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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

REPUBLIC AIRWAYS HOLDINGS INC., et al.,

Debtors.

Chapter 11 Case No. 16-10429-shl

Jointly Administered

**WASTE CONNECTIONS OF NORTH CAROLINA'S OPPOSITION
TO DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 366 & 105(a) FOR ENTRY OF
INTERIM AND FINAL ORDERS (i) APPROVING DEBTORS' PROPOSED FORM OF
ADEQUATE ASSURANCE OF PAYMENT TO UTILITIES, (ii) ESTABLISHING
PROCEDURES FOR RESOLVING OBJECTIONS BY UTILITY COMPANIES, AND
(iii) PROHIBITING UTILITIES FROM ALTERING, REFUSING, OR
DISCONTINUING SERVICE**

TO THE HONORABLE SEAN H. LANE, UNITED STATES BANKRUPTCY JUDGE:

Waste Connections of North Carolina, Inc. ("WCNC"), by its undersigned counsel, objects to Debtors' Motion Pursuant to 11 U.S.C. §§ 366 & 105(a) for Entry of Interim and Final Orders (i) Approving Debtors' Proposed Form of Adequate Assurance of Payment to Utilities, (ii) Establishing Procedures for Resolving Objections by Utility Companies, and (iii) Prohibiting Utilities from Altering, Refusing, or Discontinuing Service (the "Motion"), as follows.

INTRODUCTION

1. WCNC provides solid waste disposal services to Republic Airline, Inc. in the Charlotte, North Carolina area. The Motion seeks to have the Court designate WCNC as a “utility” for purposes of 11 U.S.C. § 366 without any evidence whatsoever to support this characterization. In fact, WCNC is not a regulated or monopoly provider of waste disposal services, and, therefore, is not a “utility” for purposes of § 366. Designation as a “utility” would force WCNC to provide services at the price negotiated for a long-term contract rather than at current market rates, and would force WCNC to provide those services without the assurance that Republic Arline Inc. (“Airline”) would remain a customer.

2. WCNC is clearly not a utility. No local or state ordinance regulates the prices that WCNC may charge to its customers, nor is there any local or state ordinance that requires WCNC to provide service to everyone. And there are several other local options for precisely the same services WCNC currently provides to Airline.

3. This Motion is an effort to make an end run around the requirement in 11 U.S.C. § 365 that an executory contract be rejected, or assumed, as a whole. Airline should not be permitted to partially assume the Contract, and WCNC should not be forced to provide service to Airline without the Contract being assumed.

4. To the extent the Court rules that WCNC is a “utility,” however, WCNC objects to the deposit of a single sum of \$122,000 for the benefit of all utilities nationwide used by any of the Debtors.¹ The sum is far too low, and none of it will be deposited specifically for WCNC’s benefit.

¹ “Debtors” as means Republic Airways Services, Inc., Shuttle America Corporation; Republic Airways Holdings Inc., Midwest Air Group, Inc.; Midwest Airlines, Inc.; and Skyway Airlines, Inc. in addition to Airline.

STATEMENT OF FACTS

5. Republic Services of North Carolina, LLC, doing business as Republic Waste Services (“Republic Waste Services”), entered into a Service Agreement with Airline on or about February 6, 2008 (the “Contract”). Declaration of Tim Fadul, submitted herewith (“Fadul Dec.”), ¶ 2 and Exhibit 1.

6. Republic Waste Services is a competitor of WCNC. In 2009, as part of a much larger arrangement, in part, mandated by a court case, WCNC purchased the Contract as well as others in the Charlotte area from Republic Waste Services, which assigned the contract to WCNC. Fadul Dec., ¶ 3.

7. Debtors acknowledge in the Motion that Airline’s current relationship is with WCNC, not Republic Waste Services, now known as Republic Services, Inc. *Id.*

8. The Contract is a three-year contract that renews automatically for successive three-year terms. It is currently in a three-year term that will not end until February 2017. Fadul Dec., Exhibit 1.

