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Chapter 7

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9 **UNITED STATES BANKRUPTCY COURT**  
10 **EASTERN DISTRICT OF WASHINGTON**

11 In Re:

12 PONDERAY NEWSPRINT COMPANY,  
13 Debtor.  
14

CASE NO. 20-01309-FPC7

**MOTION FOR RELIEF FROM STAY  
AND ABANDONMENT**

15 COMES NOW, Public Utility District No. 1 of Pend Oreille County, (the “**PUD**”), a  
16 creditor of debtor Ponderay Newsprint Company (the “**Debtor**”) and hereby moves this Court  
17 pursuant to 11 U.S.C. §§ 362(d)(1) and (2) and 544(b), Fed. R. Bankr. P. 4001(a) and 6007, and  
18 LR 4001-1 and 6007-1 for entry of an order terminating the automatic stay to permit the PUD to  
19 exercise all of its rights and remedies with respect to certain collateral consisting of its \$10  
20 million deposit account (the “**Collateral**”) held by Wells Fargo Bank, N.A. (“**Wells Fargo**”)  
21 under a certain Collateral Trust Agreement and Custody Agreement and abandoning the  
22 Collateral such that the Collateral is no longer property of the estate (the “**Motion**”). In support  
23 of this Motion, the PUD respectfully represents the following:

24 **I. JURISDICTION AND VENUE**

25 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157.  
26 This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G).

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1 Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2 The Motion relies upon 11 U.S.C. §§ 362(d)(1) and 544(b) and Fed. R. Bankr. P 4001(a)  
3 and 6007 and the Declaration of Colin Willenbrock, hereinafter Willenbrock Dec., and exhibits  
4 thereto.

## 5 II. FACTUAL BACKGROUND

6 1. The PUD is a not-for-profit, public utility serving the residents and businesses of  
7 Pend Oreille County, Washington. The PUD owns and operates hydroelectric generating  
8 facilities, an electric transmission and distribution system, nine community water systems, and a  
9 wholesale broadband network. Pend Oreille County is economically distressed, with a 14.8%  
10 unemployment rate as of May 2020. Willenbrock Dec., ¶ 8.

11 2. On or about July 10, 1986, the Debtor entered into two substantively identical  
12 contracts to purchase power from the PUD (the “Power Contracts”). A true and correct copy of  
13 the Power Contracts is attached to the Willenbrock Dec., as **Exhibit A-1 through A-11** and  
14 incorporated herein by this reference. The Power Contracts run through June 2027 and require  
15 the Debtor to purchase and pay for all of the Debtor’s power needs under a cost-based rate.  
16 Willenbrock Dec., ¶ 12, **Ex. A-11, § 3**. The Debtor’s annual power requirements exceed 85  
17 average megawatts (“aMW”), and its annual power bills exceed \$25 million. Willenbrock Dec.,  
18 ¶ 13. The Debtor consumes approximately 70% of all power sold by the PUD to its electric  
19 customers in Pend Oreille County, and pays for a roughly proportionate share of The PUD’s  
20 costs. Willenbrock Dec., ¶ 14.

21 3. The PUD has financial obligations that must be met, including obligations to  
22 make payments to its bondholders and payments required under the PUD’s federal license to  
23 operate Box Canyon Dam. Willenbrock Dec., ¶ 15. The PUD’s annual debt-service payments  
24 exceed \$10 million. Willenbrock Dec., ¶ 16. In 1999, the PUD applied for a new, 50-year  
25 license for Box Canyon Dam from the Federal Energy Regulatory Commission. Willenbrock  
26 Dec., ¶ 17. In applying for the new license, the PUD agreed to make improvements to the dam

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1 and other environmental mitigation measures that the PUD financed by issuing more than \$150  
2 million in bonds. Willenbrock Dec., ¶ 18. In doing so, the PUD relied upon the Debtor agreeing  
3 to be a long-term customer that would pay the substantial portion of these costs over the next 30  
4 years; this is reflected in the fact that the PUD and the Debtor agreed to extend the Power  
5 Contracts by an additional 20 years a decade earlier than was required. Willenbrock Dec., ¶ 19.

6 4. Pursuant to the terms of the Power Contracts, in the event of early contract  
7 termination, the Debtor owes liquidated damages and further “shall remain liable for the cost of  
8 Power scheduled prior to the Effective Date of Termination...” Willenbrock Dec., ¶ 20, **Ex. A-**  
9 **11 § 14.A(1)**.

