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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

_____)	
In re:)	Chapter 11
)	
AGERA ENERGY LLC, <i>et al.</i> , ¹)	Case No. 19-_____ (____)
)	
Debtors.)	(Joint Administration Requested)
_____)	

**DEBTORS' MOTION FOR THE ENTRY OF AN ORDER
UNDER SECTIONS 105(a), 362, 365, AND 525 OF THE
BANKRUPTCY CODE ENFORCING AND RESTATING
AUTOMATIC STAY, *IPSO FACTO*, AND NON-DISCRIMINATION PROVISIONS**

Agera Energy LLC and the above-captioned debtors, as debtors and debtors in possession (collectively, the “Debtors”) in these chapter 11 cases (these “Chapter 11 Cases”), hereby submit this motion (this “Motion”) for entry of an order pursuant to sections 105(a), 362, 365, and 525 of title 11 of the United States Code (the “Bankruptcy Code”), substantially in the form attached hereto as **Exhibit A**, enforcing and restating the automatic stay, *ipso facto*, and non-discrimination provisions of the Bankruptcy Code. In support of the Motion, the Debtors rely upon and incorporate by reference the *Declaration of Todd Sandford Pursuant to Rule 1007-2 of the Local Bankruptcy Rules for the Southern District of New York in Support of the Debtors*’

¹ The Debtors, together with the last four digits of each Debtor’s federal tax identification number, are: Agera Energy LLC (8122); Agera Holdings, LLC (3335); energy.me midwest llc (9484); Aequitas Energy, Inc. (7988); Utility Recovery LLC (4351); and Agera Solutions LLC (8749). The location of the Debtors’ corporate headquarters and the service address for all Debtors is 555 Pleasantville Road, S-107, Briarcliff Manor, NY 10510.

Chapter 11 Petitions and First Day Pleadings (the “First Day Declaration”), filed contemporaneously herewith.² In further support of this Motion, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Southern District of New York (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §157(b).

3. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105(a), 362, 365, and 525.

BACKGROUND

4. On the date hereof (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

5. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

6. No trustee, examiner, creditors’ committee, or other official committee has been appointed in these Chapter 11 Cases.

7. The factual background regarding the Debtors, including a description of the Debtors’ business, capital structure, and the circumstances leading to these Chapter 11 Cases, is set forth in the First Day Declaration, which is incorporated herein by reference.

² Capitalized terms used but not defined herein have the meanings ascribed to such terms in the First Day Declaration.

RELIEF REQUESTED

8. Pursuant to Bankruptcy Code sections 105(a), 362, 365, and 525, the Debtors request the entry of an order confirming, restating, enforcing, and restraining any action taken in violation of the following key protections afforded the Debtors under the Bankruptcy Code: (a) the automatic stay provision of Bankruptcy Code section 362; (b) the prohibition of Bankruptcy Code section 365 against terminating executory contracts or unexpired leases due to *ipso facto* provisions; and (c) the non-discrimination provisions of Bankruptcy Code section 525.

BASIS FOR REQUESTED RELIEF

9. As described in the First Day Declaration, across both electricity and natural gas supply, the Debtors service 87 distinct utility regions and provide service to approximately 35,000 customers, comprised of over 75,000 accounts in California, Connecticut, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas and Virginia.

10. Prior to the Petition Date, governmental units in Massachusetts, Rhode Island, and New Hampshire have taken acts against the Debtors with respect to the Debtors' failure to satisfy their 2018 renewable portfolio standard ("RPS") obligations or alternative compliance payment ("ACP") obligations, as more fully described in the First Day Declaration.

