

**McDERMOTT WILL & EMERY LLP**

Timothy W. Walsh

Darren Azman

Ravi Vohra

340 Madison Avenue

New York, New York 10173

Telephone: (212) 547-5615

Facsimile: (212) 547-5444

*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> , <sup>1</sup>	)	Case No. 19-_____ (____)
	)	
Debtors.	)	(Joint Administration Requested)
_____	)	

**DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS  
AUTHORIZING PAYMENT OF CERTAIN PREPETITION  
WAGES, REIMBURSABLE EXPENSES,  
BENEFITS, AND RELATED ITEMS**

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 (the “Motion”) for entry of an interim order (the “Interim Order”) and a final order (the “Final Order”) pursuant to sections 105(a), 362(d), 363(b), 507, 1107(a) and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9013-1(a) of the Local Bankruptcy Rules for the Southern District of New York (the “Local Rules”), substantially in the form

<sup>1</sup> 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.

attached hereto as **Exhibit A** and **Exhibit B**, respectively: (i) authorizing, but not directing, the Debtors to pay, in their sole discretion: (a) prepetition wages, salaries, commissions, overtime pay, sick pay, vacation pay, and other accrued compensation owed to their Employees, Independent Contractors, and Temporary Workers (collectively, the “Prepetition Wages”); (b) unreimbursed or unpaid prepetition business expenses (collectively, the “Prepetition Business Expenses”) owed to their Employees and Independent Contractors; (c) Prepetition Deductions (as defined below); (d) prepetition contributions to, and benefits under, Employee benefit programs (collectively, the “Prepetition Benefits”); and (e) all costs and expenses relating to the foregoing payments and contributions, including any payments to third-party administrators, staffing agencies or other administrative service providers (the “Prepetition Processing Costs”); (ii) authorizing, but not directing, the Debtors to honor and continue the Debtors’ prepetition practices as described in this Motion in the ordinary course of business; and (iii) authorizing the Debtors’ banks and other financial institutions to process and honor checks and transfers related to such obligations. In addition, the Debtors request that the Court (as defined below) schedule a hearing to consider approval of this Motion on a final basis. In support of this Motion, the Debtors rely upon the *Declaration of Todd Sanford Pursuant to Rule 1007-2 of the Local Bankruptcy Rules for the Southern District of New York in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings* (the “First Day Declaration”) filed contemporaneously herewith.<sup>2</sup> In further support of this Motion, the Debtors respectfully state as follows:

---

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

## **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. §§ 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. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

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

3. The statutory bases for the relief requested herein are Bankruptcy Code sections 105(a), 362(d), 363(b), 507, 1107(a) and 1108, Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule 9013-1(a).

## **BACKGROUND**

4. On the date hereof (the “Petition Date”), each of the Debtors filed a voluntary petition 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.

## **RELIEF REQUESTED**

8. The Debtors seek entry of the Interim Order and the Final Order, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**, respectively: (i) authorizing, but not directing, the Debtors to pay, in their sole discretion the: (a) Prepetition Wages; (b) Prepetition

Business Expenses; (c) Prepetition Deductions; (d) Prepetition Benefits; and (e) Prepetition Processing Costs; (ii) authorizing, but not directing, the Debtors to honor and continue the Debtors' prepetition practices as described in this Motion with respect to the Prepetition Wages, Prepetition Business Expenses, Prepetition Deductions, Prepetition Benefits, and Prepetition Processing Costs in the ordinary course of business; and (iii) authorizing the Debtors' banks and other financial institutions to process and honor checks and transfers related to such obligations.

**A. Prepetition Wages and Prepetition Deductions**

9. As of the Petition Date, the Debtors have approximately 56 employees (the "Employees"), located in eight (8) states. All 56 of the Employees are salaried. The Debtors also periodically retain specialized individuals as independent contractors (the "Independent Contractors"),<sup>3</sup> as well as temporary workers (the "Temporary Workers") sourced periodically from various staffing agencies for the performance of certain services critical to the Debtors' operations, including, among other things, administrative and operational functions. As of the Petition Date, the Debtors utilize three (3) Independent Contractors and two (2) Temporary Workers.

