UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter
of

Case No.
02-40188

GLOBAL CROSSING LTD.

Debtor

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February 21, 2002

United States Custom House

One Bowling Green

New York, New York 10004

Motion by Atty for the Debtor for Authorization to Provide Adequate Assurance To Utility Co; Decision to be rendered

B E F O R E:

HON. ROBERT E. GERBER

Bankruptcy Judge.

GLOBAL CROSSING LTD.

A P P E A R A N C E S :

(PLEASE REFER TO APPEARANCES IN THE UNDERLYING MATTER HELD ON FEBRUARY 20, 2002)

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P R O C E E D I N G S

THE COURT: In this contested matter, in a case under Chapter 11 of the Bankruptcy Code, approximately 200 of the Debtor's actual or possible utilities have filed objections to the Debtor's request that this Court find that the utilities have adequate assurance of payment of their postpetition billings, under Section 366 of the code.

I have used the expression "actual or possible", because at this juncture neither the Debtor's nor the utilities can say with certainty whether a particular entity should be treated as such, or whether either the Debtor's or the utility wants the utility to be treated as such; and the characterization may depend, even with respect to a given utility, on the particular contract involved. More about that later.

The utilities argue that adequate assurance to them requires payment of security deposits to them, aggregating approximately $155 million. A few don't request that, but those that do total up in their requests to $155 million.

Subject to the imposition of certain

safeguards that I will impose, and they are numerous, about triple the number imposed in Caldor, the utilities objections' are overruled at this time without prejudice to reconsideration in the manner described below.

However, the request by the utilities for certain of the specific measures they seek for adequate assurance, specifically deposits, requirements that services be paid for in advance and requests that the estate secure the payment of utility bills with a lien are expressly denied at this time.

Though with exceptions not material here, Fed R. Civ P 52, made applicable in contested matters under Federal Bankruptcy Rule of Procedure 9014, does not require Findings of Facts and Conclusions of Law on Motions, I believe that under the circumstances they are desirable here, and the following are my Findings of Facts Conclusions of Law, and the basis for the exercise of my discretion in connection with this Motion:

In connection with the facts I have accepted proffers on behalf of any of the entities who wished to make them.

The Debtors and several of the utilities did so, although the bulk of the utilities did not.

Where elements of the Debtor's proffer were challenged by one or more utilities, as they were with respect to the Debtor's history with prepetition payment and prepetition requests for deposits, I did not rely on that portion of the Debtor's proffer.

Where the utilities did make proffers, I have accepted the facts set forth in their proffers, which typically address circumstances unique to the particular utility involved, and in particular, the prepetition dealings between the Debtor and that utility, as true in all respects, though they have varying degrees of relevance.

To determine whether and to what extent they were at this juncture material disputed issues of facts, I asked the parties, in argument, to identify what they perceived to be material disputed issues of fact and to advise me of any desire to cross-examine.

After providing parties with that

opportunity, a few expressed areas in which they might wish to engage in discovery in the future, although none indicated that any earlier request for discovery from the Debtor's had been dishonored.

No party asked to cross-examine with respect to the proffers, although one party, Qwest, indicated that it lacked information sufficient to enable it to cross-examine, leading me to consider that there was at least a possibility that it might have a different view after it had engaged in discovery.

After consideration of the facts as proffered, and approximately 5 hours in total of oral argument, which also included the proffers, it is clear to me that there are no disputed issues of fact with respect to whether the utilities have adequate assurance of payment in the short term, although there may be disputed facts with respect to whether they would have had adequate assurance of payment further down the road, and the facts might change over time.

This ruling, and the protection provided focuses on that distinction.

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As facts, I find that approximately 200 utilities seek, by their objections, cash deposits to secure future payments to them for postpetition utility service, or alternative methods, such as by payment for service in advance to achieve the same end.

The great bulk of them are providers of one type or another of telecommunications services, though a few provide electricity.

The bulk of the utilities demand two months deposit each, which typically is the maximum amount authorized under applicable State law or tariffs.

Though one, Interstate Fibernet, only asks for half a month, two others ask for one month and a few say they would be satisfied with variance, such as payment in advance.

On the other extreme one, Avaya seeks three months and one, Integra Telecom Holdings seeks an astonishing six months, and in addition asks for two months advance payment as well.

The deposit requests, as I noted, typically conform to the maximum amounts each of them is allowed to demand under State law or

tariffs.

Some of the requested deposits on an individual basis are relatively modest in size, but some are very substantial.

For example, SBC seeks a deposit of $40 million, MCI WorldCom seeks a deposit of $25.2 million; Bellsouth Telecommunications seeks a deposit of $16 million, and Citizens Communications Frontier of Rochester and related entities seek $11.2 million.

In the aggregate, requests for deposits are very substantial. As I said they seek an aggregate of $155 million.

On January 28th of this year the Debtor's commenced cases under Chapter 11 in this Court. They continued to operate their businesses and manage their properties as Debtors in Possession.

On that date, each of the Debtors that is incorporated in Bermuda commenced a coordinated proceeding in the Supreme Court of Bermuda.

The Supreme Court of Bermuda has appointed certain principals of KPMG International

as Joint Provisional Liquidators of the Bermuda entities.

The Supreme Court of Bermuda also empowered and directed the Joint Provisional Liquidators to oversee the continuation of Global Crossing under the control of its Board of Directors and under the supervision of the Supreme Court of Bermuda and this Court in effecting a Plan of Reorganization under the Bankruptcy Code.

Global Crossing has built what it describes as the world's most extensive owned and controlled fiber-optic network.

However, as big as it is, it nevertheless needs to link up, and/or work in tandem with other telecommunication providers.

