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## Coates' Canons Blog: Now What? Utility Billing and Collections Post Executive Orders 124/142

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Article: <https://canons.sog.unc.edu/now-what-utility-billing-and-collections-post-executive-orders-124-142/>

This entry was posted on August 05, 2020 and is filed under Finance & Tax, Public Enterprise / Utility Finance

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On March 31, 2020, Governor Cooper issued Executive Order 124, which, among other things, prohibited certain collection practices by local government utilities due to the COVID-19 pandemic. Most of the utility-related provisions of **Executive Order 124**, as amended by **Executive Order 142**, (hereinafter EO 124/142) expired at 11:59pm on July 29, 2020. That means that local government utilities may resume normal billing and collection practices, including disconnections and late penalties, for customers who go delinquent on or after that date. There are some mandates under EO 124/142 that remain in effect for another six months (through January 29, 2021), though. This blog post explains those remaining obligations. It incorporates **recent guidance from the NC Attorney General's Office (AG's Office)** on how that Office interprets certain provisions of EO 124/142, specifically related to a local government utility's continuing obligations.

### EO 124/142 Payment Plan Mandate

EO 124/142 requires that a local government utility afford a *residential customer who accrued an arrearage from March 31 through July 29, 2020*, the option to participate in a *reasonable payment arrangement* that allows for repayment over at least a 6-month period (effectively through January 29, 2021). EO 124/142 also prohibits the imposition of any late fees or interest charges on arrearages. As indicated by italics, there are several terms that need to be further defined to understand this mandate.

The AG's Office issued guidance on July 30, 2020, as to how it will interpret some aspects of the payment plan requirement (hereinafter AG's guidance). The guidance is helpful in some respects but also raises some new interpretation questions. I will discuss what we know from the mandate based on the AG's guidance and where there are now open questions. I want to emphasize at the outset, that because the AG's Office is charged with enforcing the provisions of EO 124/142, it is important to understand and follow its guidance, even where it deviates from industry standards/normal practice. A local utility may need to follow-up with the AG's Office directly with questions about aspects of the utility's payment plan. And, as always, I suggest that each utility consult with its local attorney about specific interpretation issues.

Note, however, that the specific requirements and restrictions discussed below only apply to the subset of customers to which the EO 124/142 payment plan mandate applies. A local government utility is free to proceed with its normal collection, disconnection, late penalties, and payment plan process/terms for customers who fall outside the EO 124/142 payment plan mandate. (And it bears mentioning that local government utilities ARE NOT subject to the stricter requirements imposed on regulated, investor-owned utilities by the North Carolina Utilities Commission.)

### Defining Payment Plan Mandate Terms

With all that said, back to fleshing out the mandate. Recall that EO 124/142 requires that a local government utility afford a *residential customer who accrued an arrearage from March 31 through July 29, 2020*, the option to participate in a *reasonable payment arrangement* that allows for repayment over at least a 6-month period (effectively through January 29, 2021).

First, let's look at the subset of customers that a utility must give the option to participate in the EO 124/142 payment plan.

**Residential customers.** EO 124/142 only applies to residential water, wastewater, electric, and natural gas customers. None of the EO 124/142 mandates apply to commercial, industrial, agricultural customers, to the extent that a local government utility has these separate customer classes. Even if your board chose to suspend disconnections and/or late penalties for these other customer classes because of the pandemic, the specific requirements of EO 124/142 do not

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apply. It is up to your utility's governing board to determine whether or not to offer these customers payment plans, and under what terms.

**Accrued an arrearage from March 31 through July 29, 2020.** This provision is important because it dictates the subset of residential utility customers to which the EO 124/142 payment plan mandate applies. The AG's guidance speaks to how to determine which customers meet this criterion. A local government may select either its bill date, due date, past-due date, or other date as the triggering date. A utility must be consistent in its approach, though.