10. In the ordinary course of their businesses, the Debtors incur payroll and various other related obligations to their Employees, Independent Contractors, and Temporary Workers, and provide certain benefits to the Employees in exchange for their performance of services. The Debtors retained ADP TotalSource, Inc. ("ADP"), as co-employer of their Employees through a Professional Employer Organization (the "PEO"), to administer its payroll for their Employees. ADP, through the PEO, handles the Debtors' human resources management and

---

<sup>3</sup> The Independent Contractors do not include the Debtors' network of commission-based independent contractors.

benefits administration function and issues payroll checks and direct deposits to the Employees on a semi-monthly basis.

i. Prepetition Wages

11. The Debtors pay Prepetition Wages on the 15th and on the last day of each month. The Debtors estimate that, as of the Petition Date and before the final hearing on this Motion, the total amount of Prepetition Wages that will be due and payable is approximately \$232,000.00, and the total amount of Prepetition Deductions (as defined below) that will be due and payable will be approximately \$127,000.00.

12. The Employees, Independent Contractors, and Temporary Workers are owed or have accrued various sums for Prepetition Wages and Prepetition Deductions. These amounts were unpaid on the Petition Date because, among other things: (i) the Debtors commenced these Chapter 11 Cases in the midst of their customary payroll period, as well as in the midst of their regular reimbursement cycle for Employee and Independent Contractor business expenses; (ii) checks previously issued on account of such obligations may not have been presented for payment or may not have cleared the banking system; (iii) amounts related to prepetition services, while accrued in whole or in part, had not yet become due and payable by the Debtors; and (iv) amounts deducted from Employee paychecks were not then due to be paid over to the intended recipient or account, including deductions taken from Employees' paychecks (a) to make payments on behalf of the Employees for or with respect to, among other things, the Debtors' Employee benefit programs, flex spending account contributions, loan repayments and garnishments, or amounts due third parties, and (b) on account of various federal, state, or local income, FICA, Medicare, state disability, workers' compensation, and other taxes for remittance

to the appropriate federal, state, or local taxing authority (the deductions described in (a) and (b) collectively, the “Prepetition Deductions”).

13. Shortly before October 15, 2019, the Debtors intend to fund amounts necessary for the upcoming pay period (October 1, 2019 through October 15, 2019) to ADP, which in turn will fund such amounts to the Debtors’ Employees on October 15, 2019. The Debtors remit to ADP the necessary cash to fund payment several days in advance of a payment date.

**B. Prepetition Business Expenses**

14. The Debtors customarily reimburse their Employees and Independent Contractors for a variety of business expenses incurred in the ordinary course of their business, including for travel expenses such as hotels, meals, and parking and fuel costs, among other things. These expenses are incurred directly by the Employees and Independent Contractors, and the Debtors reimburse such expenses after the Employees and Independent Contractors submit a reimbursement request.

15. The Debtors respectfully request authority to pay all Prepetition Business Expenses and to continue paying business-related expenses in the ordinary course of their businesses. If the Debtors are not permitted to continue paying business expenses in the ordinary course, many Employees and Independent Contractors would be significantly prejudiced, and the Debtors’ administrative procedures related to payment of business expenses would be significantly disrupted. Although it is difficult for the Debtors to determine the exact amount of Prepetition Business Expenses that are outstanding because, among other things, the Employees and Independent Contractors may not submit reimbursement requests promptly, the Debtors estimate that, as of the Petition Date and before the final hearing on this Motion, the total amount of Prepetition Business Expenses that will be due and payable will be approximately \$20,000.00.

**C. Prepetition Benefits**

16. The Prepetition Benefits relate to the Debtors' Employee benefit programs, including, for eligible Employees: medical, dental, vision, prescription drug, life, accidental death and dismemberment, and disability insurance, and 401(k) retirement plans, as well as COBRA medical coverage for former employees.<sup>4</sup> The Debtors' medical, dental, vision, and prescription drug benefits plans and accidental death and dismemberment and disability insurance programs are administered by Oxford Health Plans, Guardian Life Insurance, VSP, and MetLife, respectively. Voya administers the 401(k) retirement plans. In addition, the Debtors' workers' compensation insurance plan is administered by ADP. These employee benefits administrators are referred to collectively herein as the "Plan Administrators." The Debtors estimate that, as of the Petition Date and before the final hearing on this Motion, the total amount of Prepetition Benefits that will be due and payable will be approximately \$40,000.00. ADP administers the Debtors' Employee benefit programs (other than the 401(k) plans), and the Debtors remit payment to ADP for the Debtors' Employee benefit programs.