9. The services that WCNC performs for Airline under the Contract consist of commercial solid waste pickup and disposal. WCNC provides a container to Airline. Then, on a regular service schedule, WCNC empties the container into its collection truck, transports the solid waste to WCNC’s disposal site and disposes of the waste. Fadul Dec., ¶ 4.

10. Numerous providers exist in the Charlotte area that could provide the same solid waste disposal service to Airline. There are several nationwide waste services such as Advanced Disposal, Waste Management, Republic Services and Waste Pro operating in the Charlotte area; there are also several local companies that provide the same type of waste management services locally in Charlotte, NC. Fadul Dec., ¶ 5.

11. These companies all provide the same types of services that WCNC provides to Airline, and any one of them could provide the same waste management disposal services to Airline, if requested to do so. Fadul Dec., ¶ 6.

12. No local ordinance or state law regulates the prices that WCNC may charge to its customers, nor is there any local ordinance or state law that requires WCNC to provide service to everyone. Fadul Dec., ¶ 7.

DISCUSSION

A. WCNC is not a “utility” because it is not a regulated monopoly; Airline could easily obtain the same services from a different provider.

13. The only evidentiary support for the Motion is the Declaration of Bryan K. Bedford (docket #4, the “Bedford Dec.”), which discusses the Motion only on pages 37-38 and makes no reference to WCNC or to any other specific provider. The Bedford Dec. *assumes* that “water, electricity, natural gas, waste management, [and] telephone ... services” are “Utility Services,” regardless of the terms on which they are provided or local market conditions, and indeed *defines* them as such.

14. The Motion does the same, then goes on to define all providers of “Utility Services,” as so defined, as “Utility Companies.” The Motion lists various companies, including WCNC, on Schedule 1 to the Motion, and includes all those companies in the definition of “Utility Companies” as well.

15. The proposed Order would prohibit all “Utility Companies” – as defined in the Motion, including all companies listed on Schedule 1 to the Motion – from refusing service to any of the Debtors.

16. Although the term “utility” is not defined in the Bankruptcy Code, three key features are recognized as making an entity a “utility” for purposes of §366: whether the service

provided is necessary to basic existence, whether the provider is a monopoly, and whether the provider is subject to special government regulation. As the Third Circuit stated in *In re Whittaker*, 882 F.2d 791, 794 (3d Cir. 1989), “The subject matter of § 366 received special treatment because Congress recognized both that utility service is essential to a minimally acceptable standard of living and that such services are often available only from a single source.” Even if the provider is not technically a monopoly, § 366 may be applied if the service is essential and it would be very difficult to replace the service. See, e.g., *In re One Stop Realtour Place, Inc.*, 268 B.R. 430, 435-36 (Bankr. E.D. Pa. 2001).

17. In the present case, however, it is clear that WCNC is far from being a monopoly. The Contract provides for services at Airline’s maintenance hangar at Charlotte Airport; WCNC has provided a waste container to Airline and empties it on a regular basis. There are a number of other companies, both national and local, that could provide the very same service at the same location.

18. Monopolies are usually regulated to prevent them from abusing their monopoly position; such regulations include setting prices and requiring service to be provided to all customers, with specific procedures to be followed before the utility can cut off a customer. In the present case, however, no governmental entity regulates the prices WCNC may charge its customers, nor requires WCNC to provide service to everyone. When neither the state nor any municipality has found WCNC to be a monopoly in need of regulation, this Court should be reluctant to conclude otherwise.

19. In fact, Debtors have not even bothered to claim that WCNC is a monopoly, or that Airline could not obtain the same services from another provider, or that it would unreasonably difficult to do so. Rather, Debtors blithely assert that all providers of “waste

management” services to all of the Debtors in all of their locations are “Utility Companies,” with no analysis or support for this proposition and nothing to specifically show that WCNC, operating in Charlotte, is a “utility” for purposes of § 366. Debtors have, therefore, failed to carry their burden of proof that WCNC is a “utility,” so WCNC should be excluded from the application of the proposed Order, even if the Motion is granted as to other providers of so-called “Utility Services.”