While the various contractual relationships it has with other telecommunication providers are diverse, there are at least two types that are particularly important; those with so-called access providers and those with entities that provide alternate means of providing service that Global Crossing also provides.

The former services are provided because while Global Crossing's network is far

reaching, as a practical matter it can only originate and/or terminate telecommunication's traffic in locations where it is physically present.

To fill those gaps and transport telecommunications from the customer to the network, or from the network to the point of termination, the Debtor's access the networks of other telecommunications companies, who are those that I referred to a moment ago as access providers, to enable them to fulfill what has been described colloquially as the "last mile" of service.

The Debtor's access the providers networks by contracting with access providers or obtaining access through tariffs that require certain access providers to allow their -- to allow access to their networks at certain rates.

The latter service's are provided because while the Debtor's Network may have a presence enabling it to fulfill certain traffic, it may be cheaper for the Debtor's to direct the traffic to another telecommunications carrier.

For example, while the Debtor's may

be able to carry international traffic from the United States to a city in Europe where they have a point of presence, it may be cheaper to direct that traffic to another telecommunications company that has a more expansive presence in that city.

From time to time in this decision I will be referring to telecommunications companies whose services the Debtor's utilize as telecommunications vendors.

Many of the telecommunications vendors suffer the same networks limitations and operate their businesses in the same manner as the Debtors.

As a result, many of the telecommunications vendors access the Debtor's network to originate, terminate or otherwise deliver services to their clients and the Debtors provision of such services may result in an offset to amounts owing by the Debtor's to such telecommunications vendors.

Putting it another way, the relationships between the vendors and other telecommunications vendors, may have the effect of debts going in each direction; that is, from a

Debtor to the telecommunications vendor and from a telecommunication's vendor to a Debtor.

Answers on the part of several utilities to my questions indicated that at least in several of the instances where deposits are requested, and relationships with debts going into each direction exists, the amounts of monthly usage upon which the utilities deposit requests are based -- are premised upon the gross amounts of the services provided by those utilities, rather than the net debt owing from the Debtor's to the utility involved, after the debts going in each direction are considered.

The Debtor's now have about $1 billion, that's with a "B", in cash. All but $130 to $135 million of that is in bank accounts in the United States.

Of that $1 billion, $670 million is said to be free or unrestricted cash. About $300 million of the billion is held as collateral by J.P. Morgan Chase, representing the proceeds of the sale of one or more subsidiaries of the Debtor, where Chase held the subsidiary stock as collateral.

The Debtor's arrangements with Chase call for the Debtor's to use their other cash first, and if it goes down to $150 million, they may seek to use the cash which is Chase collateral.

Any such use would require a proof -- providing Chase with adequate protection for the use of its collateral, which, as will be described shortly, is not the same as adequate assurance of payment for a utility, the latter of which can be provided under applicable Bankruptcy law, and the former; that is, adequate protection, which can be provided under applicable bankruptcy law by providing a variety of mechanisms, including a substitute lien.

Other than the cash that is subject to the Chase lien, and which is thereby referred to as restricted, the assets of the Debtor are subject to no significant liens.

As a consequence, substantially the entirety of their asset base is available to satisfy claims of Creditors under a statutory scheme where postpetition obligations have priority as administrative expenses over

prepetition obligations.

It is undisputed that any and all charges of utilities for their postpetition services, to the extent not paid in the ordinary course, would be entitled to the priority afforded to administrative expenses.

On the filing date of this case, the Debtor's stated in their first day papers that they expected to operate at a negative cash flow of approximately $138 million for the thirty days following the filing.

Since the filing, the Debtor's have done slightly better than that. They expect their results for that period to be a negative $135 million, which the Court regards as consistent with their cash forecast, and certainly not creating doubts as to their cash forecasting, but also as representing quite a small sampling.

Several utilities, NTS Communications, the Iowa Telecommunications Group, FBN America, Inc. and the Small Rural Telecommunications Utility Group, all of whom are represented by the same counsel, noted that the Debtor's balance sheet showed $1.7 billion of

unrestricted cash as being on hand as of September 30, 2001, but as of the January 28th filing, the Debtor's reported only $600 million in unrestricted cash.

The $1.1 billion difference was said to suggest a substantial outflow of cash noticed in a relatively short period.

However, the Debtor's responded that this was a consequence, to a significant degree, of capital expenditures which would be dramatically reduced in 2002 as their fiber-optic network came closer to completion.

In any event, there is no dispute of the fact, at least on this record, that the Debtor's cash flow performance since the filing is as described above and did not reflect the so-called burn rate that was the burn rate during the approximately four months prior to the filing.

The Debtors' forecast that they will have approximately $500 million in unrestricted cash as of May 31, 2002; slightly more than ninety days away, and $380 million in cash as of August 31, 2002, slightly more than six months away.

These projected cash balances take

into account the payment to all of the utilities of their monthly charges during that period, or stated another way, are after the payment of the monthly bills to the utilities in the relevant time periods.

In addition to the cash just mentioned, the Debtor's expect to have $531 million in accounts receivable as of February 28th; $500 million on May 31st and $500 million on August 31st.

While accounts receivable normally can be expected to be converted into cash, the amounts just noted are in addition to the cash balances forecast for each of those dates.

If the thirty day burn rate projected by the Debtors at the outset of the cases were maintained, the Debtors could be expected to have depleted their available cash in approximately four and a third months from the time of filing, in the first half of June, but plainly the Debtor's cash forecast, which quote a cash balance of $500 million on May 31st, slightly before that, and which also show accounts receivable on that date of another $500 million, do not support that

fear.

