

IN THE UNITED STATES OF BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

In Re:	:	
	:	
EXPRESS ONE INTERNATIONAL, INC.	:	Case No. 02-41981
	:	Chapter 11
Debtor.	:	

**CORRECTED**  
**PRELIMINARY MEMORANDUM ORDER PURSUANT TO 11 U.S.C. §366**

The Debtor has filed a pleading denominated Motion of the Debtor and Debtor in Possession for an Interim and Final Order (i) Establishing Adequate Assurance of Payments for Future Utility Services and (ii) Restraining Utility Companies from Discontinuing, Altering or Refusing Service Pursuant to Section 366 of the Bankruptcy Code (the “Motion”). Though the Debtor does not seek a ruling on the Motion today, the Court, as hereinafter set forth, has questions about the Motion that it believes the Debtor and other parties in interest should address.

**I. Introduction**

By the Motion Debtor seeks from this Court an Order establishing certain procedures that it alleges satisfy its obligation under 11 U.S.C. §366.<sup>1</sup> In essence, Debtor asserts that provision to utilities of a cost of administration priority status for postpetition claims constitutes “adequate assurance of payment” of those claims within the meaning of

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<sup>1</sup> Section 366 states:

- (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.

§366(b). (Motion ¶ 13). Debtor further proposes to give its utility providers 30 days within which to request additional “adequate assurance” of payment of postpetition bills. (Motion ¶ 19b). If a utility<sup>2</sup> does not request further “adequate assurance” within the 30 day period, it is to be “deemed on a final basis, to have adequate assurance of payment.” (Motion ¶ 19e). If a utility makes a request for further “adequate assurance,” the Debtor may either reach agreement with the utility without further order of the Court or bring the matter before the Court. (Motion ¶¶ 19c, 19d).

By the Motion Debtor also asks the Court to prohibit utilities “from drawing upon any existing cash security deposit, surety bond or other form of security to secure future payments for utility services.” (Motion ¶ 18). The Court is unclear why this relief is sought. To the extent *prepetition* deposits are applied to *postpetition*, as opposed to *prepetition*, debt or used to secure against payment of postpetition debt, it would not seem to the Court to be harmful to the Debtor or its estate.

## I. Issues

Besides the question raised by the Court at the end of the preceding section, the Motion must be evaluated by the Court in terms of its obligation to enforce the Bankruptcy Code—in this case, specifically, §366.

Section 366(b) of the Code poses three questions that this Court must address to determine whether the procedures proposed by Debtor satisfy its requirements. The first question, as Debtor recognizes, is what is a “utility” within the meaning of §366. The Court concludes that the Debtor’s efforts to identify likely candidates for protection under §366(b) (Exhibit A to the Motion) and the Notice procedures proposed by the Debtor

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<sup>2</sup> Debtor lists 38 entities as utilities in Exhibit A to the Motion but notes there may be other entities covered by §366. (Motion ¶ 20). Debtor also reserves the right to argue that an entity listed on Exhibit A is not a utility. (Motion ¶ 10 n.2).

(Motion ¶20) are sufficient to identify whether the meaning of “utility” will be an issue in this case.<sup>3</sup>

The second question the Court must decide is whether a “cost of administration claim” in this case constitutes “adequate assurance of payment” within the meaning of §366(b). Congress has provided guidance as to the meaning of “adequate assurance of payment” in the next, modifying clause of §366(b). Thus, adequate assurance must be “in the form of a deposit or other security.” The term deposit is fairly clear, but what constitutes “other security” is not. While “security” is a term defined in the Code, *see* 11 U.S.C. §101(49), the definition encompasses such things as common stock and limited partnership interests.

Use of the plain meaning rule in construing a statute must give way when common sense tells us that its application could lead to an absurd result. *See United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543, 60 S. Ct. 1059, 1063-64, 84 L. Ed. 1345 (1940); *see also In re Broughton*, 6 B.R. 1011, 1017 (N.D. Ga. 1980). The use of the defined meaning of “security” to construe §366(b) would lead to such an absurd result.