For example, if you use due date as the triggering event, any residential customer with due date(s) from March 31 through July 29, 2020, who did not pay the bill(s) in full on or after the date(s), must be afforded an EO 124/142 payment plan option to pay off the amounts that were not paid during this time period. Note that you do not have to include in the payment plan any amounts that the customer already owed prior to March 31 or amounts that come due after July 29. Similarly, if you use bill date as the triggering event, any residential customer with a bill date from March 31 through July 29, 2020, who did not pay the bill(s) in full, must be afforded an EO 124/142 payment plan option to pay the amount of these bills that remain unpaid. You would not have to include in the payment plan any amounts that the customer owed based on bill dates before March 31 or after July 29.

Second, let's look at what terms may or may not be part of an EO 124/142 payment plan.

**Reasonable payment arrangement.** Unfortunately, this is where the interpretation becomes much more difficult. We know some things for certain based on the language in EO 124/142. We also know that the AG's Office is interpreting EO 124/142 to allow certain common payment plan terms but disallow others. There are some outstanding interpretation issues, though. I've laid out below what we know for certain is allowed and not allowed and where there are still open questions.

**ALLOWED payment plan terms:**

**ALLOWED: Disconnection for nonpayment of payment plan installment.** The AG's guidance clearly allows a local government utility to specify in its EO 124/142 payment plan terms that in order to continue receiving service, a customer must make his/her payment plan installment payments. In other words, one of the terms of the payment plan may provide that the utility will disconnect service to a customer who has a payment plan if the customer does not make a payment plan installment payment. The AG's guidance mandates that the utility "clearly disclose to the customer the terms of the repayment plan, including when the customer will be disconnected if the customer does not make a payment."

Disconnecting service, or the threat of disconnecting service, may be the most effective collection tool that a water, electric, and natural gas utility has to compel compliance with its EO 124/142 payment plan. Of course, it is far less effective for wastewater services, which utilities are often very reluctant to disconnect. Also, it probably goes without saying that we are still in the middle of the pandemic, and it may even worsen in the coming months. A utility will have to balance its need to collect outstanding balances (and its financial stability) with its desire to ensure continued access to vital utility services to its customers.

**ALLOWED: Disconnecting service and/or applying late fees, interest charges, and applicable administrative fees for nonpayment of amounts that come due after July 29, 2020.** A local government utility may resume its normal collection practices for amounts that come due after the termination of EO 124/142. That includes imposing late penalties, interest charges, and administrative charges, as well as submitting the amounts owed to a collection agency and the state's debt set-off program. And, it includes disconnecting service for nonpayment. Even if a customer pays his/her EO 124/142 installment payment, a local government utility may impose penalties and disconnect for nonpayment of the new amounts that come due, according to the utility's normal policies. A local government may refuse to reconnect service until the outstanding balance of new charges (including all applicable penalties and administrative fees, such as disconnect fees and reconnect fees) are paid in full. As discussed below, however, a local utility may not terminate the EO 124/142 payment plan or accelerate the remaining amounts due.

Note that the AG's guidance does not directly address the provision in Section 8 of EO 142 that purports to extend the effective date of the both the late fee prohibition and the payment plan obligation. However, the AG's Office

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clearly appears to be taking the position that the continuing mandate does not apply to late penalties on new delinquencies. Specifically, the AG's guidance states that "[the executive orders do not prohibit disconnection late fees, or interest for bills outside [the assigned dates of March 31 to July 29, 2020]."

**ALLOWED: Disconnecting service and/or applying late fees, interest charges, and applicable administrative fees for nonpayment of amounts that were outstanding before March 31, 2020.** The continuing provisions of EO 124/142 do not apply to amounts that went delinquent before March 31. A local utility is free to resume its normal collection practices related to these amounts owed. As per above, this includes imposing late penalties, interest charges, and administrative charges, as well as submitting the amounts owed to a collection agency and the state's debt set-off program. And, it includes disconnecting service for nonpayment.

