

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

IN RE:

In Proceedings  
Under Chapter 13

CRAIG THOMACZEK

Case No. 00-60224

Debtor(s).

OPINION

This matter is before the Court on debtor's motion to compel restoration of utility service. The facts are not in dispute. EJ Water Corporation ("EJ Water"), a not-for-profit cooperative funded with rural development money, provides water services to its members, all of whom reside in rural areas. EJ Water's "standard practice procedures," which resemble corporate bylaws, provide that a new member must pay one of two possible membership fees to have service established at his or her premises. If the member joins the cooperative at the time the ground work for the water line is initially brought to the territory, the new member must pay a "user contract" fee of \$500.00. However, if the member joins the cooperative after the water line to the territory is already in place, the new member must pay a "tap-on" fee of \$1,500 to establish service. The membership fees cover the cost to the cooperative of installing

the water line and establishing a new connection.<sup>1</sup>

The standard practice procedures further provide that in the event a member becomes more than sixty days delinquent with respect to payments for water usage after service has been established, EJ Water will terminate service by locking off the water meter. EJ Water must then officially notify the member in writing that the water meter has been locked off. The member has ninety days from the date of lock-off to pay a \$75.00 reconnect fee, in addition to curing the account deficiency, in order to have service reestablished.

Cooperative policy does not permit a meter to be locked off for more than ninety days. Consequently, in the event the member does not pay the reconnect fee and cure the account delinquency within the ninety-day period, the meter is removed from the residence and the member loses his or her member status. The former member is then treated as if he or she were never a member, and, as such, is required to pay the \$1500 tap-on fee to renew membership and have service reestablished.

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<sup>1</sup> Members benefit by joining the cooperative when the water line is initially brought to the area through payment of a lower membership fee. The lower fee is possible because all new members joining EJ Water at that time share the cost of installation of the water line. If EJ Water must come to the territory at a later time to establish service for a particular member, the membership fee is, logically, more costly, as that particular member alone must bear the cost.

Residents of this rural area have another water source to choose from as an alternative to EJ Water membership. At oral argument, counsel for EJ Water stated that its membership is composed of approximately eighty percent of the potential users in this area. The remaining twenty percent obtain their water from wells.

Debtor was, during a period of time prior to his bankruptcy filing, a member of EJ Water. However, debtor became more than sixty days delinquent in payment of his water bill. As a result, EJ Water locked off debtor's water meter on September 21, 1999, and sent debtor a notice of removal, officially notifying debtor of the meter lock-off, advising him of the amount due before water service would be reestablished, and reiterating the cooperative's standard practice procedures regarding delinquent bills. Debtor failed to cure the delinquency within the ninety-day period. Consequently, the meter was removed on December 21, 1999, and debtor's membership interest was forfeited. Debtor's bankruptcy case was filed three months later on March 22, 2000.

On March 31, 2000, six months after the water meter lock-off, debtor filed a motion to compel restoration of utility service, alleging that EJ Water violated § 366 of the Bankruptcy Code when the cooperative refused to reestablish service

without payment of the tap-on fee after debtor offered to provide EJ Water with an adequate assurance payment equal to two-months utility service. Debtor asks the Court to enter an order compelling EJ Water to restore utility service to debtor's residence, accept a security deposit equal to two-months water usage, and pay the attorney's fees that debtor incurred in bringing this motion.

Section 366 of the Bankruptcy Code prohibits a utility provider from disconnecting service or otherwise discriminating against a debtor on account of the debtor's bankruptcy filing or unpaid prepetition bills.<sup>2</sup> This section, however, allows the utility to demand a deposit or other form of security as "adequate assurance of payment" before continuing to supply services to the debtor.<sup>3</sup> "A utility can only demand adequate

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<sup>2</sup> Section 366(a) 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 or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

11 U.S.C. § 366 (a).

<sup>3</sup> Section 366(b) provides further that:

Such utility may alter, refuse, or discontinue

assurance of payment for post-petition services rendered to a debtor. It cannot demand assurance that amounts owed by the debtor as of the petition date will ever be paid in full or in part." Ginsberg & Martin on Bankruptcy § 3.04[A] at 3-49 (4<sup>th</sup> ed. 2000 Supp.)(citing In re M. Miller Ltd., 13 B.R. 5 (Bankr. M.D. Pa. 1980)).

