UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
GARY LAMONT ABRAHAM,	)	CASE NO. BK01-41713
	)	
Debtor(s).	)	CH. 7

MEMORANDUM

Hearing was held in Omaha, Nebraska, on March 13, 2002, on Debtor's Motion for Contempt against Cox Communications (Fil. #57) and Resistance by Cox (Fil. #66). The debtor appeared pro se, and Harvey Cooper appeared for Cox Communications. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

The motion is denied.

Debtor's motion concerns Cox's post-petition termination of his telephone and cable television service. Debtor has had Cox service twice – he still owes $159.46 on the "First Account," opened in 1989. That service was disconnected in 1990 for failure to pay. Cox indicates that debtor had both cable and telephone service through Cox on the First Account, although the debtor asserts that Cox did not offer phone service at that time.

Debtor moved into a new apartment and opened the "Second Account" in July 2001, after he filed his Chapter 13 petition in this case. The account was opened under the name of "Lamont Abraham" with a slightly different Social Security number than that belonging to the debtor. For that reason, the Cox records did not pick up the account receivable from the First Account, so the company did not charge debtor a security deposit or otherwise ask that arrangements be made to pay the past-due balance. Debtor asserts that Cox verifies names and Social Security numbers through a national credit reporting service, so he believes Cox should have known immediately that the name and Social Security number he gave when opening the Second Account did not match.

Cox also indicates it was not aware of debtor's bankruptcy filing until later in July, although the debtor asserts that he listed it as a creditor when he filed and gave appropriate notice. Regardless, it does not appear that Cox requested any sort of adequate assurance of payment under 11 U.S.C. § 366(b) upon learning of debtor's bankruptcy.

The Second Account was for telephone and cable television service. Debtor made periodic payments on the account but was never current.

Debtor's Chapter 13 case was dismissed on January 8, 2002. Cox disconnected his telephone service the following day for nonpayment. It does not appear that Cox was aware of the dismissal at the time, however. The discontinuation of service apparently was an automatic function based on the delinquency of payment. Cox reinstated phone service the next day, although the computer system assigned a new number for that line, so it took a few days to reassign the old number to the line.

On January 16, Cox disconnected telephone service for non-payment. On January 22, it disconnected cable service for the same reason.

Debtor's Chapter 13 case was reinstated on Feb. 11, 2002, and the case was converted to Chapter 7 on Feb. 21, 2002.

The Bankruptcy Code provides debtors with some protection from the discontinuation of essential utility services.

> (a) 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.
>
> (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.

According to Collier's, the first sentence of subparagraph (b), regarding adequate assurance of payment, is self-executing and a formal proceeding by the utility is not required. 3 Collier on Bankruptcy ¶ 366.03 at 366-4 (rev. 15th ed. 2002). In other words, if the debtor does not provide adequate assurance of payment to the utility within 20 days after the order for relief, he runs the risk of service being terminated. Only if the debtor and the utility disagree as to what "adequate assurance" means will the court become involved.

As the Third Circuit noted, "the purpose and policy" of § 366 is "to prevent the threat of termination from being used to collect prepetition debts while not forcing the utility to provide services for which it may never be paid." Hanratty v. Philadelphia Elec. Co. (In re Hanratty), 907 F.2d 1418, 1424 (3d Cir. 1990) (quoting Begley v. Philadelphia Elec. Co., 760 F.2d 46, 49 (3d Cir. 1985)). In passing § 366, "Congress struck a balance between the general right of a creditor to refuse to do business with a debtor and the debtor's need for utility services." Hanratty, 907 F.2d at 1424.

Under § 366, subsection (a) broadly protects debtors from having their utility service altered, refused, or discontinued, and from suffering discrimination in that regard because of their bankruptcy filing. Subsection (b) creates a narrow exception to that protection: if adequate assurance of payment is not provided after 20 days, the utility may alter, refuse, or discontinue service to the debtors but may not otherwise discriminate against them. Id. See also Tarrant v. City of Douglas, Georgia (In re Tarrant), 190 B.R. 704, 708 (Bankr. S.D. Ga. 1995) (City not permitted to cut off power for period of 20 days after bankruptcy petition filed. After the 20-day period, city could terminate debtor's service only if it had not received adequate assurance of payment for post-petition services.).

The Third Circuit, in the Begley decision, recognized that § 366 does not limit a utility's freedom to take action on post-petition arrearages. Once a Chapter 7 debtor permits post-petition debts to become delinquent, the utility may begin termination proceedings and the bankruptcy court's jurisdiction over the issue of adequate assurance under section 366(b) is by that time no longer relevant. 760 F.2d at 50.

The obvious question in this discussion becomes "what is a utility?" The term is not defined in the Bankruptcy Code, but Congress explained in the House Report at the time § 366 was enacted that the section "is intended to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another utility." One Stop Realtour Place, Inc. v. Allegiance Telecom, Inc. (In re One Stop Realtour Place, Inc.), 268 B.R. 430, 435 (Bankr. E.D. Pa. 2001).