If a customer had an outstanding balance before March 31 and then also failed to make one or more payments from March 31 through July 29, 2020, the local utility must offer the customer an EO 124/142 payment plan for the arrearages that accrued from March 31 through July 29, but not for the amounts that were outstanding before March 31. A local utility's governing board may choose to include the prior delinquency amounts in the EO 124/142 payment plan, and it may be administratively easier to do so, but it is not legally required.

#### **DISALLOWED payment plan terms:**

There are a handful of payment plan terms, some of which that are standard practice, that the AG's Office has determined are not consistent with its interpretation of "reasonable payment arrangements."

**NOT ALLOWED: Assessing late fees and interest charges for nonpayment of payment plan installment.** Because a payment plan is a separate contractual arrangement between the customer and the utility, a local government typically imposes additional late fees and/or interest charges on any payment plan installments that are not paid on time. The AG's Office has deemed that doing this would violate the prohibition in the EO's against charging interest or late fees on arrearages that accrued between March 31 and July 29, 2020.

**NOT ALLOWED: Voiding payment plans for nonpayment of an installment.** It also is standard practice for a local government to make the continued validity of a payment plan conditioned on the customer making each installment payment. Most plans are voided if an installment payment is missed, resulting in immediate disconnection if the full amount owed under the payment plan is not paid. (This is sometimes referred to as an acceleration clause.) The AG's guidance indicates that doing this "would amount to a late fee on the arrearage, which is prohibited [by the EO 124/142]" and "would be inconsistent with the requirement in [EO 124/142] that repayment plans have a duration of at least six months."

As a practical matter, what this means is that if a customer misses a payment plan installment payment, the utility may disconnect service (according to the terms in the payment plan). The utility must reconnect service, however, if the customer makes that months' installment payment. The utility may not condition reconnection on the payment of the full amount owed under the payment plan. And it may not otherwise compel early pay off of the remaining amounts owed.

**NOT ALLOWED: Requiring a down payment on the amount owed as a condition of the payment plan.** Local governments often require a customer to pay a certain percentage of the total amount owed up front as a condition of being able to finance the rest through a payment plan. The AG's Office has determined that doing so is not consistent with a layperson's understanding of what constitutes a reasonable payment arrangement. (The AG's Office also stated that it will be looking to the NC Utilities Commission for guidance in how to interpret EO 124/142. In its July 29, 2020 Order, the NCUC similarly prohibited front loading installment payments.)

A customer may choose to make a down payment on the total amount owed, pay off the amount owed early, or otherwise negotiate a different payment arrangement with the local government utility. According to the AG's guidance, though, the default is that the utility either require "equal, fixed monthly installments" or "a pre-agreed fixed percentage of each monthly bill added to current charges."

**NOT ALLOWED: Reporting a customer to a credit reporting agency if the customer is in compliance with an established payment plan and is current on bills that are not covered by the EOs.** The AG's guidance

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states that “[u]tilities may not report a customer to a credit reporting agency if the customer is in compliance with an established payment plan and is current on bills that are not covered by the [EO 124/142].” Doing so, according to the AG, would be a “prohibited fee” under EO 124/142. Although the AG’s guidance does not state this specifically, presumably the same prohibition would apply to suing the customer for the amounts owed and/or submitting the amounts owed to the state’s debt set-off program. This prohibition is consistent with common practice. Presumably, however, a utility may report a customer to a credit reporting agency, if that customer fails to comply with the utility’s payment plan or becomes delinquent on new charges.

**NOT ALLOWED: Requiring customer to pay off full amount owed under payment plan if customer terminates service and asks to reestablish it at a new location.** Another common, although not universal, practice is for a local government utility to require that a customer pay off any outstanding balance in order to terminate service at one location and establish it at a different location in the utility’s service area. The AG’s guidance states that this practice is prohibited with respect to payment plans required by EO 124/142. A utility must allow a customer to transfer his/her EO 124/142 payment plan balance from one location to another in the utility’s service area. Note, however, that the utility may continue to require full payment of delinquent amounts that occurred before March 31 or after July 29, 2020, as a condition of the account transfer.

