IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:	)	**Chapter 11**
	)	
FURR'S SUPERMARKET,	)	**Case No. 11-01-10779**
	)	
Debtor.	)	

MOTION OF VALOR TELECOMMUNICATIONS
FOR ADEQUATE ASSURANCE OF PAYMENT OR, IN THE
ALTERNATIVE, TO TERMINATE SERVICE, AND FOR
PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM

COMES NOW Valor Telecommications, Inc., ("Valor") and, pursuant to 11 U.S.C. §§ 366, 503(b)(1)(A) and 507(a)(1), files this Motion and seek an Order granting:

(a) Adequate assurance of payment pursuant to 11 U.S.C. § 366, or in the alternative, the right to immediately terminate service, and

(b) Payment of an administrative expense claim for all post-petition utility services provided by the Valor to the Debtor.

FACTUAL BACKGROUND

1. On February 8, 2001 (the "Petition Date"), Furr's Supermarket ("Furr's Supermarket" or the "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. Valor is a provider of telecommunications services to the Debtor, and has continued to provide such services to the Debtor during the pendency of this bankruptcy case.

3. This Court entered its Section 366 Order (the "§ 366 Order").

4. Since filing its Chapter 11 petition, the Debtor has failed to pay its post-petition charges for services provided it by Valor.

5. The Debtor's pre-petition obligations to Valor are significant: $16,373.13.

6. From the Petition Date through October 2, 2001, the Debtor has incurred additional charges in the approximate amount of $20,404.27.

ARGUMENT AND CITATION TO AUTHORITY

A. Valor Has The Right To Adequate Assurance Of Payment Or To Terminate Service

7. Section 366 of the Bankruptcy Code addresses utility service to a debtor and provides specific protection for the debtor and the creditor. Section 366 provides as follows:

> (1) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.
>
> (2) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On a request of a party in interest and after notice of hearing, the Court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

11 U.S.C. § 366.

8. In order to maintain service from Valor, the Debtor must timely pay for its post petition usage. This has not occurred, and, in addition to a substantial pre-petition debt to Valor, the Debtor has failed to pay all of its post-petition charges that have accrued.

9. In view of the Debtor's failure to pay, Valor is entitled now to seek full compliance with the provisions of § 366 in the form of (1) payment of all post-petition charges accrued to date, and (2) an adequate deposit. To the extent the Debtor will not provide this, Valor should be allowed to terminate service.

10. In In re Hanrattv, 907 F.2d 1418 (3d Cir. 1990), the debtors sought to require an electric utility company to provide utility service without the payment of a security deposit. The Third Circuit Court of Appeals found that "[u]nder subsection (b), a utility is expressly authorized to request a debtor to furnish adequate assurance of payment in the form of a security deposit and may discontinue service if it is not provided within 20 days after the order for relief." Id, at 1423. The court added that "[w]e could only reach the result urged by the debtors by engrafting a court-created exception on 11 U.S.C. § 366 which would not further the purpose of that section. This we will not do." Id

incurred a prepetition bill of over $400,000, the court commented that "[t]he debtor proposes to earn its way out of its current financial embarrassment ... [t]he issue is whether Bell South may be compelled to finance that effort," and the court required the debtor/reseller of long distance to provide a deposit to Bell South.[1]

12. At most, the Court may only modify the amount of the deposit or other security necessary to provide adequate assurance of payment. The "scope of jurisdiction granted by Section 366 to the bankruptcy court is explicitly limited to ordering `reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment, in case the debtor or trustee and the utility cannot reach agreement on the amount.'" Robinson v. Michigan Consolidated Gas Co., 918 F.2d 579, 588 (6th Cir. 1990) (finding that Section 366 does not preempt state procedural regulations). As stated by the Sixth Circuit Court of Appeals, it is "well-established" that a utility may terminate service in accordance with state procedural regulations if, after expiration of the 20-day period, the debtor fails to post adequate assurance of payment for post-petition service or the debtor posts adequate assurance but fails to make a post-petition payment. Id See also Begley v. Philadelphia Elec. Co., 760 F.2d 46, 48-51 (3d Cir. 1985) (reaching same conclusions as Robinson).