In the Realtour case, the telephone company took the position that it was not a "utility" because it was not a monopoly. It argued that deregulation of telephone service in the years since
§ 366 was passed changed the industry dramatically by opening the market to other service providers.

The Pennsylvania bankruptcy court did not accept the phone company's argument, however. The court said, first, that § 366 is not ambiguous so there was no reason to consider the legislative history. A telephone company is a utility according to the common meaning of the word, according to the court, because it provides telephone service to the public and is subject to regulation by the FCC and the state public utilities commission. Second, the court said, the term "utility" has always been given a broad meaning under § 366 consistent with the common and ordinary meaning of the word. The Realtour court cited the case of In re Good Time Charlie's Ltd., 25 B.R. 226, 227 (Bankr. E.D. Pa. 1982), which applied the term "utility" to a shopping center owner who was supplying electricity to the debtor. That decision noted that while the debtor could obtain electric service directly from the public utility company, to do so would be prohibitively expensive because re-wiring would be necessary, and therefore the debtor could not "easily obtain

comparable service."

Cox does not dispute that debtor's apartment building is hard-wired for Cox telephone service. However, Cox denies that it has a monopoly on telephone service for the residents of debtor's apartment complex because those residents could purchase wireless service from any provider instead of wired service from Cox. Cox asserts that debtor can obtain wireless telephone service for less than he is paying for Cox phone service with a separate wireless service.

Little case law exists to provide guidance on whether cable television qualifies as a utility. There is a decision from the bankruptcy court in the Middle District of North Carolina that a cable television provider is not a utility. In In re Moorefield, 218 B.R. 795 (Bankr. M.D.N.C. 1997), the court found that a cable television company that disconnected debtors' service upon learning of their bankruptcy filing, and refused to reconnect it even after the debtors offered a security deposit, was not a utility pursuant to § 366. The court found that the cable company was not a monopoly because it had a non-exclusive franchise with the city, so debtors could obtain cable service from an alternate provider. The court further found that § 366 did not apply because cable television "does not rise to the level of importance" of the utilities contemplated by Congress when the statue was enacted. The court noted that services such as electricity, gas, water, and phone "are typically regarded as necessary to meet minimum standards of living", while millions of Americans exist without cable television service. 218 B.R. at 795-96.

For purposes of the motion before the court, I need not decide whether Cox is a utility under § 366 for either telephone or cable service. Cox's termination of service did not violate the Bankruptcy Code regardless of the company's status as a utility.

If Cox is a utility, it does not appear to have run afoul of either § 366(a) or (b) because it did not terminate debtor's service simply because he filed bankruptcy. Nor does it appear from the evidence that Cox attempted to use the threat of disconnection as a method of forcing the debtor to pay his pre-petition dischargeable debt on the First Account. Specifically,

a review of the billing statements submitted with the affidavit of Christina Wickiser, Cox Customer Service Supervisor, indicate that debtor's balance due included only the charges for the Second Account. See Fil. #77.

Contrary to what debtor appears to be arguing, it is clear from the language of § 366 that a utility is not required to provide unrecompensed service to debtors for the duration of the bankruptcy. The utility need only provide service for 20 days after the order for relief in order to allow the debtor to make arrangements for future utility service. If, after that grace period, the debtor has not provided adequate assurance of payment, such as a security deposit, the utility is not obligated to provide service for which it is not receiving payment. Here, the evidence indicates that debtor did not provide, and Cox did not request, adequate assurance of future payment after the bankruptcy petition was filed. Rather, Cox terminated his service, months after the initial 20-day period after entry of the order for relief, because debtor failed to pay for post-petition service.

In the alternative, if Cox is not a utility, its termination of debtor's service was permissible because the automatic stay does not apply to claims arising after the bankruptcy case was filed. Here, the debtor incurred post-petition debt for the purchase of services, for which the provider of those services is entitled to payment. The automatic stay that goes into effect upon a bankruptcy filing will protect a debtor from pre-petition creditors, but it does not allow that debtor to remain immune while he continues to incur debt for services such as those provided under debtor's contract with Cox.

IT IS ORDERED Debtor's Motion for Contempt against Cox Communications (Fil. #57) is denied. Separate order to be filed.

DATED: April 11, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Gary L. Abraham
Harvey Cooper
Rick Lange
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
GARY LAMONT ABRAHAM,	)	CASE NO. BK01-41713
	)	
Debtor(s).	)	CH. 7

ORDER

Hearing was held in Omaha, Nebraska, on March 13, 2002, on Debtor's Motion for Contempt against Cox Communications (Fil. #57) and Resistance by Cox (Fil. #66). The debtor appeared pro se, and Harvey Cooper appeared for Cox Communications.

IT IS ORDERED Debtor's Motion for Contempt against Cox Communications is denied. See Memorandum filed this date.

DATED: April 11,2002

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*Gary L. Abraham
Harvey Cooper
Rick Lange
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.