The Debtors, in consultation with the Creditors' Committee in this case, which supports the Debtor's position on this Motion, are in discussions with respect to the possibility of securing postpetition financing, frequently referred to colloquially as "Debtor in Possession financing", to achieve additional liquidity in their Chapter 11 cases.

Two proposals are under active consideration, one for up to $150 million in postpetition financing, and one for up to $500 million in postpetition financing. The Creditors Committee is reviewing whether such financing is necessary.

It is reasonably to be expected that any postpetition lender would expect a lien on at least a meaningful portion of the Debtor's assets if it was to put such a facility into place.

It is also reasonably to be expected that to the extent that any of the Debtor's assets do thereby become subject to such liens, that would only be because the postpetition lender has advanced additional funds to the estate, and any

liens would be available only to secure such funds as has been advanced and are outstanding.

On February 4, 2002, the Debtor's filed an Auction Procedures Motion seeking Court approval of a Letter of Intent and Term Sheet dated January 28th of this year.

I'll refer to that as the Letter of Intent among Global Crossing Limited, Hutchison Whampoa Limited, and Singapore Technologies, and the establishment of procedures for consideration of alternative investment proposals.

The Letter of Intent and the procedures for obtaining hire or better offers described in the Auction Procedures Motion served as the a basis for the Debtor's reorganization.

The transaction reflected in that Letter of Intent would call for a payment by the investors of $750 million for a 79 percent interest in the reorganized Debtors.

It is also contemplated that the reorganized Debtors will issue $800 million of debt, and secure an exit financing facility in the amount of $350 million. Those translate to an enterprise value of approximately $1.7 billion;

that of course is estimated but it reflects the facts as known at this time.

Pursuant to the procedures proposed in the Auctions Procedures Motion, the Debtor's are soliciting proposals from prospective sponsors of their Plan of Reorganization that are hire or otherwise more favorable than the Letter of Intent.

As of September 30th, 2001, the last date for which information as to this was reported, the Debtor's showed assets of a value in excess of $25 billion; though I understand this to reflect book value, a function of historical cost as contrasted to the value that might be fetched if the assets were to be sold, either as part of a going concern or under more distressed conditions.

Nevertheless, even if, as I assume, the enterprise value reflected in the term sheet is more appropriate, as a bottom floor for the Debtor's enterprise value, we're talking about a very valuable entity with a huge cushion in the way of asset value, at least at the present time, apart from the available cash.

The Debtors asserted in their proffer

that they were generally current with their obligations. Several of the utilities took issue with this, backing up their assertions in their own proffers.

While the prepetition indebtedness owing to utilities was in considerable part a consequence of the billing cycle under which utilities typically bill the Debtor for the service provided in the preceding month and the period of time thereafter permitted to pay the bills, some utilities made showings that at least inferentially would suggest that prepetition defaults could not be attributed merely to the billing cycle.

The matters were complicated by the fact that as the Debtor proffered, and the utilities agreed, there is a custom in the telecommunications industry, at least in material part, that charges invoiced on a monthly basis rarely coincide with the exact amount due for services provided and are subject to reconciliation and true up; there also are not uncommonly billing disputes between customer and provider.

There plainly was a dispute of fact with this, but in the context with the other evidence and the factors discussed below, I do not find this to be material.

I find that the Debtors prepetition history of payment is not sufficiently strong to merit considering it as a factor relevant to whether adequate assurance of payment has been provided, but neither is it so bad that it strengthens the claim of utilities for deposits, and that no finding along the spectrum of the Debtor's showing, on the one hand, or the showing of those utilities who made showings as to this, on the other, would change the result.

Also, for reasons that will be obvious from what I say below, I see no meaningful basis for treating objecting utilities differently, with only one exception that will be obvious when I deal with the eight biggest ones, on the one hand, and the great remainder of the rest, on the other.

Thus, I do not believe that any particular utility that has a history of prepayment worse than utilities generally should

get treatment better or different than the other utilities who are likewise providing postpetition service.

As noted above, while some of the request emanates from entities that provide utility services to the Debtors, the overwhelming majority of requests have been interposed by telecommunication vendors.

While the Debtors contend that all utilities companies have adequate assurance of payment, they say, and the Court accepts as true, that the demands of the Chapter 11 cases have left them with little opportunity to determine which of the requested entities are utility companies entitled to the protection of 366 of the Bankruptcy Code, or for those who are, at least with respect to some kinds of telecommunication services or contractual relationships, with respect to which particular ones.

Conversely, the telecommunications providers have had little opportunity to focus on this, and have likewise not committed themselves with respect to whether or not they should be regarded as utilities, or, if so, with respect to

which services or which contractual relationships.

I find that understandably, each of the two sides is still in the process of analyzing the various services and relationships involved, and again, understandably, trying to understand which position would be in its own economic interest.

While the Debtor's argue persuasively that there is an injustice associated with demands that they pay deposits to entities that may not be legally entitled to such preferential treatment, I am not in a position at this time, without further briefing and argument, and to the extent facts can be stipulated to evidentiary presentations, to determine the extent to which the telecommunication providers should be regarded as utilities with respect to any particular service any of them provides.

I necessarily must assume, for the purposes of the Motion now, that each telecommunications provider is entitled to be treated as a utility without prejudice to the rights of the respected parties to bring this matter before me for determination in an orderly

way.

This is not, of course, a concern for the relatively small number of providers of classic utility services, such as the electricity providers, Florida Power and light, and Niagra Mohawk.

The Debtor has noted that to the extent that any utility has not paid it's postpetition charges on a current basis, it is entitled to an administrative expense priority under Section 503(b), and I find as a fact, or as a mix question of fact and law, that that is true.

The utilities argue that they would be entitled to administrative expense status for their postpetition expense services whether or not it was specifically awarded as a means of ensuring adequate assurance of future performance to the utilities. And I find as a fact, or as a mixed question of fact and law, that this is also true.