B. Debtors’ attempted end-run around § 365 is improper and should not be permitted.

20. In order to assume an executory contract, 11 U.S.C. § 365 would require Airline to assume the entire Contract and cure all outstanding defaults. The Motion, however, seeks to force WCNC to continue to provide services to Airline at the prices set by the Contract, even though Airline is not assuming the Contract at this time and could therefore change its mind and reject the Contract before the currently-scheduled termination date of February 2017. Debtors apparently want Airline to have the freedom to pick and choose among the terms of the existing Contract, selecting the price terms to remain in place, but rejecting its long-term commitment. Debtors have provided no case law support for their position.

C. Debtors’ proposed “Adequate Assurance Deposit” would not in fact provide adequate assurance to WCNC as required by 11 U.S.C. § 366(c)(2).

21. To the extent that the Court nevertheless rules that WCNC is a “utility” for purposes of § 366 and therefore required to provide services to Airline even if Airline does not assume the Contract, WCNC objects to the proposed “Adequate Assurance Deposit” as insufficient in amount and inappropriate in structure.

22. The Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) amended 11 U.S.C. §366 in 2005 by adding subsection (c), which applies only to Chapter 11 cases. That section provides that in a Chapter 11 case, a utility “*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 ...adequate assurance of payment for utility service *that is satisfactory to the utility.*” 11 U.S.C. §366(c)(2) (emphasis added).

23. New subsection (c)(1) of 11 U.S.C. § 366 makes it clear that only cash and cash equivalents are acceptable as “adequate assurance” in a Chapter 11 case, unless the utility agrees otherwise:

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.* (Emphasis added.)

24. Debtors propose a single cash deposit for the benefit of all “Utility Companies,” as they define the term. This deposit is a mere \$122,000.00, the estimated amount all Debtors combined would spend for “Utility Services” (again, as they define the term) in two weeks. This proposal is completely inadequate for at least three reasons. First, there will be no cash deposit given specifically to WCNC, or any other provider; Debtors themselves propose to hold the deposit. As a result, the deposit could easily be used up by payments to other providers, leaving nothing at all for WCNC. Second, most utilities bill their customers monthly, as does WCNC, and payment is generally made within 30 days after issuance of a bill. As a result, Airline could easily owe WCNC for up to *two months’* service at any given time. Providing a deposit equivalent to a mere two weeks’ worth of service is therefore manifestly inadequate. Third, the form and amount of “adequate assurance” have not been agreed to by WCNC, as required by § 366(c).

CONCLUSION

25. WCNC is not a “utility” and merely defining it as such does not mean that WCNC is properly subject to the provisions of 11 U.S.C. § 366. While waste disposal may be an essential service, so is food. Yet grocery stores and restaurants are not “utilities,” because there are many alternatives for provision of food. In the present case, when there are a number of providers of waste disposal services that could service Airline’s needs at the Charlotte Airport, WCNC should not be included in the definition of “Utility Companies” and forced to provide services under a Contract that has not been assumed.

WHEREFORE, WCNC respectfully requests:

(A) that this Court refrain from making any finding that WCNC is a “utility” or a “Utility Company” as defined in the Motion, and specifically exclude WCNC from the application of any Order granting the Motion, and

(B) that to the extent this Court nevertheless finds that SCNC is a “utility,” the Court require Airline to make a deposit for WCNC’s sole benefit, to be held by WCNC or a third party acceptable to WCNC, and that the amount of the deposit be equivalent to two months’ average payment to WCNC under the Contract, based on the twelve months preceding the petition, or to such other adequate assurance that Airline and WCNC may mutually agree.

Dated: March 3, 2016
Sacramento, California

/s/ Margaret E. Garms
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(motion for admission *pro hac vice* pending)
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