

Legal Q&A

By **Christy Drake-Adams**, TML Assistant General Counsel

Q. May a city discontinue utility services for non-payment of a utility bill?

A. Yes, assuming due process is satisfied. This requires that the customer be given notice and an opportunity for a hearing before service is terminated. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1977); *see also Bradford v. Edelstein*, 467 F.Supp. 1361 (S.D. Tex. 1979). The notice must include: (1) the reasons for disconnection of service, such as overdue payment; (2) the date by which service will be discontinued if payment is not made; and (3) information regarding the procedure by which the customer may request a hearing to protest the proposed termination of service. The hearing does not need to be formal; an informal meeting with a designated city officer or employee can suffice. The designated officer or employee must have the authority to resolve the issue and rescind the disconnection order in accordance with city policy. The notice and hearing process is necessary in order to avoid the arbitrary or erroneous disconnection of essential services such as water, sewer, and electricity.

A city utility that bills and collects solid waste disposal service fees may suspend service of that utility, as well as solid waste disposal service, to a person who has not paid his solid waste bill. TEX. HEALTH & SAFETY CODE § 364.034(d)(2); *see also* TEX. LOC. GOV'T CODE § 552.910. For example, if a city water utility bills and collects solid waste fees and a customer doesn't pay his solid waste bill, the city may discontinue the water service until the delinquent solid waste utility bill is fully paid, even if the water account is current. *Cf.* Tex. Att'y Gen. Op. No. GA-0770 (2010) (concluding that § 364.034(d)(2) authorizes a water service company contracting with a county to collect the fees for the county's solid waste disposal service to suspend its own utility service for nonpayment of the county's solid waste disposal fee).

Q. How can cities increase collections on delinquent utility bills?

A. As discussed in the previous question, a city may adopt procedures to discontinue utility service to a customer whose account is delinquent.

Cities may also use late fees to encourage utility customers to pay their bills in a timely manner. A late charge on bills for utility service is neither interest nor penalty, but is a cost of doing business assessed against a delinquent customer. Tex. Att'y Gen. Op. No. H-1289 (1978). The late fee should be authorized by ordinance and should be reasonable. Reasonableness will generally be determined by the degree to which the amount of the fee relates to the costs the fee is meant to recoup. With regard to a utility bill, the city's cost of collection, absent the fee, plus any other city costs resulting from the tardiness of the payment, would be the costs the fee is meant to recoup. *Id.*

A city may reduce delinquencies by adopting an ordinance providing for the imposition of a utility lien against an owner's property for unpaid accounts. TEX. LOC. GOV'T CODE § 552.0025(d). To impose a lien, a city must adopt an ordinance setting out the city's intention to do so. The authority to impose utility liens has certain limitations; a lien may not be imposed for delinquent utility bills where:

1. service is connected in a tenant's name after the property owner has given notice to the city that the property is rental property. *Id.* § 552.0025(e).
2. service is connected in a tenant's name prior to the effective date of the ordinance imposing the lien. *Id.* § 552.0025(f).
3. the property involved is a homestead. *Id.* § 552.0025(d).

A city utility lien, when perfected, is superior to all other liens except a bona fide mortgage lien recorded before the utility lien. *Id.* § 552.0025(h).

Assuming the city's utility policies provide for it, a utility deposit may be applied to delinquent charges. Moreover, a city may require varying utility deposits for customers to reduce the impact of delinquencies on the utility. *Id.* § 552.0025(c); *see also id.* § 552.001(b) (providing that a city may regulate its utility system in a manner that protects the interests of the city). For instance, a city might impose a larger deposit on tenants in order to account for the inability to place a lien on rental property.

Q. May a city hold a landlord responsible for a tenant's utility bill?

A. No, not if the city contracts directly with the tenant and not the landlord. Under Local Government Code Section 552.0025, a city is prohibited from requiring a customer's utility bill to be guaranteed by a third party as a condition of connecting or continuing service. That same statute prohibits a city from requiring a customer to pay for utility service previously furnished to another customer at the same service connection as a condition of connecting or continuing service.

Q. What are some common causes of non-collection on utility bills?

A. The failure to timely file a utility lien can result in non-collection. As described above, a city is prohibited from requiring a customer to pay for utility services previously furnished to another customer at the same service connection. *Id.* § 552.0025(a). Thus, placing a utility lien on a property after the property is sold to someone other than the customer who incurred the charges would likely constitute an attempt to collect a delinquent bill from a subsequent owner. It is critical that, if your city files delinquent utility liens, the liens be filed as soon as the city policy allows.

Bankruptcy is also a common cause of non-collection of utility bills. A city utility that receives a notice of bankruptcy from a federal bankruptcy court generally "may not alter, refuse, or discontinue service to, or discriminate against, [a] trustee or [a] debtor solely on the basis of the commencement" of bankruptcy proceedings or because of an unpaid pre-bankruptcy utility bill. 11 U.S.C. § 366. For Chapter 11 bankruptcies (applicable to corporations), the utility may,

however, alter, refuse, or discontinue service if the utility has not received adequate assurance of payment of the bill within 30 days of the debtor filing its bankruptcy petition. “Adequate assurance” of payment is usually a cash deposit, but can be other forms of security (e.g., a surety bond). *Id.* Residential utility users who file bankruptcy under Chapter 7 (individual liquidation) or under Chapter 13 (Adjustments of Debts of an Individual with Regular Income) must provide adequate assurance to a utility provider within 20 days after the date of the “order for relief” and after notice and hearing. *Id.* A city should seek advice from an attorney who specializes in bankruptcy law before attempting to utilize these collection rights against a bankrupt utility customer.