### Status of Other Common Payment Plan Terms

What about common payment plan terms that are not specifically addressed in the AG’s guidance document? Are local government utilities authorized to include these terms? The answer likely depends on the specific terms at issue. Here is my read on some of these terms.

**LIKELY ALLOWED: Requiring customer to opt-in or sign up for payment plan.** EO 124/142 states that a local government must provide eligible residential customers “the opportunity to make reasonable payment arrangements.” EO 124/142 does not mandate that a utility automatically enroll a customer in a payment plan and does not mandate that a customer participate in a payment plan. The AG’s guidance requires that a local utility provide sufficient notice to its eligible residential customers of the payment plan option, and of any payment plan terms, including consequences for nonpayment of payment plan installments. (See section below on notice for more details.)

**LIKELY ALLOWED: Requiring a customer to sign a payment plan contract to participate in the payment plan.** In order to ensure that all parties understand their rights and responsibilities related to a payment plan, it is common practice for a local government utility to require that a customer sign a payment plan contract, or, at a minimum, sign a form indicating that the customer is aware of all the payment plan terms. Assuming that the process to sign the contract/agreement/form is reasonable, and otherwise abides by the AG’s interpretation of the EOs’ requirements, it appears consistent with EO 124/142. In fact, having the customer sign an agreement could be proof that the utility provided reasonable notice of the EO 124/142 payment plan terms.

**UNCLEAR, BUT PROBABLY NOT ALLOWED: Specifying that customer must sign up for EO 124/142 payment plan option by a certain date in order to participate.** It is common for a local government to set a date or time period for a customer to sign up for a payment plan. If the customer does not sign up by the deadline, he/she forgoes the right to participate in the payment plan. May a local government utility apply this same practice to an EO 124/142 payment plan? The AG’s guidance does not address this issue directly. However, based on my reading of the AG’s Office’s various interpretations, I believe that the AG’s Office would deem this requirement inconsistent with the EO 124/142 mandate to allow an eligible customer the option to pay the amounts due over at least a 6-month period. A customer likely has not forfeited his/her right to participate in the EO 124/142 payment plan by not signing up by a certain date. As a practical matter, that means that a customer could request a payment plan after service is disconnected. The utility would have to reconnect service if the customer then makes an installment payment under the EO 124/142 payment plan. (Of course, if the customer has an outstanding balance from before March 31 or after July 29, the utility may refuse to reconnect service until those amounts, plus penalties and applicable fees, are paid in full.) A local government that wishes to set a deadline should reach out to the AG’s Office for further guidance.

Note, however, that the minimum payment plan period runs from July 29, 2020 through January 29, 2021. The longer a residential customer waits to sign up, the shorter the total repayment period afforded under the payment

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plan. For example, if a customer was offered a payment plan as of July 29, 2020, but waits until his/her service is disconnected on August 15, 2020 to sign up, he/she effectively has between August 15 and January 29, 2021 to pay off the full amount owed. Signing up late does not extend the minimum repayment period beyond January 29, 2021.

**LIKELY ALLOWED: Specifying the order of partial payments between the payment plan installment and new bill amounts.** Another usual payment plan practice is for a local government utility to specify how partial payments will be applied between past due amounts and new charges. Typically, utilities apply partial payments to past due amounts first, before applying to new service charges. Because a local government utility is otherwise free to resume normal collection practices for new delinquencies, ordering partial payments does not appear inconsistent with the EO 124/142 payment plan mandates. A utility must provide clear notice of its intent to order partial payments in its payment plan terms.

**LIKELY ALLOWED: Specifying what happens if a customer makes an overpayment or extra payment.** Similarly, it is also typical for a local government utility to specify how customer overpayments will be treated. There are several options. An overpayment could be applied toward the customer's next payment plan installment payment, applied to future new charges, or applied to payment plan principal. All of these options appear consistent with the EO 124/142 payment plan mandate. A utility should provide clear notice of how it will apply over payments in its payment plan terms.