Other matters based on the foregoing facts, which may be pure facts or which may be regarded as mix questions of fact and law will be discussed below.

All right, turning to my Conclusions

of Law:

Section 366(a) of the Bankruptcy Code provides that,

"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" --

That is, Title 11 of the Bankruptcy Code --

-- "or that a debt owed by the Debtor to such utility for such service rendered before the Order for relief was not paid when due."

Section 366(b) then goes on to provide:

"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 --"

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Adequate assurance under Section 366 is not synonymous with adequate protection.

In determining adequate assurance, a bankruptcy court is not required to give the utility the equivalent of a guarantee of payment, but must only determine that the utility is not subject to an unreasonable risk of nonpayment for postpetition services.

See In re Caldor Inc. New York, 199 B.R. 1, at Page 3, Southern District of New York, 1996, Judge Stein, District Judge; In re Santa Clara Circuits, 27 Bankruptcy Reporter 680 at Page 685, that's the Bankruptcy Court from the District of Utah, 1982; In re George C. Frye Company, 7 Bankruptcy Reporter 856, at Page 858, the Bankruptcy Court from the District of Maine 1980.

The parties seem to agree, and certainly I believe that whether utilities have adequate assurance of future payments is determined by the individual circumstances of each case, and I assume that they would also agree that it turns on the totality of the circumstances.

See Massachusetts Electric Company versus Keydata Corp., that's In re Keydata Corp.,

12 Bankruptcy Reporter 156 at page 158, a division of the First Circuit B.A.P. in 1981.

The determinations of the type I'm asked to make now are within the discretion of the Court. See Virginia Electric & Power Company versus Caldor Inc., 117 F.3d 646, a decision of the Second Circuit in 1997; that is the decision that I typically refer to as the Caldor decision.

From time to time I will also be referring to the Judge Stein decision at the District Court level that I sited a moment ago, and when I do so I'll make it clear whether I'm talking about the District Court decision on the one hand or the decision from the Circuit Court of Appeals on the other.

As the Second Circuit held in Caldor:

> "Bankruptcy Court's are properly afforded significant discretion in the exercise of their duties.
>
> We have observed that:
>
> "In bankruptcy proceedings substance should not give way to form" and "a bankruptcy Judge must not be shackled with unnecessarily ridged rules when exercising

the undoubtedly broad administrative power granted him under the Bankruptcy Code.

It cites In re Financial News Network, 980 F.2d 155 at page 169, another decision of the Second Circuit Court of Appeals in 1992.

It goes on to say -- and both that earlier remark and the one that follows were of course in the context of a Section 366 determination:

"In deciding what constitutes adequate assurance in a given case, a Bankruptcy Court must focus upon the need of the utility for assurance and to require that the Debtor supply no more than that, since the Debtor almost per force has a conflicting need to conserve scarce financial resources."

I'm going to omit a citation.

"Accordingly, bankruptcy courts must be afforded reasonable discretion in determining what constitutes adequate assurance of payment for continuing utility services."

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Under Section 366(b) of the Bankruptcy Code, Bankruptcy Court's, subject to appellate review of course, on appeal to the District Court and the Court of Appeals, have the exclusive responsibility for determining what constitutes adequate assurance for payment of postpetition utility charges and are not bound by local or state regulations.

See Begley versus Philadelphia Electric Company; that's In re Begley, at 1 B.R. 402 at pages 405 to 406, a decision at the District Court level in the Eastern District of Pennsylvania, 1984, which was thereafter affirmed by the Third Circuit Court of Appeals, at 760 F.2d 46 in 1985.

Thus, I find that the mechanistic reliance on the part of several utilities on local tariffs or State law fails appropriately to respond to the statutory analysis that a Bankruptcy Court like this one must make on this federal question.

I also must say that there was a notable failure on the part of the great bulk of the utilities to address the case law and

practices in the Southern District of New York, and to a lesser degree, though more shockingly when it happened, the Second Circuit's decision in Caldor.

As counsel for Florida Power and Light acknowledged, the practice in the Southern District of New York, and in large cases, at least in this district, has not been to routinely require deposits.

As a reading of the authorities relied upon by the bulk of the utilities would suggest, I think its a fair to say that the attitudes of the Court's within the Southern District of New York is not accurately measured by those cases from other districts, particularly to the extent, which is considerable, that they came from cases where Caldor is not controlling authority.

The approach in the Southern District in New York may be the result of there being a controlling decision in the Second Circuit in Caldor; it may be the result of a practice of engaging in a more fact-driven analysis on the part of the judges in this district, focusing on

the ultimate question, whether, as a matter of fact, given the unique circumstances of the particular case and the totality of those circumstances, whether the utilities have adequate assurance that they'll be paid for their postpetition services.

Whether it is for one of those reasons, or an amalgam of them, or for other reasons as well, it can hardly be doubted that counsel for Florida Power and Light was correct in its observation, in that the precedents for this district manifestly do not call for a mechanical requirement for requiring deposits for an automated, define and requisite assurance or for their first cousins, bonds or Letters of Credit, but rather call for particularized industry in the postpetition economics of the Debtor's Chapter 11 case, to make an informed judgment as to the degree of comfort that utilities will be paid for their postpetition charges.

Needless to say, Caldor, at the Circuit Court of Appeals level says that in no uncertain terms.

Judge Garrity, at the Bankruptcy

Court level, had determined that in light of Caldor's prepetition payment history and it's postpetition liquidity, the utilities had "adequate assurance of payment" for their continued service when certain safeguards were also put in place; one, an administrative expense priority; two, an expedited procedure for relief, in the event of a payment default by Caldor; and three, an Order requiring Caldor to convey it's monthly operating statements directly to the utilities.

