

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT  
ALBUQUERQUE N.M.

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In re : **11-001-10779-00**  
FURR'S SUPERMARKETS, INC., : Chapter 11  
Debtor. :  
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MOTION FOR ORDER UNDER 11 U.S.C. §§ 105, 366, 503(b), AND 507(a)  
PROHIBITING UTILITIES FROM ALTERING, REFUSING OR  
DISCONTINUING SERVICES ON ACCOUNT OF PREPETITION  
INVOICES AND ESTABLISHING PROCEDURES FOR DETERMINING  
REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE

Furr's Supermarkets, Inc., debtor and debtor-in-possession (the "Debtor"), submits this motion (the "Motion") for an order under 11 U.S.C. §§ 105, 366, 503(b), and 507(a) (i) prohibiting the Debtor's utility service providers (collectively, the "Utility Companies")<sup>1</sup> from altering, refusing or discontinuing services on account of outstanding prepetition invoices and (ii) establishing procedures for determining requests by the Utility Companies for additional adequate assurance.

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The Utility Companies are listed on Exhibit A to the proposed order, submitted herewith. The Debtor believes that Exhibit A is substantially complete but acknowledges that it may have inadvertently omitted some Utility Companies. All of the Utility Companies are "utilities" within the meaning of 11 U.S.C. § 366.

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## BACKGROUND

1. On February 8, 2001 (the "Petition Date"), the Debtor filed a voluntary petition in this Court for reorganization relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code").

The Debtor continues to operate its businesses and manage its property as a debtor-in-possession under sections 1107 and 1108 of the Bankruptcy Code.

2. No creditors' committee, trustee or examiner has been appointed in the Debtor's Chapter 11 case.

3. The Debtor is a leading regional supermarket chain, with operations in New Mexico and Western Texas. The Debtor has a leading market share in this region. The Debtor employs some 4,900 individuals, and operates seventy-one stores.

4. The Debtor's stores offer a broad selection of grocery, meat, poultry, seafood, dairy, fresh fruits, vegetables and frozen food products. The stores also offer an extended line of non-food products, health and beauty care products, housewares, general merchandise and, in many instances, in-store pharmacies.

## JURISDICTION AND VENUE

5. The Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334 and this matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper under 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

6. The Debtor seeks immediate entry of an order, substantially in the form submitted herewith, (i) prohibiting the Utility Companies from altering, refusing or discontinuing services on account of prepetition invoices and (ii) establishing procedures for determining requests for additional adequate assurance. Under the proposed order submitted herewith: (a) if a Utility Company timely requests additional adequate assurance that the Debtor believes is unreasonable, the Debtor will file a Motion for Determination of Adequate Assurance (the "Determination Motion") and set the motion for hearing (the "Determination Hearing"), (b) if a Determination Motion is filed and a Determination Hearing scheduled, the Utility Company shall be deemed to have adequate assurance of payment under section 366 of the Bankruptcy Code until the entry of a final order finding that the Utility Company is not adequately assured of future payment, which final order, after the Determination Hearing, shall fix the amount of any additional adequate assurance payments, and (c) any Utility Company that does not timely request additional adequate assurance shall be deemed to have adequate assurance under section 366 of the Bankruptcy Code. In addition, the proposed order establishes a procedure for supplementing the Debtor's list of Utility Companies.

## BASIS FOR RELIEF

7. The Debtor currently uses gas, water, electric and telephone utility services provided by numerous Utility Companies, including those listed on Exhibit A to the proposed Order. Any interruption in these services would seriously hamper the Debtor's ability to operate and, perhaps, to reorganize successfully.

8. Utility services such as gas, water, electricity and telephone service are vital to (a) afford the Debtor's employees a safe and sanitary work environment, (b) ensure uninterrupted operations at the Debtor's various stores, warehouse and corporate office, and (c) maintain the Debtor's computer system through which the Debtor monitors and integrates its operations, including, but not limited to, its cash management system. Even a temporary interruption in utility services could seriously disrupt the Debtor's operations.

9. To the best of the Debtor's knowledge, as of the Petition Date there are no significant defaults with respect to any utility bills. The Debtor anticipates that its ongoing business operations will generate cash flow which, when combined with the funds available under its proposed debtor-in-possession financing, will be sufficient to permit the Debtor to pay all of its postpetition utility bills on a current and ongoing basis.

