The following constitutes the ruling of the court and has the force and effect therein described.

Signed January 4, 2009 **United States Bankruptcy Judge**

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

In re	§	**Chapter 11**
PILGRIM'S PRIDE CORPORATION, *et al.*,	§	**Case No. 08-45664 (DML)**
Debtors.	§	
	§	**JOINTLY ADMINISTERED**

MEMORANDUM ORDER
[Related to Docket No. 51]

Before the court is the *Debtor's Motion Pursuant to Sections 105(a) and 366 of the Bankruptcy Code to (i) Approve Debtors' Proposed Form of Adequate Assurance; (ii) Establish Procedures for Resolving Objections by Utility Companies; and (iii) Prohibit Utilities from*

Altering, Refusing, or Discontinuing Service (the "Motion")[1] filed by Debtors.[2] By the Motion Debtors seek certain relief respecting utilities that serve Debtors' various facilities. A number of objections were filed to the Motion[3] and the court held a hearing on the Motion on December 30, 2008 (the "Hearing").

At the Hearing Debtors advised the court that, following discussions with the objecting parties, agreements had been reached with each and, in light of this, all objections to the Motion were withdrawn. The court invited parties objecting to the Motion (most of which had announced appearances at the Hearing) to address the Motion, but no party did so. The court therefore announced it would approve the arrangements agreed to between Debtors and each objecting party, and the court now reiterates that approval, holding that Debtors and the objecting parties are bound by their agreements and that the objecting parties have each been afforded "adequate assurance of payment" of post-petition billings as required by section 366 of the Bankruptcy Code (the "Code")[4] and each is therefore barred from, altering, refusing or discontinuing utility service to Debtors or any of them under section 366(c)(2) of the Code on the basis that it did not receive satisfactory adequate assurance of payment.

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1 The Motion was filed at docket no. 51.

2 As used herein, the term "Debtors" shall have the same meaning as in the Motion.

3 Objections to the Motion were filed by Carroll Electric Membership Corporation, Jackson Electric Membership Corp., Rayle Electric Membership Corp., South Carolina Electric & Gas Co., Public Service of North Carolina, Inc., Scana Energy Marketing of Georgia, Scana Energy Marketing, Inc., Southeast Alabama Gas Dist., Deep East Texas Electric, Inc., Upshur County Rural Electric Co-Op, Corp., Duke Energy Carolinas, LLC, Shenandoah Valley Electric Cooperative, CenterPoint Energy Gas Transmission Co., CerterPoint Energy Entex, CerterPoint Energy Arkla, CerterPoint Energy Services, Inc., Alleghney Power, Florida Power Corp. d/b/a Progress Energy Florida, Carolina Power & Light Co. d/b/a Progress Energy Carolinas, Piedmont Natural Gas, Virginia Electric and Power Co. d/b/a Dominion Virginia Power, American Electric Power, Municipal and Cooperative Utilities, Alabama Power Co., Bicounty Water Supply, Wood County Electric Cooperative, Bowie Cass Electric Cooperative, Additional Municipal and Cooperative Utilities, TXU Energy Retail Company, LP, El Dorado Water Utilities, City of Sumpter, South Carolina, Marshall County Gas District and Improvement Authority for the City of Fort Payne.

4 11 U.S.C. §§ 101, *et. seq*.

The objecting parties, however, do not constitute the entire universe of utilities that serve Debtors. Debtors accordingly ask in the Motion that the court conclude that any utility that failed to object to the Motion is now barred from asserting that the assurances of payments proposed in the Motion are not adequate. While Debtors propose a loop hole for any utility that may not have had notice of the Motion, the effect of granting the relief sought in the Motion would be to force upon the non-objecting utilities "adequate assurance of payment" deemed sufficient by Debtors.

In determining the relief it may grant upon the Motion, the court is governed by Code § 366(c)(2). Section 366(c)(2) states:

> Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in section (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.

See 11 U.S.C. § 366(c)(2).

While section 366(c)(4) (which deals with offset of prepetition utility deposits) is not relevant to the court's disposition of the Motion, section 366(c)(3)(A) states "On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2)." See 11 U.S.C. § 366(c)(3)(A).