The utilities argued to the Second Circuit on appeal that those safeguards could not, as a matter of law, satisfy Section 366(b)'s requirement that utility suppliers enjoy an "adequate assurance of payment in the form of a deposit or other security".

They also argue that these safeguards were otherwise available to them in the formal course and could not alone meet the "deposit or other security requirement".

The Second Circuit held directly to the contrary. It stated,

"We hold that, even assuming that the

forms of payment assurance ordered by the Bankruptcy Court were otherwise available to the utilities, they do not fail as a matter of law to satisfy Section 366(b)'s requirement that utilities suppliers receive 'adequate assurance of payment' from Debtors in bankruptcy."

Given that, I do not believe that I can appropriately rely on contrary authority from outside the Second Circuit, even from Judges as respected as Judge Farnan and Walsh in Delaware, and Armstrong and Weiner.

When we look at Caldor at the District Court level, the only other level that is reported, we can get further guidance from Judge Stein's decision.

Judge Stein noted that at the Bankruptcy Court level there were certain factors in the Caldor's case which drove Judge Garrity's decision.

The Debtors had significant cash on hand and access to over $500 million in financing.

The Debtors posed significant less risk than other customers of the utilities. The

utilities had a greater ability to monitor the financial strength of the Debtors.

The Debtors were solvent and were operating out of the proceeds of their operations.

The Debtors had a solid prepetition payment history and the utilities generally had not required deposits from the Debtors in the past.

Based on those findings, Judge Garrity determined that the only security necessary to provide "adequate assurance" to the utilities was, as I just mentioned, granting the utilities an administrative priority; creating a streamline procedure for utilities to obtain immediate relief and future securities if the Debtor's were late on a single payment; and three, requiring the Debtor's to provide certain financial reports on a monthly basis to the utilities.

The factors there and here are an imperfect match. As mixed questions of fact and law, I find that some available cash and safeguards that the Court imposes are stronger here than they were in Caldor.

Others, the lack of a Debtor in Possession facility, but conversely, the lack of any lien on the great bulk of the Debtor's assets are different here, but as strong, from the Debtor's perspective, if not stronger; others, the financial strength of the Debtors, relative to other customers, where the Debtor's are obviously in Chapter 11, but as a consequence are free from the duty to satisfy a huge number here, $12 billion of unsecured claims against their asset base and prepetition payment history, are about a wash; and another, the factor relating to solvency and negative cash flow is one where the Debtor's here compare less favorably.

I also will say that the factor of prepetition requests for deposits mildly favors the Debtor, although for reasons that I have stated and for reasons that I will state, I consider the factors mentioned there to be more significant when one focuses on the postpetition period and the risks to the utilities going forward, than I consider prepetition history to be relevant.

What we're looking at is what the

situation is going forward, and the past may inform that judgment, but the objectively known facts in terms of the situation going forward, in my view, are more significant.

But while, on the balance, I believe that the factors that Judge Garrity considered there, insofar as I tried to adapt them here, to provide adequate assurance here, I believe that a mechanical ticking off of the factors that were relevant in that case under these facts is not fully responsive to the analysis that Judge Stein and the Second Circuit later provided after Judge Garrity had made his decision.

In affirming Judge Garrity, Judge Stein noted that:

> "Section 366(b) requires the Bankruptcy Court to determine whether the circumstances are sufficient to provide a utility with 'adequate assurance' of payment."

That, I believe is the key to the analysis, to look at the totality of the circumstances, to see whether the fear or concern on the part of the utility not getting its

legitimate entitlement to its postpetition payments is addressed in any particular case.

I believe it is appropriate, as Judge Stein did at the District Court level, before he was affirmed by the Second Circuit in Caldor, to look at the totality of the circumstances to compare the bundle of circumstances which would determine whether or not I can appropriately make a finding that the utilities have adequate assurance that this will be paid -- that there is a reasonable expectation that any postpetition obligations of the utilities will be satisfied.

In my view, it is not a deposit or an administrative expense claim or any other single thing that is necessary to give the Court comfort that the utilities will be paid; it is all of them together.

In that connection, I think I should digress from Section 366 doctrine for just a moment to observe that there are many areas in bankruptcy law where bankruptcy courts are invested with discretion. And in the case law, as it has developed, it has not infrequently been the case that one or another Court has considered

factors which they take into account in exercising their discretion.

A classic example of that is a decision in the 1112(b) area, In re CTC Ninth Avenue Partnership 113 F.3d 1304, which is a decision under 1112(b)

There, in deciding whether a case should be dismissed for cause under 1112(b), the Second Circuit referred to particular indicia having been taken into account and adopted for the purpose of its analysis, indicia that had been used in a lower Court decision, Pleasant Point Departments Limited versus Kentucky Housing Corp., 139 B.R. 828, a decision out of the Western District of Kentucky, 1992.

Its look at the indicia, as a means for exercising a discretion that ultimately is the result of the totality of the circumstances. Thus, it's stated in that 1112(b) context.

It is important to note that this list is illustrative not exhaustive, and in a footnote it continued that the Court will be able to consider other factors as they arise, and to use it's equitable powers to reach an appropriate

result in individual cases.

In my view, when, as here, I am exercising my discretion, the general principals set forth, vis-a-vis the exercise of a Bankruptcy Court's discretion, albeit in a different context, as in the CTC, are no less applicable here, and therefore I considered factors as considered by Judge Garrity to be illustrative rather than exhaustive, and I consider them to be objective means by which I can exercise my discretion when looking at the totality of the circumstances.