10 5. To partially secure its obligations under the Power Contracts, the Debtor  
11 established a cash deposit account through Wells Fargo to hold the Collateral. Willenbrock  
12 Dec., ¶ 21. The Collateral is established pursuant to a certain Collateral Trust Agreement dated  
13 January 7, 2010, and a Custody Agreement dated January 7, 2010. Willenbrock Dec., ¶ 23. A  
14 true and correct copy of the Collateral Trust Agreement is attached as **Exhibit B** to the  
15 Willenbrock Dec., and a true and correct copy of the Custody Agreement is attached as **Exhibit**  
16 **C** to the Willenbrock Dec., each of which are incorporated herein by this reference (and  
17 collectively **Exhibit B** and **Exhibit C** are known as the “**Account Control Agreement**”).

18 6. The PUD has maintained custody and control over the Collateral under the  
19 Account Control Agreement since January 2010. Willenbrock Dec., ¶ 25.

20 7. The balance in the deposit account as of June 30, 2020 equals \$10,125,946.14,  
21 which includes \$125,946.14 in interest. Willenbrock Dec., ¶ 26.

22 8. The PUD does not claim a security interest in or to the interest accrued and  
23 accruing on its Collateral and will turn over the interest to the Trustee upon the entry of an order  
24 from the Court. Willenbrock Dec., ¶ 27.

25 9. Pursuant to the Power Contracts, semi-monthly payments are to be made to the  
26 PUD. Willenbrock Dec., ¶ 28. The Debtor defaulted on its obligations under the Power

1 Contracts by failing to make the semi-monthly payment due on June 22, 2020. The amount of  
2 that payment was \$1,065,009.47. Willenbrock Dec., ¶ 29.

3 10. Pursuant to § 13.A of the Power Contracts, the PUD provided the Debtor with  
4 notice of breach and intent to terminate the Power Contracts, via notice letter dated June 23,  
5 2020 (the “**Notice Letter**”). Willenbrock Dec., ¶ 30. A true and correct copy of the Notice  
6 Letter is attached as **Exhibit D** to the Willenbrock Dec. and incorporated herein by this  
7 reference. The Notice Letter gave the Debtor until July 6, 2020, to cure its breach. Willenbrock  
8 Dec., ¶ 31, **Ex. D**. The Debtor did not cure its breach prior to commencing this Chapter 7  
9 proceeding. Willenbrock Dec., ¶ 31.

10 11. The Notice Letter also provided the Debtor with a statement of amounts that  
11 would be owed to the PUD if the Debtor did not timely cure its breach. Willenbrock Dec., ¶ 32.  
12 As of July 7, 2020, Debtor’s gross liquidated damages are \$33,000,000, which are estimated to  
13 net to \$17,399,680 under the calculation provided in § 14 of the Power Contracts. Further, the  
14 Debtor’s balance-of-year power costs total \$14,866,687.57. The Debtor’s total amount owed  
15 within 30 days of the Effective Date of Termination under the terms of the Power Contracts (i.e.,  
16 by August 6, 2020), is \$32,266,367.57, which includes the June 22, 2020 pre-petition amount  
17 owed (\$1,065,009.47). Willenbrock Dec., ¶ 33, **Ex. D**.

18 12. On June 26, 2020 (“Petition Date”), the Debtor commenced a voluntary case  
19 under Chapter 7 of the Bankruptcy Code. John Munding was appointed Chapter 7 trustee (the  
20 “**Trustee**”) over the administration of the Debtor’s bankruptcy estate (the “**Bankruptcy Estate**”  
21 or simply “**Estate**”). See Dkt No. 1.

22 13. Even after remarketing power that would have been sold to the Debtor, the PUD  
23 will lose potentially millions of dollars each month that the Debtor is not making payments as  
24 required under the Power Contracts. Those payments allow the PUD to provide for safe, reliable  
25 electric service to its customers and to make payments to the PUD’s bondholders. Willenbrock  
26 Dec., ¶ 35.

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### III. RELIEF REQUESTED

1. By this Motion, the PUD seeks entry of an order, pursuant to 11 U.S.C. § 362(d)(1), terminating the automatic stay to permit the PUD to exercise all of its rights and remedies under applicable law with respect to the Collateral, including but not limited to immediately accessing and drawing on the Collateral.

2. By way of this Motion, the PUD also seeks entry of an order, pursuant to 11 U.S.C. § 554 ordering that any interest the Trustee and the Bankruptcy Estate may have in the Collateral is abandoned.

