c)(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.

11 U.S.C. § 366.

36. Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA"), it was well established by courts, commentators, and legislative history that section 366 of the Bankruptcy Code did not require, as a matter of course, that the debtor provide a deposit or other security to its utilities as adequate assurance of payment. In Virginia Electric & Power Co. v. Calder, Inc., 117 F.3d 646, 647 (2d Cir. 1997), the United States Court of Appeals for the Second Circuit affirmed the bankruptcy court's ruling that the debtor's prepetition payment history, its postpetition liquidity, and the administrative expense priority afforded to postpetition invoices constituted adequate assurance of future performance. The Second Circuit rejected the argument that section 366(b) nevertheless required a "deposit or other security," holding that "a bankruptcy court's authority to 'modify' the level of the 'deposit or other security,' provided for under section 366(b), includes the power to require no 'deposit or other security' where none is necessary to provide a utility supplier with 'adequate assurance of payment.'" Id. at 650; see also Shirev v. Philadelphia Elec. Co. (In re Shirev), 25 B.R. 247, 249 (Bankr. E.D. Pa. 1982) ("section 366(b) . . . does not permit a utility to request adequate assurance of payment for continued services unless there has been a default by the debtor on a pre-petition debt owed for services rendered.").

37. Under the recently enacted section 366(c) of the Bankruptcy Code, however, in a chapter 11 case, a utility company may alter, refuse, or discontinue utility service if, within 30 days after the commencement of the chapter 11 case, the utility company does not receive adequate assurance in a form that is "satisfactory" to the utility company, subject to the Court's ability to modify the amount of adequate assurance. See Jones v. Boston Gas Co. (In re Jones), 369 B.R. 745, 748-49 (B.A.P. 1st Cir. 2007) ("Based on a debtor's failure to provide adequate assurance of payment, bankruptcy courts have concluded that § 366 . . . grants utilities

the unilateral right to terminate service."); St. Torrance v. Cincinnati Gas & Elec. Co. (In re St. Torrance), 2007 Bankr. LEXIS 3180, at *8 (B.A.P. 6th Cir. 2007) (same). Furthermore, pursuant to changes made effective by BAPCPA, in determining whether an assurance of payment is adequate, the court may not consider (i) the absence of security before the petition date, (ii) the debtor's history of timely payments or (iii) the availability of an administrative expense priority. 11 U.S.C. § 366(c)(3)(B).

38. While the recently amended section 366(c) clarifies what does and does not constitute "assurance of payment" and what can be considered in determining whether such assurance is adequate, Congress, in enacting that section, did not divest the Court of its power to determine what amount, if any, is necessary to provide adequate assurance of payment to a Utility Provider. See 11 U.S.C. § 366(c)(3)(A) ("On request of a party in interest and after notice and a hearing, the Court may order modification of the amount of an assurance of payment..."). Under section 366(c) of the Bankruptcy Code, there is nothing to prevent a court from deciding, as courts did before the enactment of BAPCPA, that, on the facts of the case before it, the amount required of a debtor to adequately assure payment to a utility company is nominal, or even zero. See In re Pac-West Telecomm, Inc., Case No. 07-10562 (BLS) (Bankr. D. Del. May 2, 2007) (approving adequate protection that was a one-time supplemental prepayment to each utility company equal to the pro-rated amount of one week's charges); In re The New York Racing Ass'n, Inc., Case No. 06-12618 (JMP) (Bankr. S.D.N.Y. Dec. 1, 2006) (approving adequate protection of a two-week deposit based on a historical average as well as procedures for opting-out).