**D. Costs and Expenses Incident to the Foregoing**

17. The Prepetition Processing Costs include, among other things, processing costs, the employer portion of payroll-related taxes and accrued but unpaid prepetition charges for administration of the Prepetition Benefits, such as payments owed to the Plan Administrators and ADP. The Prepetition Processing Costs also include amounts due to the various staffing agencies for the Temporary Workers. The Debtors estimate that, as of the Petition Date and

---

<sup>4</sup> Failure to comply with the requirements of the Consolidated Omnibus Budget Reconciliation Act of 1986 (as amended, "COBRA") can subject the Debtors to penalties of up to \$110 per day per qualified beneficiary (with a minimum penalty of \$15,000 for more than *de minimis* violations), actions by the Department of Labor, and civil lawsuits by former employees to recover their benefits. *See, e.g.*, 29 C.F.R. § 2575.502c-6. Accordingly, the Debtors request authority in this Motion to continue to offer COBRA coverage to eligible former employees during these Chapter 11 Cases.

before the final hearing on this Motion, the total amount of Prepetition Processing Costs that will be due and payable will be approximately \$6,000.00.

### **BASIS FOR REQUESTED RELIEF**

18. It is essential that the Debtors pay the Prepetition Wages, Prepetition Business Expenses, Prepetition Benefits, Prepetition Deductions, and Prepetition Processing Costs to ensure the continued operation of the Debtors' businesses in order to maintain the morale of the Debtors' Employees, Independent Contractors, and Temporary Workers, and preserve the Debtors' ability to maximize value for all of their stakeholders. Absent the requested relief, the Employees, Independent Contractors, and Temporary Workers may be unable to meet personal obligations, may be left without medical insurance, or may seek alternative employment opportunities, perhaps with the Debtors' competitors.

#### **A. Prepetition Wages and Related Costs are Entitled To Priority Status Under the Bankruptcy Code**

19. The Debtors believe that the vast majority of the Prepetition Wages and Prepetition Benefits the Debtors seek authority to fund are entitled to priority treatment under Bankruptcy Code sections 507(a)(4) and 507(a)(5). Pursuant to Bankruptcy Code section 507(a)(4), each employee may be granted a priority claim:

to the extent of \$13,650 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for –

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual . . .

11 U.S.C. § 507(a)(4).

Bankruptcy Code section 507(a)(5) accords priority in payment for:

allowed unsecured claims for contributions to an employee benefit plan –



- (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtors' business, whichever occurs first; but only
- (B) for each such plan, to the extent of –
  - (i) the number of employees covered by each such plan multiplied by \$13,650; less
  - (ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan . . . .

11 U.S.C. § 507(a)(5).<sup>5</sup>

20. Prepetition Wages and Prepetition Benefits claims below the \$13,650 cap set forth in Bankruptcy Code section 507(a)(4) are entitled to priority treatment at the conclusion of these Chapter 11 Cases. The Debtors believe that the vast majority, if not all, of the Prepetition Wages and Prepetition Benefits claims are below the statutory cap for each individual, and the Debtors are not seeking authority to pay Prepetition Wages and Prepetition Benefits claims in excess of the statutory cap to any individual. Similarly, to the extent other employee benefits are entitled to priority status under Bankruptcy Code section 507(a)(5), the relief requested in this Motion will only change the timing of the payment of such claims and not the amount.

**B. Applicable Bankruptcy and Non-Bankruptcy Law Requires Payment and Continuation of Certain of the Prepetition Wages and Benefits**

21. The Prepetition Deductions principally represent Employee earnings that governments (in the case of taxes), Employees (in the case of voluntarily withheld amounts), and judicial authorities (in the case of involuntarily withheld amounts) have designated for deduction

---

<sup>5</sup> The costs of administering personnel benefits programs are also entitled to priority under Bankruptcy Code section 507(a)(5). See *Allegheny Int'l, Inc. v. Metro. Life Ins. Co.*, 145 B.R. 820, 822 (W.D. Pa. 1992). In *Allegheny*, the court found that prepetition fees of a plan administrator were entitled to priority under former Bankruptcy Code section 507(a)(4). *Id.* The court stated “[i]t would be useless to prioritize expenses for contributions to an employee benefit plan and not prioritize the expenses necessary to administer those plans.” *Id.* at 822-23. The Debtors believe that the Prepetition Processing Costs are entitled to priority under Bankruptcy Code section 507(a)(5).

from Employees' paychecks. If the Debtors do not remit those amounts, the Employees may face legal action and the Debtors may be burdened by inquiries and disputes concerning their failure to submit legally required payments. Most, if not all, of the unremitted Prepetition Deductions constitute moneys held in trust and are not property of the Debtors' estates. With respect to any such amounts held in trust, the Debtors believe they both are entitled and required to continue directing such funds to the appropriate parties. *See City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 96 (3d Cir. 1994) (finding that, under state law, withholding of city income taxes by debtor from employees' wages created a trust such that the debtor held the funds in trust for the city); *DuCharmes & Co. v. Michigan (In re DuCharmes & Co.)*, 852 F.2d 194, 195-96 (6th Cir. 1988) (noting that "individual officials of an employer who fail to pay over [federal withholding] taxes that have been withheld are subject to personal liability").

**C. Bankruptcy Code Section 105(a) and the Doctrine of Necessity Provide Further Bases for Granting the Requested Relief**

22. Bankruptcy Code section 105(a) empowers 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). This equitable power is granted to effect the policies and goals of chapter 11 reorganization, which are to rehabilitate the debtor, *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176-77 (Bankr. S.D.N.Y. 1989), and to "create a flexible mechanism that will permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately." *Mich. Bureau of Workers' Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.)*, 80 B.R. 279, 287 (S.D.N.Y. 1987); *see also In re Structurlite Plastics Corp.*, 86 B.R. 922, 932 (Bankr. S.D. Ohio 1998) (rejecting a bright line rule prohibiting payment of prepetition debts because it "may well be too inflexible to permit the effectuation of the rehabilitation purposes of the Code").

23. Under the “doctrine of necessity” or “necessity of payment” rule, first articulated in *Miltenberger v. Logansport Ry. Co.*, 106 U.S. 286 (1882), bankruptcy courts can exercise these equitable powers “to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor.” *Ionosphere Clubs*, 98 B.R. at 176; *see also In re Lehigh & N.E. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (stating that payment of a claim arising before reorganization is authorized if it is “essential to the continuing operation of the [debtor]”); *In re Columbus Gas Sys., Inc.*, 171 B.R. 189, 192 (Bankr. D. Del. 1994) (noting that, in the Third Circuit, a debtor may pay pre-petition creditors “in advance of a confirmed plan,” where such payments are “essential to the continued operation of the [debtor’s] business”); *In re Fin. News Network, Inc.*, 134 B.R. 732, 735-36 (Bankr. S.D.N.Y. 1991) (observing that the doctrine of necessity “stands for the principle that a bankruptcy court may allow pre-plan payments of pre-petition obligations where such payments are critical to the debtor’s reorganization”). The doctrine of necessity permits a deviation from the equal treatment of creditors because “otherwise there will be no reorganization and no creditor will have an opportunity to recoup any part of its prepetition claim.” *In re United Am., Inc.*, 327 B.R. 776, 781 (Bankr. E.D. Va. 2005); *see also In re NVR L.P.*, 147 B.R. 126, 128 (Bankr. E.D. Va. 1992) (stating that the necessity of payment exception is “well-established in bankruptcy common law”).

24. Courts in this district have recognized the importance of a debtor’s employees to its operations, and such courts have granted relief similar to the relief requested herein. *See, e.g., In re Cenveo, Inc., et al.*, Case No. 18-22178 (RDD) (Bankr. S.D.N.Y. Mar. 8, 2018) (authorizing debtors to continue employee compensation and benefit programs and pay certain prepetition obligations related thereto on a postpetition basis); *In re 21st Century Oncology*

*Holdings, Inc.*, Case No. 17-22770 (RDD) (Bankr. S.D.N.Y. June 20, 2017) (same); *In re BCBG Max Azria Global Holdings, LLC*, Case No. 17-10466 (SCC) (Bankr. S.D.N.Y. Mar. 29, 2017) (same); *In re Avaya Inc.*, Case No. 17-10089 (SMB) (Bankr. S.D.N.Y. Mar. 20, 2017) (same); *In re Sabine Oil & Gas Corp.*, Case No. 15-11835 (SCC) (Bankr. S.D.N.Y. July 16, 2015) (same); *In re Eagle Bulk Shipping Inc.*, Case No. 14-12303 (SHL) (Bankr. S.D.N.Y. Sept. 19, 2014) (same).