The court is governed by the plain meaning of a statute. See *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004), *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989). The plain meaning of section 366(c)(2) is that a utility "may alter, refuse or discontinue…service" if it does not receive "adequate assurance of payment for utility service that is satisfactory to the utility." Section 366(c)(2) imposes no requirement that a utility come to the court before altering, refusing or discontinuing service, though clearly Congress knew how

to condition an action upon first seeking a hearing (see, e.g., Code §§ 362, 1104(a) and 1113(d)). Likewise nothing in section 366 suggests that the court may set a time limit within which a utility must contest a debtor's proposal of adequate assurance or that the court may prohibit a utility from thereafter demanding further or alternate assurance. The court thus concludes that it cannot grant relief to Debtors as sought in the Motion.

At first blush, this would seem to leave Debtors' operations poised precariously on the verge of disaster. If a critical utility should determine that the assurance of payment proposed by Debtors is not "satisfactory" nothing in section 366 prevents that utility from altering, refusing or discontinuing service to Debtors. The consequences of an unexpected termination of utility service to one of Debtors could be catastrophic. As stated in the Motion, Debtors' business requires uninterrupted service from certain utilities, and, if a critical utility may terminate service to one of Debtors without notice, substantial loss would likely occur.

The court concludes, however, that the situation is not so desperate as it first appears. If the Code does not restrict actions by a utility once the 30 days specified in section 366(c)(2) have passed, neither does it excuse a utility from complying with the requirements of other applicable law before terminating service to a customer, including one of Debtors.[5] State or local law typically requires notice prior to termination of service by a utility.[6] Even absent a notice period specified in applicable law a utility may not terminate service to a customer without giving the customer reasonable notice.

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[5] Congress knew how to avoid the application of applicable of non-bankruptcy law. See, e.g., Code §§ 362, 1145, 545 and 524. Had Congress wished to exempt utilities action under section 366 from applicable non-bankruptcy law, it would have said so.

[6] See, e.g., 16 TEX. ADMIN. CODE § 25.29 (1999) (Disconnection of Service); Alabama Public Service Commission General Rule 12 (1998) (found at http://www.psc.state.al.us/Administrative/GenRules_01_10_05.pdf).

Moreover, if a utility elects to terminate service to a debtor under the Code, it may not, in doing so, rely on notice given prior to the commencement of the debtor's bankruptcy case. Termination in reliance on such a prepetition notice (or based upon a prepetition failure to pay or other prepetition default) would violate Code §§ 362(a)(1) and 362(a)(6). Termination (alteration, refusal or discontinuance) of service by a utility based on a debtor's (or trustee's) failure to provide adequate assurance of payment, the court thus holds, may occur only after such notice as is required under other non-bankruptcy applicable law, or, in any event, after reasonable notice. This court, of course, has and retains the jurisdiction to determine whether notice of a termination of service to any Debtors by a utility meets the requirements of applicable law or reasonableness.

As Debtors must therefore have at least reasonable notice of any utility's decision to terminate service, Debtors will have an opportunity to negotiate adequate assurance with the utility or, if necessary, to invoke Code § 366(c)(3) to obtain a determination from the court respecting adequate assurance. Pending a determination under section 366(c)(3), the court can, if necessary, provide temporary injunctive relief to preserve Debtors' estates and their respective businesses. Thus, full force and effect may be given to Code § 366 without undue risk to Debtors and their economic constituencies.

For the foregoing reasons, the Motion is disposed of as follows:

It is:

ORDERED that the agreements regarding adequate assurance of payment among Debtors and the parties objecting to the Motion are APPROVED and the parties objecting to the Motion are deemed to have received from Debtors adequate assurance of payment within the meaning of Code § 366(c)(2) and, therefore, may not alter, refuse or discontinue utility service to

any of Debtors absent a default in postpetition payment by such Debtor (in which case such utility may act as permitted by applicable non-bankruptcy law); and it is further

ORDERED that any utility that did not object to the Motion which provides service to any of Debtors, which utility did not, pursuant to the Motion receive adequate assurance of payment for utility service that is satisfactory to such utility, may, after 30 days after the commencement of these cases and only after compliance with all applicable non-bankruptcy law, including giving any notice that is required under applicable law and is in any event no less reasonable, alter, refuse or discontinue utility service to Debtors or any of them; and it is further

ORDERED that this court reserves jurisdiction to determine whether any utility seeking to alter, refuse or discontinue utility service to Debtors or any of them has complied with applicable non-bankruptcy law, including giving required, or at least reasonable notice to Debtors of such alteration, refusal or discontinuance; and it is further

ORDERED that nothing herein shall prejudice the rights of Debtors or any of them or any other party in interest to seek appropriate relief from this court under Code § 366(c)(3) or Code § 105(a), including in the event any utility should give notice of its intent to alter, refuse or discontinue services to Debtors or any of them.

END OF MEMORANDUM ORDER