13. In In re Conxus Communications. Inc., 262 B.R. 893, 899 (D.Del. 2001)(Farnan, J.) the District Court reversed a bankruptcy court's injunction that barred telecommunications service providers from discontinuing service based on the Debtor's *post petition* default. The District Court in Conxus noted that the Bankruptcy Court had incorrectly utilized its equitable powers under § 105 to restrict the utility's rights "while

[1] Only where the debtor is able to demonstrate a history of timely pre-petition payments, a clear financial ability to maintain post-petition payments from unencumbered assets and sufficient net worth - facts not present in this case - have some courts not required a separate deposit or other security. See In re Penn Jersey Corp., 72 B.R. 981 (Bank. E.D. Pa. 1987) (court found super-priority administrative claim sufficient under these facts). This is clearly not the case with this Debtor.

expanding the Debtor's rights beyond the protection afforded to Debtors under Section 366." 262 B.R. at 899. The District Court further concluded that the failure to file the required adversary proceeding "was alone sufficient reason . . . to deny [the] request for an injunction." 262 B.R. at 899.

14. The District Court in Conxus also explicitly found that a utility had the right to terminate services to a Debtor based on the Debtor's post-petition default:

> Pursuant to Section 366, a "utility" may not terminate or refuse service to a debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was no paid when due." 11 U.S.C. § 366(a). However, the Third Circuit has recognized that Section 366 does not preclude a utility from terminating services based upon a debtor's post-petition default. Begley v. Philadelphia Elec. Co., 760 F.2d 46, 50 (3d Cir. 1985)(recognizing that utility may "commence termination procedures once a post-petition payment is missed, despite the prior security or `assurance' deposit'").

262 B.R. at 899.

15. In light of the Debtor's prepetition and post-petition defaults - in excess of $36,700 - and the magnitude of Valor's exposure attributable to the Debtor's continued use of Valor's telecommunications services (without having paid for such services or having provided a deposit), the Debtor has demonstrated that Valor is faced with an unreasonable risk of continued non-payment. As described in the authority cited above, the Debtor is required to provide adequate assurance of payment to Valor pursuant to Section 366(b) of the Bankruptcy Code. The Debtor, therefore, should be required to (1) immediately pay all charges for post-petition services, and (2) post a security deposit immediately in an amount equal to two month's usage based on historical usage levels. The amount of such a deposit for wholesale services alone is at least $7,200.

16. In the event the requested payment and deposit are not immediately made, the Court should confirm Valor's right to terminate service immediately.

B. <u>Valor Should Be Granted An Administrative Expense Claim Pursuant to §503 Of The Bankruptcy Code.</u>

17. Section 503 of the Bankruptcy Code provides, in part, as follows:

> (a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request as permitted by the court for cause;
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under Section 502(f) of this title, including-
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including, wages, salaries, or commissions for services rendered after the commencement of the case….

11 U.S.C. § 503(a) and (b)(1)(A).

18. The Debtor would not have sufficient services, and its ability to generate post-petition income would be substantially impaired, without the telecommunication services being provided by Valor. Accordingly, Valor's services are "actual, necessary costs and expenses of preserving the estate" pursuant to §503(b)(1)(A) of the Bankruptcy Code.

19. Thus Valor requests this Court enter an order, pursuant to §503(b)(1)(A) of the Bankruptcy Code, directing the Debtor to immediately pay all past due invoices from Valor and to timely pay all invoices from Valor as and when they become due, as an administrative expense priority claim.

WHEREFORE, Valor respectfully requests this Court enter an Order:

(i) directing the Debtor to immediately: (a) pay all post-petition amounts due for Valor's provision of post-petition services, pursuant to 11 U.S.C. §366 and 11 U.S.C. §503(b)(1)(A); and (b) post a security deposit in an amount equal to two (2) month's average usage as adequate assurance of payment to Valor pursuant to the provisions of §366(b) of the Bankruptcy Code, which Valor asserts is a minimum of $7200.00; or, alternatively, confirm Valor's right to terminate service immediately; and

(ii) directing the Debtor to timely pay all invoices from Valor as and when they become due and providing Valor with an administrative expense claim for all unpaid post-petition services provided to the Debtor pursuant to the provisions of §503(b)(1)(A) of the Bankruptcy Code; and

(iii) for such other and further relief as this Court deems just and proper.

Respectfully Submitted:

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I certify that on October 2, 2001 I mailed a true copy of the foregoing to the attorneys/parties listed below:

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