25. While Bankruptcy Code section 105(a) alone is sufficient, *see Ionosphere Clubs*, 98 B.R. at 176, other courts have applied it in conjunction with Bankruptcy Code sections 1107(a), 1108, and 362(d) to allow payment of prepetition claims under the doctrine of necessity. *See In re CoServ, L.L.C.*, 273 B.R. 487, 496 (Bankr. N.D. Tex. 2002) (holding that there are occasions when the debtor in possession's fiduciary duty under Bankruptcy Code sections 1107(a) and 1108 to protect and preserve the estate "can only be fulfilled by the preplan satisfaction of a prepetition claim"); *In re CEI Roofing, Inc.*, 315 B.R. 50, 59 (Bankr. N.D. Tex. 2004) (opining that the debtor in possession and its "critical vendors" could request relief under Bankruptcy Code section 362(d) for cause, such cause "being the urgency and necessity of paying the prepetition claims, such payment being the only means of protecting the going concern value of the operating business in Chapter 11").

26. Courts are also empowered to authorize debtors to pay prepetition claims under Bankruptcy Code section 363(b)(1), which provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). This section gives the court "broad flexibility in tailoring its orders to meet a wide variety of circumstances." *Ionosphere Clubs, Inc.*, 98 B.R. at 175. Before the court can apply Bankruptcy Code section 363(b) in a debtor's favor, the debtor must "articulate some

business justification, other than mere appeasements of major creditors.” *Id.* (finding that the debtor gave “sound business reasons for its decision to pay pre-petition wages,” those reasons being that it was necessary to “serve and protect its business and ultimately reorganize, retain its currently working employees and maintain positive employee morale”). Here, the Debtors’ request to pay the Prepetition Wages, Prepetition Business Expenses, Prepetition Benefits, Prepetition Deductions, and Prepetition Processing Costs satisfies this standard because the failure to do so could have a material adverse impact on the Debtors’ day-to-day operations, which would, in turn, hinder the Debtors’ sale process.

27. Further, Bankruptcy Rule 6003 makes clear that the bankruptcy court, if “necessary to avoid immediate and irreparable harm,” may grant relief early in a bankruptcy case to “use, sell, lease, or otherwise incur an obligation regarding property of the estate, *including a motion to pay all or part of a claim that arose before the filing of the petition . . .*” Fed. R. Bankr. P. 6003 (emphasis added). Thus, Bankruptcy Rule 6003 specifically contemplates granting relief to honor prepetition claims where necessary to preserve the estate and the debtor’s prospects for reorganization and provides guidance on whether such authority should be granted immediately or delayed. And as set forth herein and in the First Day Declaration, the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors’ businesses. Accordingly, immediate approval is appropriate.

**D. Request for Authority for Banks to Honor and Pay Checks and Transfers Issued to Pay Prepetition Wages, Prepetition Business Expenses, Prepetition Deductions, Prepetition Benefits, and Prepetition Processing Costs**

28. To assist in implementing the relief requested herein, the Debtors further request that the Court authorize the Debtors’ banks and other financial institutions (the “Banks”) to receive, honor, process, and pay, at the Debtors’ request and to the extent of funds on deposit, (i)

prepetition payroll checks or electronic transfers and (ii) all other checks or electronic transfers issued for payments approved by this Motion, regardless of whether such checks or electronic transfers were drawn or issued prior to the Petition Date. The Debtors also seek authorization to reissue prepetition checks or electronic transfers for payments approved by this Motion that are dishonored notwithstanding the foregoing direction.

#### **WAIVER OF BANKRUPTCY RULES 6004(a) AND 6004(h)**

29. 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).

#### **RESERVATION OF RIGHTS**

30. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors' or any other party's rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under Bankruptcy Code section 365. If this Court grants the relief sought herein, any payment made pursuant to this Court's order is not intended and should not be construed as an admission of the validity of any claim or a waiver of the Debtors' or any other party's rights to dispute such claim subsequently.