**LIKELY NOT ALLOWED: Voiding payment plan if customer does not stay current on new bill amounts.** Yet another common payment plan term is to specify that the payment plan is void if a customer does not stay current on new bills. The AG's guidance does not address this issue directly, but such a requirement seems inconsistent with the AG's directive that a utility may not accelerate amounts owed under an EO 124/142 payment plan because doing so would amount to an impermissible late fee and be inconsistent with the EO 124/142 mandate that residential customers be afforded at least 6 months to pay. However, if a customer does not pay his/her new charges in full, a utility is free to disconnect service until those new charges, plus any applicable penalties, interest charges, and administrative fees are paid in full, even if the customer has made his/her EO 124/142 installment payment.

**UNCLEAR: Assessing disconnect and/or reconnect fees if a customer is disconnected for nonpayment of a payment plan installment amount.** This is a difficult issue to analyze in light of the AG's interpretation of the EO 124/142 mandates. EO 124/142 only prohibits the assessment of interest or late fees on arrearages. For many utilities, disconnect and reconnect fees are not late penalties; they are administrative charges, calculated so as to reimburse the utility for the costs of performing the disconnection/reconnection. These types of administrative charges are not directly covered by EO 124/142. What gives me pause, though, is that the AG has taken a very broad interpretation of what constitutes a late fee. For example, the AG has determined that voiding a payment plan for nonpayment of an installment amounts to a late fee. It is possible that the AG's Office also would deem a disconnect/reconnect fee as a type of late fee that is prohibited by EO 124/142. A utility is well advised to seek additional guidance from the AG's Office on this issue.

**UNCLEAR: Applying a deposit and engaging in other normal collection remedies of former customer's outstanding balance if customer has terminated account.** What if a customer accrued an arrearage from March 31 through July 29, 2020, but has since terminated his/her account altogether? The AG interprets EO 124/142 to prohibit a local government from refusing to transfer utility accounts to a new location because of outstanding EO 124/142 payment plan amount. However, the AG's guidance does not address what happens if a customer terminates service altogether. EO 124/142 states that "[c]ustomers shall be provided the opportunity to make reasonable payment arrangements...." One interpretation of this provision is that the mandate only applies to current customers, not former customers. In that case, a local utility would not have to afford an EO 124/142 payment plan option to a former customer who has closed his/her account. A local utility would be free to apply the former customer's deposit and otherwise engage in its normal collection practices for outstanding delinquencies on the closed account. However, the AG may interpret the EO 124/142 payment plan mandate to apply to anyone who was a customer when the arrearage occurred. For that reason, a utility should seek further guidance from the AG's Office on this issue.



### **Notice to Customers of EO 124/142 Payment Plan Option**

Once a local government utility determines the specific terms of its payment plan, it must provide reasonable notice of these terms to its affected customers. The AG's guidance states that a local government utility "must inform customers about their right to a repayment plan, and must communicate this notice: clearly; at a reasonable time—at least ten days—before any disconnection may take place; and on a bill, or through the communication method the utility uses to communicate urgent messages (like a text message or phone call), or both." According to the AG, if a utility has already provided sufficient notice, it need not do so again.

### **Consequences for Violating EO 124/142 Payment Plan Mandate**

EO 124/142 assigns responsibility for enforcing its provisions to the AG's Office "through any methods provided by current law." According to the AG's guidance, the Office will "pursue any enforcement by seeking a temporary restraining order against the utility entity after providing notice to the entity and seeking a resolution of the issue without litigation."

### **Links**

- [governor.nc.gov/documents/executive-order-no-124](http://governor.nc.gov/documents/executive-order-no-124)
- [files.nc.gov/governor/documents/files/EO142-Temp-Prohibitions-on-Evictions-and-Extending-Prohibition-on-Utility-Shut-Offs.pdf](http://files.nc.gov/governor/documents/files/EO142-Temp-Prohibitions-on-Evictions-and-Extending-Prohibition-on-Utility-Shut-Offs.pdf)