11. Specifically, the Massachusetts Department of Energy Resources has recommended to the Massachusetts Department of Public Utilities that it revoke or suspend the retail supplier licenses of Debtor Agera Energy, LLC ("Agera Energy"). The Rhode Island Division of Public Utilities and Carriers has issued Agera Energy a Suspension Order, under which Agera Energy is prohibited from entering into new contracts or renewing existing contracts with customers in Rhode Island, and is scheduled to conduct a public hearing on October 22, 2019 to consider whether Agera Energy's license to sell energy in Rhode Island

should be rescinded. The New Hampshire Public Utilities Commission sent Agera Energy a demand letter on September 17, 2019 requesting that Agera Energy satisfy its ACP liability for 2018 within ten days or it may pursue further action, including referral of the unpaid amount for collection to the New Hampshire Department of Justice.

12. The Debtors may soon be in default of their RPS obligations in other states.

13. The Debtors' business operations are conducted across the country, and the Debtors therefore possess licenses from governmental units in and have creditors and counterparties to contracts in many states. The governmental units may attempt to initiate or continue prosecuting regulatory and other proceedings against the Debtors to the detriment of the Debtors and their creditors, or take other actions in contravention of the automatic stay of Bankruptcy Code section 362 that could harm the Debtors' estates. An order will make clear the impact of the automatic stay and its applicability to creditors and other parties in interest wherever located.

14. In addition, upon learning of the Debtors' bankruptcy, counterparties to executory contracts may attempt to terminate those contracts pursuant to *ipso facto* provisions in contravention of Bankruptcy Code section 365.

15. Finally, the governmental units that granted the Debtors their licenses may be unfamiliar with the non-discrimination provision of Bankruptcy Code section 525, which prohibits governmental units from revoking, suspending, or failing to renew a license, permit, charter, franchise, or other similar grant or to discriminate with respect to such grant against a debtor solely based on a debtor's bankrupt status or financial condition. Without the relief requested in this motion, these governmental units may attempt to take adverse action against the Debtors with respect to their licenses upon learning of the Debtors' bankruptcy filings.

16. Accordingly, by this Motion, the Debtors seek entry of an order, under Bankruptcy Code sections 105(a), 362, 365, and 525, enforcing and restating the automatic stay, *ipso facto*, and non-discrimination provisions of the Bankruptcy Code. The Debtors believe that a specific order from this Court will help to protect the Debtors from improper actions, particularly from the governmental units that granted the Debtors their licenses, who may not be familiar with the Bankruptcy Code or its protections and who might unwittingly otherwise violate those sections.

A. The Automatic Stay and *Ipsa Facto* Provisions of the Bankruptcy Code

17. As a result of the commencement of these Chapter 11 Cases, and by operation of law pursuant to Bankruptcy Code section 362, the automatic stay enjoins all persons and entities from, among other things, commencing or continuing an action or proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case. The injunction contained in Bankruptcy Code section 362 constitutes a fundamental protection for debtors, which, in combination with other provisions of the Bankruptcy Code, provides these Debtors with a “breathing spell from [their] creditors” that is essential to the Debtors’ ability to reorganize successfully. *See, e.g., Shugrue v. Air Line Pilots Ass’n, Int’l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 989 (2d Cir. 1990) (citations omitted).

18. Given its fundamental importance to a debtor’s reorganization, courts broadly construe the stay provisions of section 362. As such, the stay has been held to preclude unilateral actions by non-debtor parties to terminate contracts without court order. *See, e.g., Fed. Ins. Co. v. Sheldon*, 150 B.R. 314, 319-20 (S.D.N.Y. 1993) (termination of insurance contract void because it violated automatic stay).

19. In addition, Bankruptcy Code section 365(e)(1)(B) prohibits counterparties to contracts with a debtor from terminating contracts because of the debtor’s bankruptcy filing.

Bankruptcy Code section 365(e)(1)(B) provides, subject to certain limited exceptions, that: [n]otwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on . . . the commencement of a case under this title. 11 U.S.C. § 365(e)(1)(B). Thus, Bankruptcy Code section 365(e) invalidates so-called “*ipso facto*” provisions, which provide for the termination of a contract upon a bankruptcy filing.