Q. Are there any state laws to keep in mind when a person 60 years or older has a utility account delinquency?

A. Yes, a public utility (electric, gas, water, or telephone) that assesses a late payment charge on residential customers, suspends service before the 26th day after the date of the bill, and isn’t regulated by the Public Utility Regulatory Act (Title 2 of the Texas Utilities Code), should keep in mind the following:

- (a) On request by [an individual who is 60 years or older], a utility shall delay without penalty the payment date of a bill for providing utility service to that individual until the 25th day after the date the bill is issued.
- (b) This . . . applies only to an elderly individual who:
 - (1) is a residential customer; and
 - (2) occupies the entire premises for which a delay is requested.

TEX. UTIL. CODE § 182.002. The request for delay may be for the most recent utility bill and/or each subsequent utility bill. *Id.* § 182.003. The utility may require reasonable proof that the individual is 60 years of age or older. *Id.* 182.004.

Q. May a city gas or water utility have different rules regarding payment deadlines and late charges for a governmental entity (e.g., a school district or county) than for other utility customers?

A. Yes. The Prompt Payment Act provides the following as to payment deadlines:

- (a) Except as provided by Subsection (b), a payment by a governmental entity under a contract executed on or after September 1, 1987, is overdue on the 31st day after the later of:
 - (1) the date the governmental entity receives the goods;
 - (2) the date the performance of the service under the contract is completed; or
 - (3) the date the governmental entity receives an invoice for the goods or service.
- (b) A payment under a contract executed on or after September 1, 1993, owed by a political subdivision whose governing body meets only once a month or less frequently is overdue on the 46th day after the later event described Subsections (a)(1) through (3).

- (c) For a contract executed on or after July 1, 1986, and before September 1, 1987, a payment by a governmental entity under that contract is overdue on the 46th day after the later event described Subsections (a)(1) through (3).
- (d) For purposes of this section, the renewal, amendment, or extension of a contract executed on or before September 1, 1993, is considered to be the execution of a new contract.

TEX. GOV'T CODE § 2251.021; *see also id.* §§ 2251.001 (defining the terms “governmental entity” and “political subdivision”), 2251.002 (providing that 2251.021 doesn't apply where there is a dispute, where federal law or a federal contract applies, or where the invoice is not mailed in accordance with the purchase order). The attorney general has opined that the provision of/regular billing for utility service and payment for those services creates an implied contract in those circumstances where there is no express contract. Tex. Att'y Gen. Op. No. GA-0429 (2006).

In regard to late charges, the Prompt Payment Act provides that an overdue payment “begins to accrue interest on the date the payment becomes overdue” and sets the rate of interest as “the rate in effect on September 1 of the fiscal year in which the payment becomes overdue.” TEX. GOV'T CODE § 2251.025(a)-(b). The interest must be paid at the time the principal is paid. *Id.* § 2251.027(b).

A city utility working to develop policies for governmental entities should also note that the Texas Railroad Commission has authority to adopt rules concerning payment of bills by the state or a state agency to a gas utility or municipally-owned utility. TEX. UTIL. CODE § 104.255. Those rules must be consistent with the Prompt Payment Act. *Id.*; *see also* 16 TEX. ADMIN. CODE § 7.470.

Q. Do (non-city) utilities operating in your city ever have to let you know they are discontinuing service to customers?

A. Yes. H.B. 1772, effective January 1, 2014, requires certain natural gas and electric utilities to provide a city a notice of disconnection of a non-submetered, master metered multifamily property (e.g., a “bills paid” apartment complex or condominium) that is located in the city. Tex. H.B. 1772, 83d Leg., R.S. (2013) (codified at TEX. PROP. CODE § 92.302 and TEX. UTIL. CODE § 17.203). Cities may, but are not required to, submit contact information for receipt of the notice.

More details are available on the Public Utility Commission and Texas Railroad Commission websites here:

- <https://www.puc.texas.gov/industry/projects/electric/42057/42057.aspx>; and
- <http://www.rrc.state.tx.us/gas-services/non-submetered-master-meter-disconnections/>.

Q. Is our city utility subject to any state agency rules regarding discontinuing service and delinquencies?

A. There are various factors to consider in answering this question, including the type of utility and the rule at issue. That said, there are rules adopted by the Texas Commission on Environmental Quality (TCEQ) and the Public Utility Commission (PUC) that citizens often

mistakenly assert are applicable to city water utilities. For instance, TCEQ has adopted rules that establish when a bill may be considered delinquent, provide what must be included in a notice of disconnection, and prohibit disconnection for certain ill customers. 30 TEX. ADMIN. CODE §§ 291.87(b), 291.88(a), (f). Those rules are not applicable to a municipally-owned utility. *See id.* §§ 291.80, 291.3(52). Likewise, the PUC has adopted a rule that prohibits a utility from discontinuing “service to a delinquent residential customer when that customer establishes that some person residing at that residence will become seriously ill or more seriously ill if service is discontinued.” 16 TEX. ADMIN. CODE § 24.88(f). That rule is not applicable to a municipally-owned utility. *See id.* § 24.3(75)-(76).