### IV. LEGAL ARGUMENT

#### 1. The PUD holds a possessory lien in and to the Collateral.

The Debtor and the PUD agreed that the Debtor would deposit \$10,000,000 into a deposit account with Wells Fargo to secure utility payments to the PUD under the Power Contracts. Willenbrock Dec., ¶¶ 21-22. The Account Control Agreement governing the deposit account holding the \$10,000,000 is a security agreement and specifically contains language granting the PUD a security interest in the Collateral. Willenbrock Dec., ¶¶ 23-24, **Ex. B**, ¶1. The PUD has controlled the Collateral under the Account Control Agreement since January 2010.

A security interest in a deposit account is perfected by control. *See* RCW 62A.9A-314(a). Under RCW 62A.9A-104(a)(2), “[a] secured creditor has control of a deposit account if...[t]he debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor.” The Account Control Agreement constitutes such a record signed by the Debtor, the PUD, and Wells Fargo. Because the PUD was granted a security interest in and to the deposit account and because the PUD has control of the deposit account, the PUD holds a properly perfected, possessory lien interest in and to the Collateral in accordance with RCW 62A.9A-314(a). Accordingly, as a secured creditor, the

1 PUD is seeking relief from stay to take possession of the Collateral and apply the Collateral to  
2 the sums due and owing to the PUD under the Power Contracts.

3 **2. The PUD holds no security interest in the Accrued and Accruing Interest**  
4 **being earned on the Collateral.**

5 The PUD claims no security interest in the interest accrued and accruing on the  
6 Collateral. Willenbrock Dec., ¶ 27. As a result, the Motion herein only seeks relief from stay to  
7 take possession of the Collateral and not the interest being earning on the Collateral. The PUD  
8 will turn over to the Trustee the accrued and accruing interest earned on the Collateral at the time  
9 the PUD takes possession of the Collateral as provided in any order entered by the Court on this  
10 Motion.

11 **3. Relief from Stay.**

12 **a. Cause exists to grant the PUD relief from the stay because the PUD is not**  
13 **adequately protected and the Bankruptcy Estate does not have equity in the**  
14 **Collateral.**

15 Under 11 U.S.C. § 362(d)(1), the court shall grant a motion for relief from the stay by  
16 terminating, annulling, modifying, or conditioning the stay “for cause, including the lack of  
17 adequate protection” of the moving party’s interest in property of the Debtor. The use of the  
18 word “including” in the section, however, is not a limiting term. 11 U.S.C. § 102(3). Thus,  
19 “[l]ack of adequate protection is but one example of ‘cause’ for relief from stay.” *In re Ellis*, 60  
20 B.R. 432, 435 (9th Cir. BAP 1985). In fact, “cause” for lifting the automatic stay has no clear  
21 definition and is determined on a case-by-case basis. *Benedor Corp. v. Conejo Enters. (In re*  
22 *Conejo Enters, Inc.)*, 96 F.3d 346, 352 (9th Cir. 1996); *In re Tucson Estates, Inc.*, 912 F.2d 1162,  
23 1166 (9th Cir. 1990); *Delaney–Morin v. Day (In re Delaney–Morin)*, 304 B.R. 365, 369 (9th Cir.  
24 BAP 2003) (*citing MacDonald v. MacDonald (In re MacDonald)*, 755 F.2d 715, 717 (9th Cir.  
1985)).

25 Here, there are a number of causal bases for granting relief from stay. First, the PUD is  
26 not adequately protected. “While ... adequate protection is not defined in the Bankruptcy Code,

1 11 U.S.C. § 361 sets forth three non-exclusive examples of what may constitute adequate  
2 protection: 1) periodic cash payments equivalent to decrease in value, 2) an additional or  
3 replacement lien on other property, or 3) other relief that provides the indubitable equivalent.”  
4 *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir.1984) *citing In re Curtis*, 9 B.R. 110, 111-112  
5 (B.Ct.E.D.Penn.1981).