20. The application of the protections afforded a debtor by Bankruptcy Code section 362 is automatic with the filing of a chapter 11 petition. *See* 11 U.S.C. § 362 (“[A] petition filed under section 301 . . . of this title . . . operates as a stay applicable to all entities, of [,among other things,] the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of a case under this title[.]”).

B. The Non-Discrimination Provisions of the Bankruptcy Code

21. Bankruptcy Code section 525 provides that “a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to [or] discriminate with respect to such grant against . . . a debtor.” 11 U.S.C. § 525. The prohibition on governmental discrimination against a debtor is both self-executing and global, and intended to preclude governmental entities from refusing to deal with a debtor based upon its chapter 11 filing, similar to the automatic stay protection but as applied to non-creditor governmental entities. *See In re Gen. Motors Corp.*, No. 09-50026 (REG), 2009 WL 1565942, at *2 (Bankr. S.D.N.Y. June 1, 2009) (ordering that “all foreign and domestic governmental units

are prohibited and enjoined from (i) denying, revoking, suspending, or refusing to renew any license, permit, charter, franchise, or other similar grant to, (ii) placing conditions upon such a grant to, or (iii) discriminating against any of the [d]ebtors (or another person with whom the [d]ebtors have been associated) solely because any of the [d]ebtors is a debtor under the Bankruptcy Code, or may have been insolvent before or during [the debtors'] chapter 11 cases”); *see also Betty Owen School v. U.S. Dep’t of Educ. (In re Betty Owen Schools, Inc.)*, 195 B.R. 23, 31 (Bankr. S.D.N.Y. 1996) (“Section 525(a) was enacted to prevent the government from frustrating the ‘fresh start’ policy of the Code.”) (citation omitted); *Saunders v. Reeher (In re Saunders)*, 105 B.R. 781, 787 (Bankr. E.D. Pa. 1989) (“Section 525(a) instead was intended to reach non-creditor governmental (or quasi-governmental entities) that . . . frustrate the ‘fresh start’ policy of the bankruptcy code by denying property interests not obtainable through the private sector” “Unless the governmental entity was acting as an agent for a creditor, such conduct would not run afoul of section 362.”) (citations omitted); *see also* H.R. Rep. No. 95-595, at 165 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6126 (“The purpose of [section 525] is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws.”).

22. The Debtors possess licenses from governmental units located throughout the country that are necessary to the conduct of the Debtors’ business. Certain of the governmental units may not be cognizant of the protections afforded to the Debtors by Bankruptcy Code section 525, and therefore, may inadvertently contravene its provisions. To ensure that these governmental units do not hamper the Debtors’ operations in contravention of the protections of Bankruptcy Code section 525, the Debtors seek, through the proposed order, to inform the governmental units of the existence and implications of Bankruptcy Code section 525.

C. Relief Requested Should Be Granted Under Section 105(a) of the Bankruptcy Code.

23. Bankruptcy Code section 105(a) authorizes the Court 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). Bankruptcy Code section 105(a) therefore authorizes bankruptcy courts to issue injunctions and take other necessary steps in aid of their jurisdiction.

24. Notwithstanding the fundamental nature of the automatic stay and non-discrimination protections, and the fact that they arise as a matter of law upon the commencement of a chapter 11 case, not all parties affected or potentially affected by the commencement of a chapter 11 case are aware of these Bankruptcy Code provisions. Nor are all parties cognizant of the significance and impact of these provisions. Experience has shown that it is often necessary to advise third parties of the existence and effect of the automatic stay and the protection from discrimination, particularly in cases in which the debtor conducts significant business in foreign jurisdictions. Occasionally, it is necessary to commence proceedings in the bankruptcy court to enforce these provisions. Accordingly, it is not uncommon for a bankruptcy court to issue an order embodying and restating the provisions of Bankruptcy Code sections 362, 365, and 525. Although these fundamental protections are automatic, they will not serve their functions if creditors and parties in interest do not realize or understand that they exist.