#### **MOTION PRACTICE**

31. 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**

32. The Debtors will provide notice of this Motion 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 Energy Company; (d) counsel to Exelon Generation Company; (e) the Banks; (f) the Internal Revenue Service; (g) the United States Attorney for the Southern District of New York; and (h) 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**

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

WHEREFORE, The Debtors seek entry of the Interim Order and the Final Order, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**, respectively: (i) authorizing, but not directing, the Debtors to pay, in their sole discretion the: (a) Prepetition Wages; (b) Prepetition Business Expenses; (c) Prepetition Deductions; (d) Prepetition Benefits; and (e) Prepetition Processing Costs; (ii) authorizing, but not directing, the Debtors to honor and continue the Debtors' prepetition practices as described in this Motion with respect to the Prepetition Wages, Prepetition Business Expenses, Prepetition Deductions, Prepetition Benefits, and Prepetition Processing Costs in the ordinary course of business; (iii) authorizing the Debtors' Banks to process and honor checks and transfers related to such obligations; and (iii) granting such other and further relief as the Court deems appropriate.

Dated: October 4, 2019  
New York, NY

Respectfully submitted,

**MCDERMOTT WILL & EMERY LLP**

/s/ Darren Azman

Timothy W. Walsh

Darren Azman

Ravi Vohra

340 Madison Avenue

New York, NY 10173

Telephone: (212) 547-5615

Facsimile: (212) 547-5444

Email: dazman@mwe.com

rvohra@mwe.com

*Proposed Counsel to the Debtors  
and Debtors in Possession*



**Exhibit A**

Proposed Interim Order

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

---

In re:

AGERA ENERGY LLC, *et al.*,<sup>1</sup>

Debtors.

---

)  
) Chapter 11  
)

) Case No. 19-\_\_\_\_ (\_\_\_\_)  
)

) (Jointly Administered)  
)

) **Re: Docket No. \_\_**  
)

**INTERIM ORDER AUTHORIZING THE DEBTORS TO PAY CERTAIN  
PREPETITION WAGES, REIMBURSABLE EXPENSES,  
BENEFITS, AND RELATED ITEMS**

Upon the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”), for entry of an interim order (this “Interim Order”) authorizing, but not directing, the Debtors, in their sole discretion, to pay the: (a) Prepetition Wages; (b) Prepetition Business Expenses; (c) Prepetition Deductions; (d) Prepetition Benefits; and (e) Prepetition Processing Costs; (ii) authorizing, but not directing, the Debtors to honor and continue the Debtors’ prepetition practices as described in this Motion with respect to the Prepetition Wages, Prepetition Business Expenses, Prepetition Deductions, Prepetition Benefits, and Prepetition Processing Costs in the ordinary course of business; and (iii) authorizing the Debtors’ Banks to process and honor checks and transfers related to such obligations; and upon the First Day Declaration; and this Court having found that it has jurisdiction to consider the Motion 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,

---

<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not defined herein have the meanings ascribed to such terms in the Motion.

2012; and this Court having found that the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b); and that the Debtors consent to entry of a final order under Article III of the United States Constitution; and this Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and this Court having reviewed the Motion and having heard statements in support of the Motion at a hearing held before this Court (the “Hearing”); and this Court having determined that the legal and factual bases set forth in the Motion and the First Day Declaration and at the Hearing establish just cause for the relief granted herein; and any objections to the relief requested herein having been withdrawn or overruled on the merits; and after due deliberation thereon and good and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. The Motion is granted on an interim basis as set forth herein until such time as the Court conducts a final hearing on this matter (the “Final Hearing Date”).

2. The Final Hearing Date is scheduled for \_\_\_\_\_, 2019 at \_\_\_\_:\_\_\_\_ \_\_.m. (ET). Any objections or responses to the Motion shall be filed and served so as to be received by: (1) proposed counsel for the Debtors, McDermott Will & Emery LLP, 340 Madison Avenue, New York, NY 10173 (Attn: Darren Azman and Ravi Vohra), (2) the U.S. Trustee, U.S. Federal Office Building, 201 Varick Street, Suite 1006, New York, NY 10014 (Attn: Andrea B. Schwartz, Esq. and Shannon Scott, Esq.; andrea.b.schwartz@usdoj.gov and shannon.scott2@usdoj.gov), and (3) counsel to BP Energy Company, Haynes & Boone LLP, 1221 McKinney Street, Suite 2100, Houston, TX 77010 (Attn: Kelli S. Norfleet and Kathryn Shurin) by **4:00 p.m. (ET)** on or before **seven (7) days prior to the Final Hearing Date**. In the

event no objections to entry of a final order on the Motion are timely received, this Court may enter such final order without need for the final hearing.