6 The Debtor has failed to make its required semi-monthly payments to the PUD since  
7 June 22, 2020. The purpose of the Collateral is to allow PUD immediate “security for any and  
8 all payments, charges, or obligations due.” Willenbrock Dec., ¶ 22, **Ex. A-11 § 17.B**. It is  
9 undisputed that the Debtor is in breach of the Power Contracts for failure to make pre-petition  
10 payments. Further, it is highly doubtful that the Trustee will cure the Debtor’s breach to avoid  
11 owing substantial amounts to the PUD, including liquidated damages and balance-of-year power  
12 costs. Willenbrock Dec., ¶ 34. Finally, the Bankruptcy Estate simply does not have the funds or  
13 ability to provide any assets to replace the “indubitable equivalent” of the Collateral. *See* Dkt  
14 No. 6.

15 Moreover, even after reselling the power that was scheduled to be used by the Debtor, the  
16 PUD will face potentially millions of dollars in damages each month that the Debtor does not  
17 pay its power bills and the ultimate termination of the Power Contracts will result in additional  
18 millions of dollars in damages for the PUD. Willenbrock Dec., ¶ 35. The PUD has obligations  
19 to pay its bondholders and other state, federal, tribal, and local agencies pursuant to the PUD’s  
20 license to operate Box Canyon Dam. Willenbrock Dec., ¶ 15. As a result, the PUD’s interest is  
21 not adequately protected.

22 The second causal basis to grant the PUD relief from stay is there is no equity in the  
23 Collateral for the Bankruptcy Estate. *See In re Russell*, 567 B.R. 833, 841 (Bankr.D.Mont. 2017)  
24 (lack of equity in the property constitutes cause for relief from stay). The PUD has a possessory  
25 lien in and to the Collateral. The evidence the PUD submitted to the Court shows that the PUD  
26 is owed approximately \$32,266,367.57. Willenbrock Dec. ¶ 33. However, the Collateral only

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1 has a value of \$10,000,000. Willenbrock Dec., ¶ 21. Accordingly, the PUD is undersecured by  
2 its possessory lien in and to the Collateral. Because the PUD is undersecured, there is no equity  
3 in the Collateral for the benefit of the Bankruptcy Estate.

4 As a result, because the PUD is not adequately protected and because the Bankruptcy  
5 Estate has no equity in the Collateral, the PUD is entitled to an order terminating the automatic  
6 stay for cause to permit the PUD to exercise all of its rights and remedies under applicable law  
7 with respect to the Collateral.

8 **b. The PUD is further entitled to relief from stay because there is no equity in  
9 the Collateral and the Collateral is not necessary for an effective  
reorganization.**

10 Under 11 U.S.C. § 362(d)(2), a party is entitled to relief from stay where the debtor has  
11 no equity in the property and the property is not necessary for an effective reorganization.  
12 A party seeking relief from stay under § 362(d)(2) bears the burden of showing that the debtor  
13 has no equity in the property subject to the stay. 11 U.S.C. § 362(g)(1); *In re Faires*, 34 B.R.  
14 549, 551 (Bankr. W.D. Wash. 1983). The burden then shifts to the debtor to show that the  
15 property is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *Sun Valley  
16 Newspapers v. Sun World Corp.*, (*In re Sun Valley Newspapers*), 171 B.R. 71, 75 (9th Cir. BAP  
17 1994). Where the debtor is not reorganizing, the second test under 11 U.S.C. § 362(d)(2) is  
18 irrelevant. *In re Preuss*, 15 B.R. 896, 897 (Bankr. 9th Cir. BAP 1981).

19 **i. The Debtor Has No Equity in the Collateral.**

20 The term “equity” as it is used in 11 U.S.C. § 362(d)(2)(A), means “the difference  
21 between the value of the property and all encumbrances against it.” *Stewart v. Gurley*, 745 F.2d  
22 1194, 1196 (9th Cir. 1984); *Sun Valley Newspapers*, 171 B.R. at 75; *In re Faires*, 34 B.R. at 552.  
23 As set forth above, the PUD has presented evidence to the Court that it has a valid, properly  
24 perfected possessory lien in and to the Collateral. Willenbrock Dec., ¶¶ 21-25. Because this is a  
25 possessory lien, there are no other liens against the Collateral.

1 As further set forth above, the evidence shows that the PUD is owed approximately  
2 \$32,266,367.57. Willenbrock Dec., ¶ 33. However, the Collateral only has a value of  
3 \$10,000,000. Willenbrock Dec., ¶ 21. Accordingly, the PUD is undersecured by its possessory  
4 lien in and to the Collateral. Because the PUD is undersecured, there is no equity in the  
5 Collateral for the benefit of the Bankruptcy Estate. As a result, the PUD has met its burden  
6 under § 362(d)(2).

