

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
* CASE NUMBER 06-40455
PELLIN EMERGENCY MEDICAL *
SERVICE, INC., * CHAPTER 11
*
Debtor. * THE HONORABLE KAY WOODS
*

MEMORANDUM OPINION REGARDING DEBTOR'S EMERGENCY MOTION
FOR DETERMINATION THAT UTILITIES HAVE ADEQUATE
ASSURANCE OF PAYMENT PURSUANT TO SECTION 366

Debtor Pellin Emergency Medical Service, Inc. ("Debtor") filed a voluntary petition pursuant to Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") on April 11, 2006 (the "Petition Date"). Debtor's petition indicates that it is a small business.

On April 12, 2006, Debtor filed several emergency motions, otherwise known as "First Day Motions," one of which was Debtor's Emergency Motion for a Determination that Utilities Have Adequate Assurance of Payment Pursuant to Section 366 (the "Utility Motion"). Attached to the Utility Motion was a "Utilities List," which set forth twelve utility service providers that were affected by the Utility Motion. Debtor represented in the Utility Motion that "[n]otice of this Motion has been given by e-mail or by mail to the United States Trustee, the twenty largest unsecured creditors of the Debtor and all Utilities." (Utility Motion, ¶ 6.)

By Order dated April 14, 2006, this Court granted Debtor's motion to set emergency hearings on each of the motions filed on April 12, 2006, including the Utility Motion. Hearing was scheduled

for April 17, 2005 at 10:30 a.m. At the hearing on April 17, Debtor represented that it was imperative that utility service continue without interruption or Debtor would not be able to continue its business operations of providing, among other services, emergency ambulance service. In particular, Debtor represented that, because of the nature of its business, it was a "911 Call Center" that required uninterrupted telephone service. The Court did not rule on the Utility Motion on that date, but adjourned the hearing until May 2, 2006 at 10:30 a.m. in order to obtain clarification about the relief being sought by the Debtor.

No utility or other party in interest filed a response to or otherwise opposed the Utility Motion.

The hearing on the Utility Motion was continued on May 2. No utility or other party in interest appeared at the hearing. In the Utility Motion, Debtor sought authority to pay pre-petition utility bills and stated that it would have adequate accounts receivable to meet its post-petition operating expenses, such as bills for utility services. The Utility Motion set forth that Debtor was seeking authority to "continue to pay all bills for Utility Services in the ordinary course of business including all service accruing before the filing date." (Utility Motion, ¶ 4.) Debtor requested the Court to enter an order that would provide each utility on the Utilities List a period of thirty (30) days to object to the proposed method of adequate assurance. If any utility objected, then Debtor would, with Court authority, re-characterize the payment for services prior to the Petition Date to be deemed to be a pre-payment for post-petition service, with such utility then having a pre-petition claim for the unpaid pre-petition utility

service.

The Court questioned how this could be done. If the Court authorized Debtor to pay certain pre-petition claims, the Debtor would not be able to re-characterize such payments as "pre-payment" of other bills. Debtor did not propose to pre-pay one entire month of utility service for each utility and Debtor's counsel was not able to tell the Court how much (either by percentage, fractional amount, or dollar amount) Debtor wanted to offer as pre-payment to each utility.

In response to questioning from the Court, Debtor's counsel orally modified the Utility Motion to request authority for the Debtor to pay each utility an amount equal to the current billing with any amount attributable to pre-petition service to be a pre-payment for service on the next bill. Debtor requested that, thereafter, it be permitted to continue to pay the bills for utility service in full with such pre-payment amount as adequate assurance of payment.

When Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005, it made significant changes to Section 366 of the Bankruptcy Code regarding utility service. The current version of Section 366 reads as follows:

(a) Except as provided in subsection (b) and (c) 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.

(c) (1) (A) For purposes of this subsection, the term "assurance of payment" means--

(i) a cash deposit;

(ii) a letter of credit;

(iii) a certificate of deposit;

(iv) a surety bond;

(v) a prepayment of utility consumption;
or

(vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee.