3. Until such time as the Final Order is entered by this Court, pursuant to Bankruptcy Code sections 105(a), 362(d), 363(b), 507(a)(4), 507(a)(5), 1107(a), and 1108, the Debtors are authorized, but not directed, in their sole discretion, to pay the Prepetition Wages, Prepetition Deductions, Prepetition Business Expenses, Prepetition Benefits, and Prepetition Processing Costs that were accrued and unpaid as of the Petition Date; provided that, the Debtors are authorized, but not directed, to pay only amounts due and payable as of the Petition Date and amounts that are or become due and payable between the Petition Date and the date that a final order on the Motion is entered, unless otherwise ordered by this Court; provided further, that the Debtors are not authorized to pay any individual an amount, which, in the aggregate, is in excess of \$13,650 on account of any of the above.

4. All Banks on which checks were drawn or electronic payment requests were made in connection with the payments approved by this Interim Order are authorized to (i) receive, process, honor, and pay all such checks and electronic payment requests when presented for payment (assuming that sufficient funds are then available in the Debtors' bank accounts to cover such payments) and (ii) rely on the Debtors' designation of any particular check or electronic payment request as approved by this Interim Order. The Debtors are authorized to reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for all payments approved by this Interim Order where such method of payment has been dishonored postpetition.

5. The Debtors are authorized and empowered to take all actions necessary to effectuate the relief granted in this Interim Order in accordance with the Motion.

6. Notwithstanding the relief granted in this Interim Order and any actions taken pursuant to such relief, nothing in this Interim Order shall be deemed: (i) an admission as to the validity of any claim against the Debtors; (ii) a waiver of the Debtors' right to dispute any claim on any grounds; (iii) a promise or requirement to pay any claim; (iv) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion; (v) a request or authorization to assume any agreement, contract, or lease pursuant to Bankruptcy Code section 365; (vi) a waiver of the Debtors' rights under the Bankruptcy Code or any other applicable law; or (vii) to create any rights in favor of, or enhance the status of, any claim held by any person or entity.

7. Notwithstanding anything to the contrary contained in this Interim Order or in the Motion, any payment, obligation, or other relief authorized by this Interim Order shall be subject to and limited by the requirements imposed on the Debtors under the terms of any interim and/or final orders regarding the use of cash collateral or the approval of postpetition financing (any such order, a "Financing Order"), or any budget in connection therewith, approved by this Court in these Chapter 11 Cases. In the event of any conflict between the terms of this Interim Order and a Financing Order, the terms of the applicable Financing Order shall control (solely to the extent of such conflict).

8. Notice of the Motion as provided therein shall be deemed good and sufficient, and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

9. The requirements of Bankruptcy Rule 6003(b) have been satisfied.

10. Notwithstanding any applicability of any Bankruptcy Rules, the terms and conditions of the Interim Order shall be immediately effective and enforceable upon its entry.

11. This Court shall retain exclusive jurisdiction to hear and determine all matters arising from or related to the interpretation, implementation, or enforcement of the Interim Order.

Dated: \_\_\_\_\_, 2019  
White Plains, New York

\_\_\_\_\_  
THE HONORABLE ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE

**Exhibit B**

Proposed Final Order

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

---

In re:

AGERA ENERGY LLC, *et al.*,<sup>1</sup>

Debtors.

---

)  
) Chapter 11  
)

) Case No. 19-\_\_\_\_ (\_\_\_\_)

) (Jointly Administered)  
)

**FINAL ORDER AUTHORIZING THE DEBTORS TO PAY CERTAIN  
PREPETITION WAGES, REIMBURSABLE EXPENSES,  
BENEFITS, AND RELATED ITEMS**

Upon the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”), for entry of a final order (this “Final Order”) authorizing, but not directing, the Debtors, in their sole discretion, to pay the: (a) Prepetition Wages; (b) Prepetition Business Expenses; (c) Prepetition Deductions; (d) Prepetition Benefits; and (e) Prepetition Processing Costs; (ii) authorizing, but not directing, the Debtors to honor and continue the Debtors’ prepetition practices as described in this Motion with respect to the Prepetition Wages, Prepetition Business Expenses, Prepetition Deductions, Prepetition Benefits, and Prepetition Processing Costs in the ordinary course of business; and (iii) authorizing the Debtors’ Banks to process and honor checks and transfers related to such obligations; and upon the First Day Declaration; and this Court having found that it has jurisdiction to consider the Motion 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,

---

<sup>1</sup> 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); Aequis 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.