39. Moreover, Congress has not changed the requirement that the assurance of payment only be "adequate." Courts construing section 366(b) of the Bankruptcy Code have long

recognized that "adequate" assurance of payment does not require an absolute guarantee of the debtor's ability to pay. See, e.g., In re Caldor, Inc. - N.Y., 199 B.R. 1, 3 (S.D.N.Y. 1996) ("Section 366(b) requires [a] [b]ankruptcy [c]ourt to determine whether the circumstances are sufficient to provide a utility with 'adequate assurance' of payment. The statute does not require an 'absolute guarantee of payment.'") (citation omitted), aff'd sub nom; Virginia Elec. & Power Co. v. Caldor, Inc - N.Y., 117 F.3d 646 (2d Cir. 1997); In re Adelphia Bus. Solutions, Inc., 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002) (same). Therefore, despite the language in section 366(c)(2) of the Bankruptcy Code allowing a utility to take action against a debtor should the debtor fail to provide adequate assurance of payment that is "satisfactory" to the utility, section 366 of the Bankruptcy Code does not require that the assurance provided be "satisfactory" once the Court determines the appropriate amount of adequate assurances.

40. Accordingly, the Debtor believes that the Proposed Adequate Assurance, Adequate Assurance Procedures and Opt-Out Procedures are reasonable and satisfy the requirements of section 366 of the Bankruptcy Code. The relief requested in this Motion is similar to the relief granted in other recent chapter 11 cases filed after the BAPCPA became effective.[4] See, e.g., In re Northeast Biofuels, LP, Case No. 09-30057 (MCR) (Bankr. N.D.N.Y. Feb. 11, 2009) (approving deposit equal to two weeks of utility service, calculated based on a historical average over the past 12 months, to any utility provider that (i) requested such a deposit in writing, (ii) did not already hold a deposit equal to or greater than two weeks of utility service, and (iii) had not been paid in advance); In re The New York Racing Association, Inc., Case No. 06-12618 (JMP) (Bankr. S.D.N.Y. Nov. 2, 2006); Silicon Graphics, Inc., Case No. 06-

[4] Because of the voluminous nature of the unreported orders cited herein, they are not annexed to this Motion. Copies of these orders are available upon request to Debtor's counsel.

10977 (ALG) (Bankr. S.D.N.Y. May 25, 2006); In re Dana Corp., Case No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 29, 2006); In re Calpine Corp., Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. Jan. 18, 2006); In re Refco, Inc., Case No. 05-60006 (RDD) (Bankr. S.D.N.Y. Dec. 9, 2005) (approving a deposit of a sum equal to 50% of the estimated costs of monthly utility consumption); see also In re Neilson Nutraceutical, Inc., Case No. 06-10072 (CSS) (Bankr. D. Del. Feb. 23, 2006) (same).

41. Further, the Court possesses the power, under section 105(a) of the Bankruptcy Code, to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The proposed procedures will ensure that the Debtor's Utility Services are continued without prejudicing the Utility Providers.

42. Based on the foregoing, the Debtor submits that the relief requested herein is necessary and appropriate, is in the best interests of its estate and creditors, and should be granted in all respects.

## RESERVATION OF RIGHTS

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

## NOTICE

44. No trustee, examiner, or creditors' committee has been appointed in the Debtor's chapter 11 case. The Debtor has served notice of this Motion on (i) the United States

Trustee for the Northern District of New York, (ii) all Utility Providers listed in Exhibit A, (iii) Oswego County, (iv) Operation Oswego County, Inc., and (v) all known unsecured creditors in this chapter 11 case. In light of the nature of the relief requested, the Debtor submits that no other or further notice need be provided.

**NO PRIOR REQUEST**

45. No previous request for the relief sought herein has been made by the Debtor to this or any other court.

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit B, (i) prohibiting the Utility Providers from altering, refusing or discontinuing service; (ii) deeming the Utility Providers adequately assured of future performance; (iii) establishing procedures for determining adequate assurance of payment; and (iv) granting such other and further relief as is just and proper.

Dated: New York, New York
April 14, 2010

Respectfully submitted,

**McDERMOTT WILL & EMERY LLP**

By: /s/ Geoffrey T. Raicht

Geoffrey T. Raicht
Bar No. 2916203
Nava Hazan
Bar No. 3064409
340 Madison Avenue
New York, New York 10173-1922
Telephone: (212) 547-5400
Facsimile: (212) 547-5444