(B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment.

(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the 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.

(3) (A) 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).

(B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider--

(i) the absence of security before the date of the filing of the petition;

(ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or

(iii) the availability of an administrative expense priority.

(4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility may recover or set off against a security deposit provided to the utility by the debtor before the date of the filing of the petition without notice or order of the court.

11 U.S.C. § 366.

Prior to enactment of BAPCPA, a debtor frequently provided adequate assurance of payment to a utility by granting such utility an administrative expense priority claim for provision of utility service post petition. BAPCPA specifically provides that "an administrative expense priority shall not constitute an assurance of payment." (§ 366(c)(1)(B) of the Bankruptcy Code.) BAPCPA also appears to change the process pursuant to which a debtor assures a utility of adequate performance. Subsection (b) of § 366 provides that a utility may alter, refuse, or discontinue service if the debtor does not, "within 20 days after the date of the order for relief, furnish[] adequate assurance of payment, in the form of a deposit or other security, for service after such date." This subsection appears to contemplate that the debtor will actually contact each utility and offer a deposit amount of other form of security. Although BAPCPA does not prohibit emergency motions such as the Utility Motion, the new language in § 366 does not appear to contemplate such motions.

In the present case, Debtor has not independently contacted any of the utilities on the Utility List. Instead, Debtor's counsel postulates that the Utility Motion itself is Debtor's offer of adequate assurance through the form of security of a partial month's pre-payment. Since the emergency hearing on the Utility Motion

was adjourned from April 17 until May 2, giving each of the notified utilities twenty (20) days' notice of the hearing and the relief requested, this Court will deem, under these circumstances, notice of the Utility Motion and notice of the hearing, as Debtor "furnishing" adequate assurance of payment to each utility. In both the Utility Motion and at the hearing, Debtor was not able to articulate how much of a pre-payment was being proposed for each utility. As a consequence, the Court cannot find or hold that the failure of any utility to respond to or oppose the Utility Motion constitutes such utility's agreement with or consent to the offer by the Debtor as adequate assurance of payment.

This Court finds that it would be appropriate to provide each utility with time to determine the specific amount of pre-payment being proposed by the Debtor for that utility.¹ Each utility will have forty-five (45) days from the date the order is entered to determine if it finds Debtor's pre-payment proposal acceptable and, if not, to respond to the proposed pre-payment amount and offer an alternate form of security for the Debtor to consider. Any such response and offer shall be filed with the Court. In the event that any utility rejects Debtor's proposed pre-payment amount on the basis that it does not constitute adequate assurance of payment, this Court will set the matter for further hearing. Absent such further hearing and further order of the Court, each utility on the Utility List is prohibited from altering, refusing or discontinuing

¹The Court anticipated, after the hearing on May 2, 2006, that Debtor would determine the fractional pre-petition amount of each proposed payment to each utility. This apparently has not been done and Debtor appears to be relying on each utility to determine the actual amount of each bill that relates to pre-petition services. Each utility will need some time to figure the pre-petition amount.

utility service to the Debtor.

An appropriate order will be entered.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
AT YOUNGSTOWN, OHIO**

IN RE:)	CASE NO. 06-40455
)	
PELLIN EMERGENCY MEDICAL)	CHAPTER 11
SERVICE, INC.,)	
)	
Debtor)	BANKRUPTCY JUDGE:
)	KAY WOODS
(Employer Tax I.D. No. 34-1434256))	
_____)	

**ORDER REGARDING ADEQUATE ASSURANCE OF
PAYMENT TO UTILITIES PURSUANT TO
SECTION 366**

This matter came on for hearing at 10:30 a.m. on April 17, 2006 upon the Emergency Motion of the Debtor for a Determination the Utilities Have Adequate Assurance of Payment Pursuant to Section 366 (the "Utilities Motion") and was continued for further consideration to May 2, 2006 at 10:30 a.m. The Debtor's Emergency Motion for a Determination the Utilities Have Adequate Assurance of Payment Pursuant to Section 366 was filed on April 12, 2006 and served upon the following utilities:

Allied Waste
Account: 1-0360-6013338
PO Box 830125
Baltimore, MD 21283-0125

AT & T
Acct# 3305332289
PO Box 9001309
Louisville, KY 40290

Cellular One
Account: 0120172511
PO Box 17308
Baltimore, MD 21297-1308

East Ohio Gas
Account: 8420300323490
PO Box 26785
Richmond, VA 23261-6785

Nextel Communications
Account: 208960012
PO Box 6220
Carol Stream, IL 60197-6220

Ohio Edison
Account: 11017100048
PO Box 3690
Akron, OH 44399-0001

Ohio Edison
Account: 110015992966
PO Box 3690
Akron, OH 44399-0001

SBC
Account: 33053322883517
Bill Payment Center
Saginaw, MI 48663-0003

SBC
Account: 33079230309952
Bill Payment Center
Saginaw, MI 48663-0003

Sprint
Account: 3306542288492
PO Box 740463
Cincinnati, OH 45274

Sprint
Account: :
PO Box 740463
Cincinnati, OH 45274

Youngstown Water Department
Account: 160672-2 0
PO Box 6219
Youngstown, OH 44501

Allied Waste
Account: 2-0360-0358051
P O Box 830125
Baltimore, MD 21283-0125

Dominion East Ohio Gas
Account: 4500015079242
P O Box 26785
Richmond, VA 23261-6785

AT&T
Accounts: 3305336616 1558803
3305338467 0884216
PO Box 9001309
Louisville, KY 40290

SBC
Accounts: 33079201648560
33053318875683
33053334908609
33053833428863
33053329806917
33053366166811
33053384675868
33096590378063

Bill Payment Center
Saginaw, MI 48663-0003

Ohio Edison
Accounts: 110016409994
110016470541
110017100121
110015582551
110015898866

PO Box 3690
Akron, OH 44399-0001

Sprint
Account: 3306542868910
PO Box 740463
Cincinnati, OH 45274

Dominion East Ohio Gas
Account: 4500015079242
P O Box 26785
Richmond, VA 23261-6785

Youngstown Water Department
Account: 120006-0 2
PO Box 6219
Youngstown, OH 44501

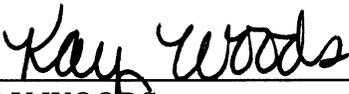
Mahoning County Sanitary Engineer
Account: 49112929-03
7980 E. Parkside Dr.
Youngstown, OH 44512-5300

The Debtor obtains utility services from vendors for which the Debtor is contractually obligated either directly or indirectly through its various leases and agreements including those accounts specifically identified in the Motion.

The Debtor is authorized to make payments to each utility pursuant to this Order. Debtor is authorized and directed to pay the outstanding bill for each utility that covers services for both pre-petition and post-petition periods of time; provided, however, that the amount paid equivalent to any pre-petition period of time shall not be payment for pre-petition services, but shall constitute pre-payment of Debtor's post-petition utility usage and shall constitute Debtor's proffer of adequate assurance of payment to each utility. Each utility will also have a claim for the pre-petition amount owed to it, which claim shall be scheduled by the Debtor. Each utility may file a proof of claim if it is not otherwise in agreement with the amount scheduled by the Debtor.

As set forth in the Memorandum Opinion of this Court, each utility shall have forty-five (45) days from the entry of this Order to object to the amount of pre-payment offered by Debtor, and authorized by this Order, as adequate assurance pursuant to 11 U.S.C. Section 366. Any such objection shall be filed with the court and served upon Debtor, the United States Trustee and the Debtor's twenty (20) largest creditors prior to expiration of the forty-five (45) day period.

Each utility given notice of this order shall continue service subject to their right to seek modification pursuant to 11 U.S.C. §366.



KAY WOODS
United States Bankruptcy Judge