7 **ii. The Collateral is not necessary for an effective reorganization.**

8 As already mentioned above, where a debtor is not reorganizing, the only issue is whether  
9 there is equity in the property. *Preuss*, 15 B.R. at 897 citing *In re Stewart*, 3 Bankr. 24, 2 CBC  
10 2d 529 (ND OH, 1980, Schlachet BJ) and *In re Moore*, 5 B.R. 449 (D MD 1980, Goldburn BJ).

11 Because the PUD has shown that there is no equity in the Collateral, “it is incumbent  
12 upon the court to dissolve the automatic stay.” *Preuss*, 15 B.R. at 898.

13 **4. Abandonment.**

14 Under 11 U.S.C. § 541(b), the Court may enter an order directing a Trustee to abandon  
15 property if the Court finds the property is (1) burdensome to the estate; or (2) of inconsequential  
16 value and inconsequential benefit to the estate. *Vu v. Kendall*, (*In re Vu*), 245 B.R. 644, 647 (9th  
17 Cir. BAP 2000). Here, the Court should order the Trustee to abandon the Collateral because the  
18 Collateral is both burdensome and of inconsequential value and benefit to the estate.

19 **a. The Collateral is burdensome.**

20 The Collateral the PUD wishes the Trustee to abandon secures an obligation to the PUD  
21 that exceeds the value of the Collateral. Willenbrock Dec., ¶¶ 21,33. As a result, if the Trustee  
22 were required to administer the Collateral, the Trustee would be administering property from  
23 which the estate will derive no benefit. Accordingly, the Collateral is burdensome to the estate  
24 and should be abandoned.

1                   **b. The Collateral is of inconsequential value and benefit to the Estate.**

2                   There would be no value inuring for the benefit of creditors or the estate if the Trustee is  
3 required to retain the Collateral. The Collateral is secured by the PUD's properly perfected  
4 possessory lien. Willenbrock Dec., ¶¶ 21-25, **Ex. B** and **Ex. C**. The value of the PUD's claim  
5 securing the lien on the Collateral exceeds the \$10,000,000 deposit constituting the Collateral.  
6 Willenbrock Dec., ¶ 33. As a result, there is no equity in the Collateral that could inure to the  
7 benefit of the estate or the creditors of the estate. Where the property affords no benefit to  
8 creditors or the estate, the property is of inconsequential value. *C.f. Morgan v. K.C. Mach. &*  
9 *Tool Co. (In re K.C. Mach. & Tool Co.)*, 816 F.2d 238, 245 (6th Cir. 1987) ("Abandonment  
10 should not be ordered where the benefit of administering the asset exceeds the cost of doing  
11 so.").

12                   Here, the evidence clearly demonstrates that there is no benefit to administering the  
13 Collateral because it is fully encumbered. Moreover, if the Trustee were to administer the  
14 property, the Trustee would simply incur administrative liabilities. This is clearly not a benefit  
15 to the estate. *Morgan*, 816 F.2d at 246, n.9 (duty to abandon where cost of administering assets  
16 exceeds benefit to estate).

17                   Accordingly, because retention of the Collateral will not result in an increase in assets for  
18 the benefit of creditors, but merely an incur liabilities for the estate, the Collateral is of  
19 inconsequential value and benefit to the estate and should be abandoned.

20                   **5. Waiver of Bankruptcy Rule 4001(a)(3).**

21                   The PUD requests that the stay as to the effectiveness of the Order be waived as provided  
22 in Bankruptcy Rule 4001(a)(3) because the PUD is continuing to accrue substantial damages.

23                   **V. CONCLUSION**

24                   Based on the foregoing arguments, the PUD respectfully requests that this Court enter an  
25 order, substantially in the form attached hereto, (i) terminating the automatic stay to permit the  
26 PUD to exercise all of its rights and remedies under applicable law with respect to the Collateral,

1 including but not limited to immediately accessing and drawing on the Collateral, (ii) ordering  
2 that any interest the Trustee and the Bankruptcy Estate may have in the Collateral is abandoned,  
3 and (iii) ordering that the provisions of Bankruptcy Rule 4001(a)(3) are waived such that the  
4 effectiveness of the Order is not stayed for fourteen days.

5 DATED this 2<sup>nd</sup> day of July, 2020.

6 **FOSTER GARVEY P.C.**

7 */s/ Deborah A. Crabbe*

8 By \_\_\_\_\_  
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MOTION - 11

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