Where, in this case or any other, factors are relevant that do not fit within the pigeon-hole of those historically used by any Judge in an earlier case, such as by Judge Garrity, if and to the extent they are relevant, it would be poor judging on my part to ignore any relevant factors.

Those factors are indicative of the kinds of things that I should consider, but with the benefit of the District Court and the Second Circuit decisions, I am going to start with the discussion, as I did, of the particular factors that Judge Garrity used, but also consider factors

that under the circumstances are appropriate under the facts of this case.

Here, I find, as mixed questions of fact and law, that the combination of:

No. 1, $1 billion in cash flow of which $670 million is unrestricted, and $300 million of which is not necessarily unavailable, provided that Chase consents or is provided adequate protection for it's use;

No. 2, projected cash balance of $500 million and $380 million respectively, on May 31st and August 31st;

No. 3, projected accounts receivable of $531 million on February 28th, $500 million on May 31st, and $500 million on August 31st, separate and apart from the cash referred to a moment ago;

No. 4, an estimated enterprise value of $1.7 billion. Though I acknowledge this estimate has not come to fruition, I just consider it to be a more appropriate value or measurement of the Debtor's value of the totality of its assets than it's $27 billion book value; if I said million, I meant billion there.

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No. 5, 503(b) priority;

No. 6, the Debtor's assets other than the restricted cash being subject to no material liens or security interests, though it would have to be honored ahead of administrative expenses;

No. 7, the shortened times for payment, discussed below, that I will impose as a condition;

No. 8, the reporting requirements, discussed below, that I will impose as conditions;

No. 9, the expedited relief provisions, discussed below, that I will impose as conditions;

No. 10, the dispute resolution provisions, discussed below, that I will impose as conditions;

And No. 11, the Adverse Change Right of Review Rights, discussed below, that I will impose as conditions;

All collectively cause me to conclude and find that utilities have adequate assurance of future payment, at least through the end of June, subject to the right of utilities, as discussed in a moment, to require the Debtor's to renew their

showing as to adequate assurance of payment in the event of an adverse change in the liquidity of the Debtor's.

In my view, it is with respect to the potential uncertainty as to matters a fair number of months in the future and not now, as to which there might be any material disputed issue of fact or any legitimate matter of concern for any utility.

Obviously, in a few months parties will have actual knowledge of liquidity levels which are significant in their own right and also as a measure of liability and cash forecasting.

Some of the utilities have referred to a portion of Caldor where very near the end of decision the Second Circuit stated:

> "That 'adequate assurance of payment' might in certain exceptional cases require nothing more than what the Code already provides, does not render unnecessary or superfluous Section 366(b)'s provision that there be adequate assurance in all cases, a provision that may indeed require something more in other, if not most, circumstances."

They use this to argue that it would be a rare case where an administrative priority would be sufficient to provide adequate assurance of future payment, but I read that comment of the Second Circuit Court of Appeals differently.

Rather, I read it as saying two things:

One, the need to find adequate assurance is not superfluous and whether it's supposed to be backed up by nothing more than the Code requires, on the one hand, or whether more is required, on the other, must be analyzed in every case. Even if Caldor were not binding on me, which it plainly is, I would agree with that, and that's what I'm doing here.

Two, I also read the lead-in language to that quoted material to say that in certain exceptional cases, it would be acceptable to provide nothing more than what the Code requires, which is essentially 503(b) protection, but I need not explore the reaches of what that language by the Second Circuit meant because here there is a great deal more than what the Code requires, and a great deal more than a mere administrative expense

priority under Section 503(b); that, in this case, is one of the 11 factors I identified.

I am well aware of pending legislation in Congress, to which Bellsouth and other utilities have referred, that would have the effect, if not the purpose of legislatively overruling Caldor, and imposing a per se rule that would require deposits or their equivalent.

But the fact that utilities, like certain others, have secured benefits in the proposed legislation that would advantage them over other Creditors, particularly Unsecured Creditors, and the fact that if this legislation were enacted it would change the law, underscores rather than contradicts the Debtor's position now.

If Congress, as a consequence of lobbying or otherwise, determines to enact legislation that benefits a particular group, that is a decision that I have sworn an oath under the Constitution to respect.

But until and unless the duly authorized members of our government have enacted such legislation, my constitutional duty is to comply with the existing law as announced by the

Second Circuit.

It is appropriate for me to follow Caldor and I do so as supplemented and modified by my examination of this case's unique facts.

However, I consider it appropriate to put into place safeguards, similar to those put into place in Caldor, but substantially more extensive.

First, of course, the utilities will have an administrative expense.

Second, for any utility that has objected other than what was referred to colloquially as the "Big 8", identified at the hearing yesterday, Verizon, Bellsouth, SBC, Qwest, AT&T, MCI WorldCom, Sprint, and Citizens/Frontier, and notwithstanding any longer time authorized under tariffs, the Debtor's time to pay will be reduced to the lesser of 14 calendar days after any utility invoice is received or the time presently existing in any Debtor utility relationship.

By way of clarification in two respects: One, I don't know whether there are any existing relationships that now provide for less

than fourteen days after receipt of payment to pay, but if there are, or if they so provide, we're still talking about the lesser of those times.

Secondly, if and to the extent that any deadline date comes out on a weekend or holiday, it will be moved out up to the preceding business day, in contrast to the rule with which lawyers are accustomed that gives them the following business day.

Third, with respect to the "Big 8", I will let the Debtor's and the members of the "Big 8" negotiate, in the first instance, as to shorten time for payment, but not advance payment or more frequent billing, and will presumptively approve any agreement reached; if an agreement is not reached, I will determine a time which I consider to satisfactorily balance the needs of those utilities to minimize their risks, and the desirability, as recognized by the Second Circuit in Caldor, to avoid subjecting Debtors to unfair drains on their working capital.