The legislative history of § 366 shows that the purpose of this section is to permit the debtor to continue to receive services that are essential to a minimum standard of living from a utility where there is a "monopoly in the area so that the debtor cannot easily obtain comparable service from another utility." S. Rep. No. 95-989, 95<sup>th</sup> Cong., 2d Sess. 60 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5846. At least one court has recognized that Congress' concern in drafting this section was regulating post-petition termination of utility service, rather than restoring utility service that was disconnected pre-petition. In re Kiriluk, 76 B.R. 979, 983

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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.

11 U.S.C. § 366(b).

(Bankr. E.D. Pa. 1987). Courts have, however, required the posting of a security deposit as adequate assurance in accordance with this section in cases where, as here, the utility has terminated service for nonpayment prior to the customer's bankruptcy filing. See In re Whittaker, 882 F.2d 791 (3<sup>rd</sup> Cir. 1989); In re Roberts, 29 B.R. 808 (E.D. Penn. 1983).

In the instant case, debtor's argument that § 366 has been violated rests on the assumption that EJ Water's demand for payment of the tap-on fee is actually a demand for an unreasonable adequate assurance payment. However, the Court finds that the membership fee, which must be paid to become a member of EJ Water, is something separate and apart from a § 366 adequate assurance payment.

The debtor, at this point in time, is no longer a cooperative member. By asking EJ Water to reestablish debtor's water connection, debtor becomes, in effect, a new customer demanding services. EJ Water is treating debtor as it would treat any new customer by requiring that he become a member and pay the tap-on fee. The fact that all new members, and not just those in a bankruptcy case, are required to pay a membership fee, illustrates that the tap-on fee is not an adequate assurance payment. To rule that § 366 compels EJ Water to provide water service to a new member who is in bankruptcy and

who has not paid the tap-on fee would turn a bankruptcy filing into a means of extracting greater services from EJ Water than it is required to provide under the standard practice procedures.

Debtor argues further that the tap-on fee requirement is actually a disguised attempt to collect pre-petition delinquencies. The Court, however, finds that this is a mischaracterization of the tap-on fee. Rather than being a mechanism for collecting payment delinquencies, this fee compensates EJ Water, a not-for-profit organization, for its cost of reestablishing debtor's water connection.

It is unfortunate that the debtor here, at a time when he is in poor financial condition, must pay the tap-on fee to renew his cooperative membership. However, debtor's bankruptcy filing was a voluntary act subject to his control and timing. If debtor had filed his bankruptcy petition during the ninety-day cure period, EJ Water would not have incurred the costs of removing debtor's water meter<sup>4</sup> due to imposition of the automatic

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<sup>4</sup> Debtor argues that EJ Water could have "administratively" disconnected debtor's water service rather than incurring the expense of using a backhoe to physically remove the water meter from debtor's premises. However, EJ Water does initially disconnect service without incurring such expenses by locking off the meter for ninety days to give delinquent payers a chance to cure their account arrearage. It is not until the meter has been locked off for more than ninety days that EJ Water undertakes the expense of physically

stay, and debtor would not have forfeited his membership. Instead, debtor neither became current nor filed his bankruptcy case within the ninety-day period, and, as a result, his membership lapsed. Debtor was made aware of EJ Water's policies and procedures with respect to delinquent bills when he became a cooperative member. As a result, he had knowledge of the consequences of his actions and cannot now complain about the limits imposed by the cooperative's practices.

In the instant case, EJ Water has the duty to follow its standard procedures by treating debtor as if he were a new customer. Accordingly, the Court finds that debtor must pay the tap-on fee to become a cooperative member prior to EJ Water reestablishing water service at debtor's residence. The Court finds further that debtor's offer of a security deposit equal to two-months water usage constitutes a reasonable adequate assurance payment.

SEE WRITTEN ORDER.

ENTERED: **June 27, 2000**

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removing the meter from the premises. Keeping in mind that EJ Water is a not-for-profit corporation, it seems incongruous that EJ Water would leave a meter at a former member's premises when the account delinquencies might never be cured and service reestablished, if that meter could be used by another member.

/s/ Kenneth J. Meyers  
UNITED STATES BANKRUPTCY JUDGE