10. The absence of significant prepetition defaults, the ability to pay future utility bills, and the administrative expense priority afforded under sections 503(b) and

507(a)(1) of the Bankruptcy Code constitute adequate assurance to the Utility Companies of payment for all future services. Substantial, additional cash security deposits to the Utility Companies are unnecessary and unwarranted.

#### APPLICABLE AUTHORITY

11. Under Bankruptcy Code section 366:

(a) 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.

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

11 U.S.C. § 366.

12. Section 366 protects a debtor against termination of its utility service immediately upon the commencement of its chapter 11 case while simultaneously providing utility companies with adequate assurance of payment for postpetition utility service. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 350, reprinted in 1978 U.S. Code & Cong. Admin. News 6306.

13. Whether a utility is subject to an unreasonable risk of nonpayment for postpetition services and whether it is therefore entitled to receive a new deposit must

be determined from the facts and circumstances of each case. See Massachusetts Electric Co. v. Keydata Corp. (In re Keydata Corp.), 12 B.R. 156 (1st Cir. B.A.P. 1981); see also In re Woodland Corp., 48 B.R. 623 (Bankr. D.N.M. 1985).

14. Absent a pre-bankruptcy default, section 366(b) of the Bankruptcy Code does not require a debtor to provide deposits and other security to utility companies as adequate assurance of payment. Indeed, Congress recognized that "[i]t will not be necessary to have a deposit in every case" to provide adequate assurance. H.R. Rep. No. 595, 95th Cong., 1st Sess. 350, reprinted in 1978 U.S. Code & Cong. Admin. News 6306; see In re Shirey, 25 B.R. 247, 249 (Bankr. E.D. Pa. 1982) ("section 366(b) of the Code does not permit a utility to request adequate assurance of payment for continued services unless there has been a default by the debtor on a pre-petition debt owed for services rendered").

15. Section 366 contemplates that a utility should receive assurance of payment that is appropriate given the debtor's financial situation. "[A] bankruptcy court's authority to 'modify' the level of the 'deposit or other security,' provided for under section 366(b), includes the power to require no 'deposit or other security' where none is necessary to provide a utility with 'adequate assurance of payment.'" Virginia Elec. & Power Co. v. Caldor, Inc. (In re Caldor, Inc.), 117 F.3d 646, 650 (2d Cir. 1997).

16. Here, the Debtor's ability to pay future utility bills from ongoing operations and postpetition financing constitute adequate assurance of payment for future utility services within the meaning of section 366 of the Bankruptcy Code. The Debtor has sufficient assets to pay its postpetition costs of administration on a timely basis and to pay its utility bills as they become due.

17. These facts and circumstances require a finding that adequate assurance of future payment to the Utility Companies exists without requiring the Debtor to provide to the Utility Companies cash deposits or other additional assurances of future payment. For that reason, the Court should enter the proposed Order, requiring that the Utility Companies continue to provide utility services and establishing a procedure for the resolution of any disputes relating to adequate assurance.

18. Notice. The Debtor has served notice of this Motion by hand delivery on the United States Trustee and by facsimile on the Debtor's secured creditors and its twenty largest unsecured creditors. In view of the nature of the relief requested, the Debtor submits that this notice is proper and adequate under the circumstances.

19. If the Court enters the Order submitted herewith, the Debtor will (as provided therein) promptly serve copies of the Order on all Utility Companies listed on Exhibit A.

WHEREFORE, the Debtor respectfully requests that the Court enter an interim order in the form submitted herewith, pending final hearing, (i) prohibiting the

Utility Companies from altering, refusing or discontinuing service on account of outstanding prepetition invoices, (ii) establishing procedures for determining requests

for additional adequate assurance, and (iii) granting the Debtor such other and further relief as is just and proper.

Dated: Albuquerque, New Mexico  
February 7, 2001

JACOBVITZ THUMA & WALKER  
A Professional Corporation

By:  \_\_\_\_\_

Robert H. Jacobvitz  
500 Marquette N.W., Suite 650  
Albuquerque, New Mexico 87102  
(505) 766-9272  
(505) 766-9287 (fax)

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP  
Jay M. Goffman  
Alan J. Carr  
Four Times Square  
New York, New York 10036-6522  
(212) 735-3000

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP  
Richard Levin (CA State Bar No. 66578)  
Jamie L. Edmonson (CA State Bar No. 185384)  
Stephen J. Lubben (CA State Bar No. 190338)  
Amy S. Park (CA State Bar No. 208204)  
300 South Grand Avenue, Suite 3400  
Los Angeles, California 90071-3144  
(213) 687-5000

*Attorneys for the Debtor-in-Possession*