

“Deadbeat Attachers” — Protecting pole attachment fees under bankruptcy



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MEUW members who attend MEUW Accounting and Customer workshops are familiar with the tools available to municipal utilities when residential or commercial customers file bankruptcy petitions. Unpaid electric utility arrearages are considered unsecured debt and utilities are stayed by federal bankruptcy law from undertaking actions to collect. In those situations, municipal utilities generally are limited to filing their proofs of claim, making sure they collect adequate assurance to protect against post-petition losses and generally waiting in line.

But what happens when the revenue at risk from a commercial bankruptcy derives from pole attachment fees? These days, MEUW members have been confronted with this question by several high profile bankruptcies involving national telecommunications providers such as Frontier Communications and Windstream.

In contrast to electricity or water, licensing the right to occupy space on utility-owned poles is not a “utility” service and therefore some of the protections afforded utility providers under the bankruptcy code such as the right of set-off or the right to seek additional adequate assurance cannot be as readily utilized by utility providers. However, municipal utilities who have pole attachment agreements with telecommunications companies petitioning for bankruptcy are not completely without remedies.

The first thing to focus on is the status of the pole attachment agreement itself. Under federal bankruptcy law, an unexpired pole attachment agreement is considered an executory contract and the debtor has the right to reject the agreement. Given that most telecommunications companies (including Frontier and Windstream) intend to continue providing service under the restructuring plan, it is likely that the attachment agreements will remain intact.

Assuming that is the case, the municipal utility has a leasehold interest and essentially obtains the rights of a landlord under the bankruptcy code. If the

attacher was in default under the attachment agreement prior to the filing of the petition, it is possible that the agreement can be terminated even after the filing of the bankruptcy petition. However, to address that situation the utility would have to file a motion with the bankruptcy court to obtain relief from the automatic stay. Depending on the nature of the breach and the amount of fees at stake, that may or may not be worth the effort.

It is worth noting, however, that the filing of the bankruptcy petition itself does not constitute an act of default — notwithstanding the language of many pole attachment agreements that specifically designate bankruptcy as a default event. Under the bankruptcy code, such a provision is considered an “ipso facto” clause and is simply unenforceable.

If the attacher does not reject the attachment agreement, it is obligated to adhere to the terms of the agreement, and therefore remains liable for paying the required attachment fees and meeting its other obligations under the agreement. To enforce these provisions, the municipal utility can avail

itself of standard collection tools available under bankruptcy law, including filing a motion for relief from the automatic stay or a motion for adequate protection. Weighing the cost and benefits of pursuing such remedies as part of the bankruptcy process will again depend on the terms of the agreement that have been breached and the losses at stake.

In the alternative, if the attaching entity fails to pay required attachment fees following the bankruptcy petition or otherwise defaults on its obligations, the municipal utility can simply opt to “evict” its tenant by removing the attachment facilities in accordance with the terms of the agreement.

As in all bankruptcy matters, it is advisable to consult an attorney before undertaking any of these measures. ●



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