Proposed Counsel for the Debtor and Debtor in Possession

# EXHIBIT "A"

# EXHIBIT A

## Utility Providers Servicing the Debtor

| Utility Provider | Utility Service Provided | Average Monthly Charges | Deposit |
|---|---|---|---|
| Windstream Communications<br>4001 Rodney Parham Road<br>Little Rock, Arkansas 72212<br>Attn: John Fletcher | Phone / Internet | $1,000[1] | None |
| National Grid<br>P.O. Box 1303<br>Buffalo, New York 14240<br>Attn: Tim Murphy | Electricity | $30,000 | $17,250 |
| City of Fulton<br>Water & Sanitation Department<br>141 South First Street<br>Fulton, New York 13069-1773<br>Attn: General Counsel | Water / Sewage | $12,500 | None |
| National Grid<br>P.O. Box 1303<br>Buffalo, New York 14240<br>Attn: Tim Murphy | Natural Gas | $30,000 | $25,000* |

* Prior to the Petition Date, National Grid required that the Debtor provide it with a $50,000 security deposit with respect to the provision of natural gas. Prior to the Petition Date, the Debtor paid $25,000 to National Grid as a security deposit.

[1] The Debtor started using the services of Windstream Communications on November 2009. Thus, the average monthly charges are calculated based on a six month period.

# EXHIBIT "B"

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF NEW YORK**
**(SYRACUSE DIVISION)**

| | | |
|---|---|---|
| In re: | : | |
| | : | |
| THE NEW YORK CHOCOLATE | : | Case No. 10-_____ - (___) |
| & CONFECTIONS COMPANY | : | Chapter 11 Case |
| | : | |
| Debtor. | : | |

**INTERIM ORDER PURSUANT TO SECTIONS 105(a) AND 366 OF THE BANKRUPTCY CODE (I) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING, OR DISCONTINUING SERVICE; (II) DEEMING UTILITY PROVIDERS ADEQUATELY ASSURED OF FUTURE PAYMENT; AND (III) ESTABLISHING PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

Upon the motion dated April 14, 2010 (the "Motion")[1] of the above-captioned debtor and debtor in possession (the "Debtor"), for an interim order, pursuant to sections 105(a) and 366 of the Bankruptcy Code, (i) prohibiting the companies including, without limitation, those companies (the "Utility Providers") listed in Exhibit A annexed hereto (the "Utility Service List"), that provide electricity, natural gas, sewage, water, telephone, internet and/or other similar services (collectively, the "Utility Services") to the Debtor from altering, refusing or discontinuing the Utility Services on account of prepetition amounts outstanding or on account of any perceived inadequacy of the Debtor's proposed adequate assurance; (ii) determining that the Utility Providers have been provided with adequate assurance of payment within the meaning of section 366 of the Bankruptcy Code; (iii) approving the Debtor's proposed offer of adequate assurance and procedures governing the Utility Providers' requests for additional or different adequate assurance; (iv) establishing procedures for the Utility Providers to seek to opt-out of the Debtor's proposed adequate assurance procedures; (v) determining that the Debtor is not

[1] Capitalized terms used herein but not otherwise defined shall have the same meaning as in the Motion.

required to provide any additional adequate assurance beyond what is proposed in the Motion; and (vi) setting a final hearing (the "Final Hearing") on the Debtor's proposed adequate assurance procedures, all as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to (i) the United States Trustee for the Northern District of New York, (ii) all Utility Providers listed in Exhibit A, (iii) Oswego County, (iv) Operation Oswego County, Inc., and (v) all known unsecured creditors in this chapter 11 case, and it appearing that no other or further notice need be provided; and the Court having determined that the relief sought in the Motion is in the best interests of the Debtor, its creditors and all parties in interest; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that the Motion is granted on an interim basis; and it is further

ORDERED that a Utility Provider that requests and accepts an Adequate Assurance Deposit within twenty days of the Petition Date, *i.e.*, May 4, 2010 (the "Request Deadline") shall be deemed to have stipulated that the Adequate Assurance Deposit constitutes adequate assurance of future payment to such Utility Provider, and such Utility Provider shall be deemed to have waived (i) any right to seek additional adequate assurance during the course of this chapter 11 case and (ii) any right to terminate its Utility Services under any existing agreement or otherwise for Utility Services with the Debtor; and it is further

ORDERED that in the event a Utility Provider believes the Adequate Assurance Deposit and the Proposed Adequate Assurance is insufficient, it may seek additional assurances of

payment in the form of deposits, prepayments or otherwise, provided that it serves its Additional Assurance Request upon the Debtor and the Debtor's counsel at the following addresses: (i) The New York Chocolate & Confections Company, 555 South Fourth Street, Fulton, New York 13069, Attn: Patrick Haney and (ii) McDermott Will & Emery LLP, 340 Madison Avenue, New York, New York 10173-1922, Attn: Geoffrey T. Raicht and Nava Hazan (together, the "Notice Parties"); and it is further

ORDERED that the following additional requirements and procedures (the "Adequate Assurance Procedures"), with respect to the submission of an Additional Assurance Request, are approved in all respects. Absent compliance with the following Adequate Assurance Procedures, the Utility Providers are forbidden to alter, refuse or discontinue service on account of any prepetition charges, or require additional adequate assurance of payment other than the Proposed Adequate Assurance pending entry of the Final Order:

a. Within two (2) business days after entry of the Interim Order, the Debtor will mail a copy of the Interim Order to the Utility Providers on the Utility Service List.

b. If a Utility Provider is not satisfied with the Proposed Adequate Assurance and seeks additional assurances of payment in the form of deposits, prepayments, or otherwise, it must serve a request (an "Additional Assurance Request") upon the Notice Parties.

c. Any Additional Assurance Request, must (i) be made in writing, (ii) set forth the type of Utility Services and the location for which such services are provided, (iii) include a summary of the Debtor's payment history relevant to the affected account(s), including any deposits and other security held by the Utility Provider, (iv) set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment, and (v) be actually received by the Debtor and its counsel within 20 days after the entry of the Interim Order granting the Motion.

d. Upon the Debtor's timely receipt of an Additional Assurance Request at the addresses set forth above, the Debtor shall have the greater of (i) 14 days from the receipt of such Additional Assurance Request or (ii) 45 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 Debtor may, in its discretion, resolve any Additional Assurance Request by mutual agreement with the requesting Utility Provider without further order of the Court and may, in connection with any such agreement and in its 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 to the extent the Debtor believes such additional assurance is reasonable in the exercise of its business judgment.

f. If the Debtor determines that a timely received Additional Assurance Request is not reasonable and it is not able to reach an alternative resolution with the Utility Provider during the Resolution Period, the Debtor will promptly file a motion with the Court seeking a hearing to determine the adequacy of assurances of payment with respect to a particular Utility Provider (the "Determination Motion") pursuant to section 366(c)(3) of the Bankruptcy Code.

g. Pending resolution of any such Determination Motion, any such Utility Providers shall be prohibited from altering, refusing, or discontinuing service to the Debtor on account of unpaid charges for prepetition services, the filing of this chapter 11 case, or any objections to the adequacy of the Proposed Adequate Assurance.

h. The Proposed Adequate Assurance shall be deemed adequate assurance of payment for any Utility Provider that fails to make a timely Additional Assurance Request and so long as the Utility Provider has timely requested (and otherwise qualifies for) the Proposed Adequate Assurance unless otherwise determined pursuant to a Procedure Objection.

and it is further

ORDERED that any Utility Provider that wishes to opt-out of the Adequate Assurance Procedures must follow the following procedures (the "Opt-Out Procedures"), which would provide the Utility Provider opting-out with different rights than the Proposed Adequate Assurance:

a. Any Utility Provider who objects to the Adequate Assurance Procedures described above must file a written objection to such procedures (a "Procedures Objection") so that it is actually received at least 5 business days before the Final Hearing. The Procedures Objection must be served on counsel for the Debtor at McDermott Will & Emery LLP, 340 Madison

Avenue, New York, New York 10173-1922, Attn: Geoffrey T. Raicht and Nava Hazan.

b. Any Procedures Objection must (i) be made in writing; (ii) set forth the amount and form of additional assurance of payment requested, (iii) set forth the location for which the Utility Services are provided, (iv) include a summary of the Debtor's payment history to such Utility Provider, relevant to the affected accounts, including any security deposits, (v) set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of payment and (vi) set forth why the Utility Provider believes it should be exempted from the Adequate Assurance Procedures.

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

d. If the Debtor determines that the Procedures Objection is not reasonable and is not able to reach a prompt consensual resolution with the Utility Provider, the Procedures Objection will be heard at the Final Hearing.

e. All Utility Provider who do not timely file a Procedures 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 Provider that do not timely file a Procedures Objection shall be to submit an Additional Assurance Request pursuant to the Adequate Assurance Procedures, and shall be prohibited from discontinuing, altering, or refusing service to the Debtor, including on account of unpaid charges for prepetition services, pending any Determination Hearing that may be conducted pursuant to the Adequate Assurance Procedures.

and it is further

ORDERED that any Utility Provider that does not request an Adequate Assurance Deposit by the Request Deadline and does not file a Procedures Objection to opt-out of the Adequate Assurance Procedures shall be deemed to have adequate assurance that is satisfactory to it, within the meaning of section 366 of the Bankruptcy Code; and it is further

ORDERED that a Final Hearing to resolve any Procedures Objections shall be scheduled for May [__], 2010 at ___:___ _m. (EST); and it is further

ORDERED that if no Procedures Objections are timely filed, served, and received in accordance with this Order, the Debtor shall submit to the Court a final order regarding the relief sought in this Motion, which will be entered without a Final Hearing; and it is further

ORDERED that a Utility Provider shall be deemed to have adequate assurance of payment unless and until (a) the Debtor, in its sole discretion, agrees to (i) an Adequate Assurance Request; (ii) an Additional Assurance Request or (iii) an alternative adequate assurance of payment with the Utility Provider during the Resolution Period; or (b) this Court enters an order at the Final Hearing or any Determination Hearing requiring that additional adequate assurance of payment be provided; and it is further

ORDERED that the Debtor is authorized to supplement, as necessary, the Utility Service List, and this Order shall apply to any such Utility Provider that is subsequently added to the Utility Service List; and it is further

ORDERED that any Adequate Assurance Deposit requested by, and provided to, any Utility Provider pursuant to the Adequate Assurance Procedures shall be returned to the Debtor at the conclusion of its chapter 11 case, if not returned or applied earlier; and it is further

ORDERED that the Debtor is authorized and empowered to take all actions necessary to implement the relief granted in this Order; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation or interpretation of this Order; and it is further

ORDERED that nothing in this Order or the Motion shall be deemed to constitute the postpetition assumption or adoption of any agreement pursuant to section 365 of the Bankruptcy Code; and it is further

ORDERED that the Debtor shall serve a copy of this Order on each Utility Provider listed on the Utility Service List within two (2) business days of the date this Order is entered, and shall promptly serve this Order on each Utility Provider subsequently added by the Debtor to the Utility Service List.

Dated: Syracuse, New York
April __, 2010

_____
United States Bankruptcy Judge

## EXHIBIT A

### Utility Providers Servicing the Debtor

| Utility Provider | Utility Service Provided | Average Monthly Charges | Deposit |
|---|---|---|---|
| Windstream Communications<br>4001 Rodney Parham Road<br>Little Rock, Arkansas 72212<br>Attn: John Fletcher | Phone / Internet | $1,000[2] | None |
| National Grid<br>P.O. Box 1303<br>Buffalo, New York 14240<br>Attn: Tim Murphy | Electricity | $30,000 | $17,250 |
| City of Fulton<br>Water & Sanitation Department<br>141 South First Street<br>Fulton, New York 13069-1773<br>Attn: General Counsel | Water / Sewage | $12,500 | None |
| National Grid<br>P.O. Box 1303<br>Buffalo, New York 14240<br>Attn: Tim Murphy | Natural Gas | $30,000 | $25,000* |

* Prior to the Petition Date, National Grid required that the Debtor provide it with a $50,000 security deposit with respect to the provision of natural gas. Pre-petition, the Debtor has paid $25,000 to National Grid as a security deposit.

[2] The Debtor started using the services of Windstream Communications on November 2009. Thus, the average monthly charges are calculated based on a six months period.