25. Thus, even though an order of the sort sought by this Motion is not necessary to trigger the protections afforded the Debtors by Bankruptcy Code sections 362, 365, and 525, the entry of such an order will be helpful for the Debtors in explaining to their creditors of the existence and broad scope of these protections. The granting of the relief requested will help ensure that the governmental entities do not initiate or continue prosecuting regulatory and other proceedings against the Debtors to the detriment of the Debtors and their creditors or take other

actions in contravention of the automatic stay, *ipso facto*, and non-discrimination provisions of Bankruptcy Code sections 362, 365, and 525 that could harm the Debtors' estates.

26. Accordingly, the Debtors respectfully request that this Court issue an order, in the form attached hereto, which substantially restates the applicable provisions of Bankruptcy Code sections 362, 365, and 525 as applicable to all creditors and parties-in-interest. Granting the relief requested herein will facilitate a smooth and orderly transition into chapter 11 and minimize the disruption of the Debtors' business affairs.

27. Courts in this district have provided similar relief in other Chapter 11 cases. *See, e.g., In re Toisa Limited, et al.*, Case No. 17-10184 (SCC) (Bankr. S.D.N.Y. Jan. 30, 2017); *In re Republic Airways Holdings Inc., et al.*, Case No. 16-10429 (SHL) (Bankr. S.D.N.Y. Feb. 29, 2016); *In re NII Holdings, Inc., et al.*, Case No. 14-12611 (SCC) (Bankr. S.D.N.Y. Sept. 16, 2014); *In re Newland Int'l Props., Corp.*, Case No. 13-11396 (MG) (Bankr. S.D.N.Y. May 1, 2013); *In re TBS Shipping Servs. Inc.*, Case No. 12-22224 (RDD) (Bankr. S.D.N.Y. Feb. 8, 2012); *In re Almatris B.V.*, Case No. 10-12308 (MG) (Bankr. S.D.N.Y. May 17, 2010); *In re Oldco M Corp. (f/k/a Metaldyne Corp.)*, Case No. 09-13412 (MG) (Bankr. S.D.N.Y. May 29, 2009); *In re Chrysler LLC*, Case No. 09-50002 (AJG) (Bankr. S.D.N.Y. May 4, 2009); *In re Satelites Mexicanos S.A. de C.V.*, No. 06-11868 (RDD) (Bankr. S.D.N.Y. Aug. 14, 2006); *In re Excel Maritime Carriers Ltd., et al.*, Case No. 13-23060 (RDD) (S.D.N.Y. July 3, 2013).

WAIVER OF BANKRUPTCY RULE 6004(a) AND 6004(h)

28. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

MOTION PRACTICE

29. This Motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated and a discussion of its application to this Motion. Accordingly, the Debtors submit that this Motion satisfies Local Rule 9013-1(a).

NOTICE

30. Notice of this Motion will be provided to: (a) the United States Trustee; (b) the holders of the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) counsel to BP; (d) counsel to the Stalking Horse Bidder; (e) the Internal Revenue Service; (f) the United States Attorney for the Southern District of New York; and (g) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, under the circumstances, no other or further notice is required.

NO PRIOR REQUEST

31. No prior request for the relief sought herein has been made to this Court or any other court.

WHEREFORE, the Debtors respectfully requests that the Court enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested in this Motion and such other and further relief as the Court may deem just and proper.