Fourth, I am directing the Debtor's and those utilities, most or all of which are

telecommunications providers who have debts going in both directions, to negotiate with each other with respect to establishing conditions for taking into account the fact that debts go in both directions, with a view to reducing the gross exposure of each to the other under those circumstances.

I'm not directing you to agree, but I'm directing you to confer.

This circumstance is what was sometimes referred to in argument as "net-off" or "offset".

If after agreements or efforts to agree are unsuccessful, either side may come back to me for consideration of whether I will fix any additional conditions in this regard.

Fifth, I will require expedited procedures to deal with postpetition payment defaults.

In the event of a payment default, a utility can fax notice to Global Crossing, with a copy to Global Crossing's counsel, and if payment is not made by wire transfer or similar good federal funds within three business days

thereafter, the utility can move by Order to Show Cause for an Order requiring immediate payment with objections returnable on as little as two business days thereafter.

Sixth, the Debtor will provide to any objecting utility who will request it, by itself or by its counsel, copies of Global Crossing's monthly operating reports on the same date that it is filed with the Court or that it is provided to the U.S. Trustee, if that comes earlier.

Seventh -- and I know the Debtor said it didn't like this -- I will require that the Debtors provide their utilities with weekly flash reports with respect to their available cash, subject to reasonable confidentiality restrictions that balance the needs of utilities to act on what they learn, and the needs on the part of the Debtor or it's Creditors to avoid the disclosure of sensitive information.

I recognize the substantial hardship that would be suffered by the Debtor, but more importantly their Creditors and other stakeholders if I were to require deposits, particularly of the enormous size requested here.

But balancing the needs of the utilities, in my view, requires establishing a kind of distant early warning system to avoid prejudice to them.

To minimize the burden on the Debtor, the utilities will designate one of their number as a liaison to receive a report from the Debtor, and the liaison will be the only one authorized to call Debtor personnel with respect to questions on those reports.

Eight, in the event of any dispute with respect to the charges and/or reconciliation associated with any bill or the balance going in either direction, I will hear such dispute by Motion, as contrasted to adversary proceeding, on ten days notice unless a longer time for presentations is jointly agreed upon. I will not, however, require that funds be escrowed.

Ninth, the Debtor and each utility that has sought adequate assurance of payment will exchange with each other names, addresses, phone numbers and fax numbers of people with appropriate authority to deal with late or missed payments, or failures appropriately to credit past payments,

that is payments that had been made by the Debtor.

To make that crystal clear, I want a mechanism to buy past lock boxes, processing agencies, and computers, not withstanding the comments of one counsel -- which I respect but which I cannot consider determinative -- of difficulties when computers do things apparently free of human control.

In connection with the crediting of postpetition payments, I take it as a given that postpetition payments will be applied only with respect to debts due for postpetition services, and will not be applied for utilities to prepetition debt or to deposits, as was reported to me in another of my cases, Casual Male.

While I will not prejudge the relief that I would grant if it were to be established that such a clearly outrageous circumstance were to exist, I want people on immediate notice that I consider such a circumstance unacceptable.

Tenth, but hardly tenth in importance, the matters in this Order will be revisited in the event a material adverse change in the liquidity of the Debtor, as evidenced by

the flash reports or U.S. Trustee operating reports or otherwise.

The Order submitted to me for signature should make clear that while the right to come back to me is not a license for reargument, there absolutely will be the right to come back in light of changed circumstances.

While I am aware that the Debtor's may have many billions of dollars in at least book value of fixed assets, I will consider that it is appropriate to take another look, based on more liquid assets alone, and will provide that utilities have the presumptive right to come back for reconsideration if the amount of the Debtor's unrestricted cash or cash equivalents dips below $100 million, net of any indebtedness that may be secured by a postpetition lien.

And I will also provide for a right to discovery under Federal Bankruptcy Rules 7026 through 7037, as generally applicable to contested matters, with respect to adequate assurance, if the amount of cash and cash equivalents drops below $200 million.

That is not to say, of course that I

would then consider that utilities therefore have a right to a deposit under such circumstances, rather it will provide a mechanism to revisit the issue again, to let the utilities make their showing of need, subject to the rights of the Debtors and the Creditors' Committee and Creditors, other than utilities, to show why the utilities nevertheless still have their adequate assurances.

If there is any subsequent hearing, it will be a full blown evidentiary hearing, with discovery available on an expedited basis if desired.

I will also take evidence, if offered, with respect to the amount that reasonably can be expected to be fetched from fixed assets, going concern value, or assets that are less liquid than cash, and accounts receivable.

In many respects, therefore, this Order has the characteristics of the so-called interim Order to which counsel for MCI WorldCom recommended.

It provides the timely and current

financial information and disputed resolution mechanisms, including expedited access to the Court, to which counsel for the Missionary Providers and other's referred; to the ability to investigate at a time when it becomes a fairly litigatable issue, which, with respect to the many earnest advocates I heard yesterday, I think has yet come.

And it balances, as counsel for MCI WorldCom refreshingly acknowledged, my needs to balance the interest of the Debtor and it's Creditors in preserving cash, with the legitimate interest of utilities in getting paid for services they provide.

But let me say that although I heard that and I understand the good faith in which the proposal was made, we're not talking here about "Let's Make a Deal".

We're talking about the safeguards which I, in my judicial judgment, have determined are appropriate when coupled with the basic economic facts of this case, to meet the standards that Caldor, at the Circuit Court of Appeals level requires me to satisfy.

Language in the original Order which may be overly broad, and in particular language that imposes an injunction that goes beyond the statute, beyond Section 366, or that denies utilities the right to reconsideration, in light of changed circumstances, under Section 366(b)'s last sentence or under this Order will be stricken when the new superseded Order is presented to me for signature, subject to the rights of the Debtor to seek broader relief in that regard, including with respect to postpetition defaults, upon notice an opportunity to be heard.

One or two utilities referred to postpetition arrearages subject to dealing with disputed amounts, in accordance with the procedures set forth in this Order.

I petition any of those which are in fact out there to be paid forthwith.

Two other points, although in my view they are not relevant to the decision I made today, I am just going to comment upon.

One, there was argument that plainly the Debtor's professionals don't share the view of having adequate assurance because they got such

massive prepetition retainers before the filing.

Aside from the issue of whether that is an apples and oranges comparison, because it is essential for any professional for a Debtor to ensure before the filing of its case that it is disinterested, and therefore is not a Creditor of the estate, observations of that character make for nice rhetoric but they don't go to the real issue, which I've now said probably no less than four times, which is whether under the totality of the circumstances there are the means for utilities to have the adequate assurance that they'll get paid; and argument of that sort, with due respect, does not go to what I consider to be the appropriate factors under the case law.

There was an -- also an issue raised, I believe by MCI WorldCom, as to whether the procedures taken on the first day of the case were consistent with Section 366 doctrine, and/or procedural due process.

On the first day of the case, the Debtor asserted that the combination of the 503(b) priority plus related circumstances, which plainly are much less than I've imposed today, provided

the utilities with adequate assurance.

It made an appropriate showing on that basis to deal with the problem that every Debtor faces of establishing a mechanism consistent with procedural due process, for utilities to make their needs and concerns known.

The procedures that were set up on that first day, and which provided the utilities, subject to the rights which I've provided for those who fell between the cracks and didn't get served, with an opportunity to be heard, and the quality of the advocacy and the briefs that I got yesterday, over five hours, causes me to believe that that procedural mechanism was workable and provided for appropriate procedural due process.

The fact that since that time I have determined that additional safeguards are necessary and appropriate doesn't take away from the fact that a sufficient showing was made on the first day to deal with this mechanically, and candidly, I cannot think of any other mechanism other than hauling, when this case was first presented, at least 200 -- and I'm not talking about the non-objectors -- in on minimum notice

could accomplish.

Put another way, if a Debtor makes an appropriate threshold showing, the next most important concern, from a Judge's point of view, is to provide procedural due process, fair notice and an opportunity it be heard and that is why we engaged in the procedures we did.

I could have shortened the return time by a couple of days and made it even harder for utilities to respond, to get it all within the 10 day limit, but on a matter of this importance, where utilities have very legitimate concerns, it seems to me that, especially in a statutory context, where bankruptcy judges have the power to issue Bridge Orders and to issue Orders extending time under Rule 9006, it is hard for me to imagine that anything is more important than fairness and giving people an appropriate opportunity to respond.

Okay. Three matters will be reserved for further briefing and consideration. First I'm today intentionally not deciding whether and to what extent utilities can be required to obtain leave of Court before discontinuing service for a

postpetition default, which is the matter now being briefed in Ames.

The Order in this case, which will supersede the earlier Order, should be silent with respect to that. The Debtor's may, if they are so advised, seek such relief, and may want to consider whether seeking it by adversary proceeding moots out a potential procedural issue if an injunction is sought, or the relief rests in whole or in part on Section 105(a), however, I'm not prejudging any part of the issues relating to that, including that one.

Second, I am likewise not deciding the issue raised by counsel for Qwest, with respect to whether there should be a different rule for services that are now being put into place, as contrast to the ones provided before these Chapter 11 cases were filed.

Qwest may notice this up for hearing if it would like a determination as to this issue, so long as the Debtor is provided with the opportunity to submit an individualized response, in contrast to having to deal with it in the omnibus response it had to file when faced with

200 separate requests.

Third, the Debtor and it's allies, on the one hand, and any utility, on the other, may raise for further consideration by this Court, whether telecommunications provider should be deemed to be a utility with respect to any particular service provided.

I will expect, however, that there be a conference between the two perspective adversaries to try to reach agreement and/or to narrow issues, and, in the event of an agreement to disagree, to agree upon a briefing schedule and an evidentiary record, including agreement, if possible on whether the issues require just Briefs, Briefs and Affidavits or a full evidentiary hearing.

Once more, I want to repeat elements of the observation that the Second Circuit made in Caldor that I quoted early on in my Conclusions of Law.

> "A bankruptcy Judge must not be shackled with unnecessarily ridged rules in exercising the undoubtedly broad administrative power granted him under the

Bankruptcy Code in deciding what constitutes 'adequate assurance' in a given case. The Bankruptcy Court must focus upon the need of the utility for assurance and to require that the Debtor supply no more than that, since the Debtor almost per force has a conflicting need to conserve his financial resources."

Accordingly, "bankruptcy courts must be afforded reasonable discretion in determining what constitutes adequate assurance of payment for continuing utility service."

This key decision, though none of you may wholly like it, is intended to serve those ends.

Subject to the conditions just set forth, the objections are overruled.

The Debtor is to settle an Order on ten business days notice by mail, no less than that.

This is an Order that is of substantial importance to a lot of parties. Needless to say, the time to appeal will run from

the entry of the Order and not this decision.

I express no view as to whether, for purposes of appeal, this should be regarded as a final Order.

We're adjourned.

C E R T I F I C A T E

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, SABINE FAUSTIN, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

I reported the proceedings in the within-entitled matter, and that the within transcript is a true record of such proceedings.

I further certify that I am not related, by blood or marriage, to any of the parties in this matter and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of February, 2001.

Sabine Faustin
SABINE FAUSTIN