<sup>2</sup> Capitalized terms used but not defined herein have the meanings ascribed to such terms in the Motion.



2012; and this Court having found that the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b); and that the Debtors consent to entry of a final order under Article III of the United States Constitution; and this Court having found that venue of these Chapter 11 Cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having held a hearing on interim relief on \_\_\_\_\_, 2019; and this Court having entered an order granting interim relief on \_\_\_\_\_, 2019; and this Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and this Court having reviewed the Motion and having heard statements in support of the Motion at a hearing held before this Court (the “Hearing”); and this Court having determined that the legal and factual bases set forth in the Motion and the First Day Declaration and at the Hearing establish just cause for the relief granted herein; and any objections to the relief requested herein having been withdrawn or overruled on the merits; and after due deliberation thereon and good and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. Pursuant to Bankruptcy Code sections 105(a), 362(d), 363(b), 507(a)(4), 507(a)(5), 1107(a), and 1108, the Debtors are authorized, but not directed, in their sole discretion, to pay and honor all Prepetition Wages, Prepetition Deductions, Prepetition Business Expenses, Prepetition Benefits, and Prepetition Processing Costs; provided that the Debtors are not authorized to pay any individual an amount, which, in the aggregate, is in excess of \$13,650 on account of any of the above, and to honor and continue the Debtors’ prepetition practices as described in this Motion with respect to the Prepetition Wages, Prepetition Business Expenses,

Prepetition Deductions, Prepetition Benefits, and Prepetition Processing Costs in the ordinary course of business.

3. All Banks on which checks were drawn or electronic payment requests were made in connection with the payments approved by this Final Order are authorized to (i) receive, process, honor, and pay all such checks and electronic payment requests when presented for payment (assuming that sufficient funds are then available in the Debtors' bank accounts to cover such payments) and (ii) rely on the Debtors' designation of any particular check or electronic payment request as approved by this Final Order. The Debtors are authorized to reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for all payments approved by this Final Order where such method of payment has been dishonored postpetition.

4. The Debtors are authorized and empowered to take all actions necessary to effectuate the relief granted in this Final Order in accordance with the Motion.

5. Notwithstanding anything to the contrary contained in this Final Order or in the Motion, any payment, obligation, or other relief authorized by this Final Order shall be subject to and limited by the requirements imposed on the Debtors under the terms of any interim and/or final orders regarding the use of cash collateral or the approval of postpetition financing (any such order, a "Financing Order"), or any budget in connection therewith, approved by this Court in these Chapter 11 Cases. In the event of any conflict between the terms of this Final Order and a Financing Order, the terms of the applicable Financing Order shall control (solely to the extent of such conflict).

6. Notwithstanding the relief granted in this Final Order and any actions taken pursuant to such relief, nothing in this Final Order shall be deemed: (i) an admission as to the

validity of any claim against the Debtors; (ii) a waiver of the Debtors' right to dispute any claim on any grounds; (iii) a promise or requirement to pay any claim; (iv) an implication or admission that any particular claim is of a type specified or defined in this Final Order or the Motion; (v) a request or authorization to assume any agreement, contract, or lease pursuant to Bankruptcy Code section 365; (vi) a waiver of the Debtors' rights under the Bankruptcy Code or any other applicable law; or (vii) to create any rights in favor of, or enhance the status of, any claim held by any person or entity.

7. Notice of the Motion as provided therein shall be deemed good and sufficient, and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

8. The requirements of Bankruptcy Rule 6003(b) have been satisfied.

9. Notwithstanding any applicability of any Bankruptcy Rules, the terms and conditions of the Final Order shall be immediately effective and enforceable upon its entry.

10. This Court shall retain exclusive jurisdiction to hear and determine all matters arising from or related to the interpretation, implementation, or enforcement of the Final Order.

Dated: \_\_\_\_\_, 2019  
White Plains, New York

\_\_\_\_\_  
THE HONORABLE ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE