THIS ORDER IS SIGNED AND ENTERED.

Dated: January 5, 2023

Rachel Blise

Hon. Rachel M. Blise
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In re:

Amy S. Hunter,

Debtor.

Case No. 21-11247-rmb

Chapter 13

ORDER ON XCEL ENERGY'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR DECLARATORY JUDGMENT OR RELIEF FROM STAY

Debtor Amy S. Hunter commenced this case on June 10, 2021. At the time, she was behind in payments to Northern States Power Company-Wisconsin d/b/a Xcel Energy ("Xcel Energy"), which provides electric service to the debtor's property. The debtor again fell behind in payments after the petition date, and she filed a modified chapter 13 plan to address some of the post-petition debt. Since filing the modified plan, the debtor incurred additional charges for post-petition services that she has not paid. This prompted Xcel Energy to file the motion presently before the Court, which Xcel Energy titled a Motion to Dismiss, or, in the Alternative, for Declaratory Judgment or Relief from Stay. For the following reasons, the Court denies the motion to dismiss but grants the motion to the extent it seeks a ruling that a utility creditor need not seek relief from the automatic stay before terminating service based on a failure to pay for post-petition services.

Motion to Dismiss

Xcel Energy offers two arguments in support of its motion to dismiss. First, Xcel Energy argues that the case should be dismissed because the debtor has not made the required plan payments to the trustee so there is "cause" to dismiss under 11 U.S.C. § 1307(c). ECF No. 77 at 4. Eleven days before Xcel Energy filed its motion, the chapter 13 trustee also filed a motion to dismiss based on the debtor's failure to make plan payments. The trustee's motion was heard by Judge Furay on November 22, 2022, and Judge Furay ordered the debtor to become current on plan payments within 21 days or the case would be dismissed. ECF No. 82. The debtor was already given a deadline to catch up on plan payments, and the Court will not disturb that deadline or enter a different ruling.

Second, Xcel Energy argues that the case should be dismissed due to the debtor's bad faith. According to Xcel Energy, the debtor's multiple bankruptcy filings and failure to pay Xcel Energy are sufficient for the Court to find bad faith. ECF No. 77 at 4-5. A debtor's bad faith in commencing a bankruptcy proceeding can constitute "cause" for dismissal under § 1307(c). This basis for dismissal is premised in "fundamental fairness." *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992). Just as the Court must consider fairness to the debtor's creditors, it must also consider fairness to the debtor. A creditor or party in interest who believes a chapter 13 debtor commenced the case in bad faith should act with some diligence and seek dismissal before the case gets too far along. This case has been pending for nearly 18 months, and, though the debtor fell behind on her plan payments, she has made many months of payments. It would be unfair to the debtor to hold now, so many months later, that the debtor cannot continue because the case was commenced in bad faith. If Xcel Energy believed the case was commenced in bad faith, it should have sought dismissal soon after commencement.

Motion for Declaratory Relief[1]

Xcel's primary goal in filing its motion is to terminate utility service without running afoul of the automatic stay under 11 U.S.C. § 362. Dismissal would end the stay, but Xcel also wants to terminate service if the case continues. Xcel therefore seeks confirmation that it does not need relief from the automatic stay to terminate service. The Court agrees that the automatic stay does not prevent Xcel Energy from terminating utility service based on the debtor's failure to pay for post-petition services.

In the absence of a contractual or other duty, persons who have business relationships with debtors are not bound to continue those relationships once the debtor enters bankruptcy. That is, there is generally no duty to do business with a person who has demonstrable financial troubles because there is a significant risk of non-payment. Debtors have a unique interest in the provision of utility services, however. Utility providers often have a monopoly, leaving a debtor without the option to do business with another provider, and services like electric, gas, and water are essential for consumer and business debtors alike.

[1] Xcel Energy phrased its request as one for declaratory relief. Equitable relief such as a declaration is generally required to be sought through an adversary proceeding. *See* Fed. R. Bankr. P. 7001(7). The debtor did not object to the procedural posture of Xcel Energy's request for relief, so she has waived any right to require an adversary proceeding. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (holding a party can lose its right to an adversary proceeding by failing to object). *See also In re Murray Energy Holdings Co.*, 641 B.R. 355, 383 (Bankr. S.D. Ohio 2022) ("The requirement that an adversary proceeding be filed is not absolute. Even if a matter should, under the Bankruptcy Rules, be tried in the context of an adversary proceeding rather than a contested matter, where the parties have received sufficient due process, a court will not elevate form over substance and may consider the claim on its merits."). Moreover, Xcel Energy's request is more in the form of a request for a "comfort order" that the stay does not apply. "A 'comfort order' is a bankruptcy term of art for an order confirming an undisputed legal result, and often is entered to confirm that the automatic stay has terminated." *In re Hill*, 364 B.R. 826, 827 (Bankr. M.D. Fla. 2007). Such orders are mandated by 11 U.S.C. § 362(j), but many courts have held that even where § 362(j) does not apply courts have "the discretion to enter a comfort order if warranted by the facts." *In re Ross*, No. 18-11356, 2019 WL 480269, at *3 (Bankr. N.D. Miss. Feb. 6, 2019). The Court exercises its discretion to issue the order requested by Xcel Energy.

The Bankruptcy Code strikes a balance between the interests of a utility provider in receiving payment for its services and the interests of a financially troubled debtor. Section 366 of the Bankruptcy Code provides, in relevant part:

> (a) Except as provided in subsections (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.
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> (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.

11 U.S.C. § 366.

Under this section, a utility must continue to provide service to a trustee or debtor after the petition date even where the debtor owes a significant pre-petition debt to the utility. 11 U.S.C. § 366(a). This obligation to provide post-petition services unwillingly continues for only 20 days after the petition date. Thereafter, a utility may disconnect service if the debtor does not provide adequate assurance of payment. 11 U.S.C. § 366(b). That is, under the plain language of the statutory scheme, a utility need not continue providing post-petition service without some assurance that the debtor will be able to pay for the services it provides. On its face, the statute is self-executing, and the utility may terminate services without seeking relief from the automatic stay.

Even where adequate assurance is provided or a utility provides post-petition services voluntarily without adequate assurance under § 366(b), a utility may disconnect service in some circumstances. Courts have uniformly held that § 366(a) prohibits a utility from refusing or disconnecting service only where the "sole" basis for refusal or disconnection is the fact of

bankruptcy or a pre-petition default. *See*, *e.g.*, *Begley v. Philadelphia Elec. Co.*, 760 F.2d 46, 49 (3d Cir. 1985); *Jones v. Boston Gas Co. (In re Jones)*, 369 B.R. 745, 752 (B.A.P. 1st Cir. 2007). Therefore, a utility may disconnect service where the assurance of payment proves to be inadequate or a debtor fails to pay for post-petition services. *See Jones*, 369 B.R. at 752; *see also In re Adams*, No. 12-21445, 2012 WL 5381596, *3 (Bankr. E.D. Wis. Nov. 1, 2012) (noting the "principle recognized in § 366(a) that a utility may terminate service when post-petition bills are unpaid").

The court in *Jones* addressed exactly the circumstances present in this case. In that case, the chapter 13 debtor accrued a debt of $1,381.13 for post-petition electric service, and the utility disconnected service based on the nonpayment. 369 B.R. at 747. The debtor filed a motion arguing that the utility had violated the automatic stay and that the utility was required to restore service. *Id.* The Bankruptcy Appellate Panel for the First Circuit held that the automatic stay did not prevent the utility from disconnecting service based on the debtor's failure to pay for post-petition service. *Id.* at 752 ("We conclude that a utility does not run afoul of the automatic stay provisions in a Chapter 13 bankruptcy case by terminating service based on a debtor's failure to pay for post-petition service."). The court reasoned that the Bankruptcy Code does not prohibit chapter 13 debtors from paying for goods and services received post-petition. To hold that a utility cannot disconnect service based on non-payment, an action plainly allowed under § 366, would mean that no post-petition creditor could request payment of the post-petition debt. *Id.*

The facts of this case are indistinguishable from *Jones*. The debtor failed to pay for several months of post-petition utility service.[2] Section 366(a) permits a utility to disconnect service for non-payment of post-petition debt, and the automatic stay does not prevent the utility from taking that action.

The debtor is not left without any protection, however. A utility is prohibited from discriminating against a debtor based on the fact of the bankruptcy. 11 U.S.C. § 366(a). Therefore, a utility must treat a debtor the same as it would treat any other customer who is behind on payments, and the utility must follow all of its own procedures and any prescribed by law. The *Jones* court also suggested that a chapter 13 debtor may be able to prevent disconnection by modifying her chapter 13 plan to include the post-petition arrearage. 369 B.R. at 752. The modified plan would bind the utility to accept payment for the post-petition arrearage through the plan. The debtor here previously did just that, without objection from Xcel Energy. The Court expresses no opinion whether that would be an available course in the face of an objection from Xcel Energy. *See Weisel v. Dominion Peoples Gas Co. (In re Weisel)*, 400 B.R. 457, 463 (Bankr. W.D. Pa. 2009) ("[P]ostpetition creditors cannot be forced to participate in a Chapter 13 plan, although they may elect to do so voluntarily.").

The debtor argues that Xcel Energy cannot disconnect service because the utility did not request adequate assurance of payment under § 366(b) in the 20 days after the petition date.[3] Under the debtor's argument, it is the utility's burden to act quickly and request adequate

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[2] There is some dispute as to the precise amount the debtor owes to Xcel Energy, but the debtor agrees that she has not timely paid her utility bill for several months.

[3] It is unclear whether the debtor's argument is that Xcel Energy cannot disconnect utility service at all, or whether it must seek relief from the automatic stay before doing so. Regardless, neither argument has merit.

assurance of payment within 20 days. Absent such a request, says the debtor, the utility must provide service for the remainder of the case.

That argument fails for two reasons. First, the statute does not impose a burden on the utility to request adequate assurance of payment, or to take any action at all. *See Weisel*, 400 B.R. at 463 ("The statute imposes no such burden on utilities [to take action within the 20-day period under § 366(b)]."); *In re Marion Steel Co.*, 35 B.R. 188, 197 (Bankr. N.D. Ohio 1983) (holding that the debtor has the burden to come forward with adequate assurance of payment). If the debtor wanted to prevent termination of service, particularly given her history of non-payment and disputes with Xcel Energy, it was incumbent on the debtor to inquire regarding the assurance of payment necessary to prevent disconnection of services. Moreover, a utility's obligation to provide service without adequate assurance of payment expires on the 21st day after the petition date. That does not prevent the utility from voluntarily providing service to the debtor thereafter, but without adequate assurance of payment, the utility may disconnect service at any time. *Carter v. South Cnty. Water Sys. (In re Carter)*, 133 B.R. 110, 113 (Bankr. N.D. Ohio 1991) ("[T]he court finds that after expiration of the 20 day period and as a result of plaintiffs' failure to furnish adequate assurance, defendant was entitled to terminate plaintiffs' utility service.").

Second, even if the debtor had provided adequate assurance of payment, § 366(a) nevertheless permits the utility to disconnect service if post-petition bills are not paid. *See* 3 Richard Levin & Henry J. Sommer, *Collier on Bankruptcy* ¶ 366.03[1] (16th ed. 2022) ("The provision of adequate assurance does not prevent a utility from terminating service to the debtor or the estate if post-petition payments for utility service are not made."); *see also Begley*, 760

F.2d at 48 (a utility is "allowed to commence termination procedures once a post-petition payment is missed, despite the prior security or 'assurance' deposit").

Finally, it is worth noting that the debtor does not contend that the automatic stay prevents Xcel Energy from sending bills to the debtor for post-petition service. If a utility can send bills to the debtor without violating the stay, then the utility can disconnect service for non-payment of those bills, an act expressly sanctioned under § 366. *See In re Sciarrino*, No. 9:11-bk-05881, 2013 WL 3465920, *5 (Bankr. S.D. Tex. July 10, 2013) (rejecting debtor's argument that a utility can disconnect service under § 366 without violating the stay but could not send bills for post-petition service).

For the foregoing reasons, IT IS HEREBY ORDERED that Xcel Energy's motion to dismiss this case is DENIED.

IT IS FURTHER ORDERED that Xcel Energy's motion for an order that the automatic stay does not prevent disconnection of utility service is GRANTED. Xcel Energy need not obtain relief from the stay to disconnect utility service where the debtor fails to pay for post-petition services and the unpaid bills are not included in a modified plan.

IT IS FURTHER ORDERED that Xcel Energy's motion for relief from the automatic stay is DENIED AS MOOT.

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