Utilities have argued that “security,” as used in §366(b) means something like a deposit, e.g., a lien or similar device to secure the utility against loss. *See, e.g., In re Stagecoach Enter., Inc.*, 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979)(other security is a “payment bond or some similar device”). However, Congress has defined “lien,” *see* 11 U.S.C. §101(37), and “security interest,” *see* 11 U.S.C. §101(51), and knew how to grant such protection to a creditor. *See, e.g.,* 11 U.S.C. §546(d)(2)(requiring grant of lien as predicate to denial of reclamation by certain creditors).

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<sup>3</sup> The Bankruptcy Code does not define “utility.”

The Court’s preliminary conclusion regarding the meaning of “security” as used in §366(b) is that it refers back to the term “assurance.” Thus, a debtor or trustee provides “other security” if the utility is assured of payment for postpetition services.

In the instant case, the Debtor argues that cost of administration status may be adequate assurance of payment under §366(b). The Court agrees—but only when an estate is clearly administratively solvent. If there is a colorable risk of administrative insolvency, then the offer of an administrative claim does not constitute adequate assurance of payment.

In the instant case the Court does not know whether the Debtor’s estate will prove administratively solvent. Moreover, the Court is troubled by the Debtor’s willingness to enter into agreements providing more favorable protection to utilities that request it. If a claim under §§503(b) and 507(a)(1) is adequate assurance for some utilities, it should serve for all. The Court has therefore decided to substitute the procedures set out, *infra*, for dealing with utilities in lieu of those proposed in the Motion. These procedures accommodate the possibility that the Debtor is administratively solvent by giving Debtor an opportunity to so prove. They also provide for the eventuality that more than a cost of administration claim will be required to provide adequate assurance of payment to Debtor’s utilities.

The final issue posed by §366(b) and the Motion is whether the procedures proposed by Debtor (as modified below) satisfy the requirement that a debtor “furnish” adequate assurance of payment. Again, the word chosen by Congress is ambiguous. Certainly the Motion “offers” a cost of administration claim as “adequate assurance of payment.” However, Debtor’s provision in ¶19c and ¶19d of the Motion for negotiating other

“adequate assurance” leads the Court to the conclusion that the Motion does not “furnish”<sup>4</sup> adequate assurance and so does not itself satisfy the requirement imposed §366(b). The Court therefore concludes that it is necessary to address whether a cost of administration claim constitutes “adequate assurance of payment” in this case.

## II. ORDER

For the foregoing reasons, it is

ORDERED that a hearing be held before this Court at 10:00 a.m. on the 5<sup>th</sup> day of April, 2002, to determine whether cost of administration status for the claim of a utility in this case constitutes adequate assurance of payment within the meaning of 11 U.S.C. §366(b); and it is further

ORDERED that any party in interest that intends to participate in such hearing shall file a response to the Motion and any other pleading it wishes the Court to consider on or before April 1, 2002; and it is further

ORDERED that, consistent with 11 U.S.C. §366(a), no utility may cease providing service to Debtor until further Order of this Court; and it is further

ORDERED that, upon obtaining authority to use cash collateral, pending the hearing hereby set, Debtor shall promptly pay any bill received for utility services provided to Debtor after commencement of this case (including, where appropriate, bills prorated between pre- and postpetition services); and it is further

ORDERED that Debtor shall promptly deposit into an account designated as “Express One Utility Contingency Account” 17% of any amount paid pursuant to the preceding paragraph; and it is further

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<sup>4</sup> “Furnish” is not only not defined in the Bankruptcy Code, it is not included in BLACK’S LAW DICTIONARY. Thus the Court assumes Congress meant by the word its customary meaning: provide or supply. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1976).

ORDERED that Debtor shall serve a copy of this Order upon the entities listed on Exhibit A to the Motion, any other entities described in ¶20 of the Motion, any committee appointed in this case pursuant to 11 U.S.C. §1102, the 20 largest unsecured creditors listed by Debtor in accordance with FED. R. BANKR. P. 1007(d) and any entity that has requested notices in this case pursuant to FED. R. BANKR. P. 2002(i) prior to March 18, 2002.

Signed this the 19<sup>th</sup> day of March, 2002.

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DENNIS MICHAEL LYNN  
UNITED STATES BANKRUPTCY JUDGE