Dated: October 4, 2019
New York, NY

Respectfully submitted,

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*Proposed Counsel to the Debtors
and Debtors in Possession*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

_____)	
In re:)	Chapter 11
)	
AGERA ENERGY LLC, <i>et al.</i> , ¹)	Case No. 19-_____ (____)
)	
Debtors.)	(Jointly Administered)
)	
_____)	Re: Docket No. ____

**ORDER PURSUANT TO SECTIONS 105(a), 362, 365, AND 525 OF THE
BANKRUPTCY CODE ENFORCING AND RESTATING AUTOMATIC STAY,
IPSO FACTO, AND NON-DISCRIMINATION PROVISIONS**

Upon the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an order (this “Order”), pursuant to 11 U.S.C. sections 105(a), 362, 365, and 525 enforcing and restating the automatic stay, *ipso facto*, and non-discrimination provisions of the Bankruptcy Code; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012; and this Court having the power to enter a final order consistent with Article III of the United States Constitution; and this Court having found that the Debtors’ notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the “Hearing”); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the

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² Capitalized terms used but not otherwise defined herein have the meanings ascribed to such terms in the Motion.

proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. Subject to the exceptions to the automatic stay contained in Bankruptcy Code section 362(b) and the right of any party in interest to seek relief from the automatic stay in accordance with Bankruptcy Code section 362(d), all persons (including individuals, partnerships, corporations, and other entities and all those acting on their behalf) and governmental units are, under Bankruptcy Code section 362(a), stayed, restrained, and enjoined from:

- a. Taking any action to obtain possession of property of the Debtors' estates, wherever located, or to exercise control over property of the estates, wherever located, or interfere in any way with the conduct of the Debtors of their businesses;
- b. commencing or continuing (including the issuance or employment of process) any judicial, administrative, or other action or proceeding against the Debtors that was or could have been commenced before the commencement of the Debtors' Chapter 11 Cases;
- c. enforcing, against the Debtors or against property of their estates, a judgment or order obtained before the commencement of the Debtors' Chapter 11 Cases;
- d. taking any action to create, perfect, or enforce against property of the Debtors any lien to the extent that such lien secures a claim that arose prior to the commencement of the Debtors' Chapter 11 Cases;

- e. taking any action to collect, assess, or recover a claim against the Debtors that arose prior to the commencement of the Debtors' Chapter 11 Cases; and
- f. offsetting any debt owing to the Debtors that arose before the commencement of the Debtors' Chapter 11 Cases against any claim against the Debtors.

3. Pursuant to Bankruptcy Code sections 362 and 365, and subject to any relevant provisions or exceptions provided for in the Bankruptcy Code, notwithstanding a provision in a contract ("Contract") or lease ("Lease") or any applicable law, all persons are hereby stayed, restrained, and enjoined from terminating or modifying any and all Contracts and Leases to which the Debtors are party or signatory, at any time after the commencement of these Chapter 11 Cases, because of a provision in such Contract or Lease that is conditioned on the (i) insolvency or financial condition of the Debtors at any time before the closing of these Chapter 11 Cases; or (ii) commencement of these Chapter 11 Cases under the Bankruptcy Code. Accordingly, all such persons are required to continue to perform their obligations under such Leases and Contracts during the postpetition period.

4. Pursuant to Bankruptcy Code section 525, all governmental units are prohibited and enjoined from (i) denying, revoking, suspending, or refusing to renew any license, permit, charter, franchise, or other similar grant to the Debtors, (ii) placing conditions upon such grant to the Debtors, or (iii) discriminating against any of the Debtors or any other person with whom the Debtors have been associated solely because any of the Debtors is a debtor under the Bankruptcy Code or may have been insolvent before or during these Chapter 11 Cases.

5. Nothing in this Order or the Motion shall constitute a rejection or assumption by the Debtors, as debtors in possession, of any executory contract or unexpired lease.

6. Nothing in this Order is intended to, or shall, alter the provisions or modify the protections of the Bankruptcy Code.

7. In accordance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable law, upon request of a party in interest, and after notice and a hearing, this Court may grant relief from the restraints imposed herein in the event that it is necessary, appropriate and warranted to terminate, annul, modify, or condition the injunctive relief herein.

8. Notwithstanding the possible applicability of Bankruptcy Rules 6004(a) and 6004(h) or otherwise, this Order shall be immediately effective and enforceable upon its entry.

9. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

10. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: _____, 2019
White Plains, New York

THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE