



A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: April 30, 2015

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**CHARLES GROVES, JR. AND
ANGELA S. GROVES,**

CASE NO. 14-14298-NPO

DEBTOR.

CHAPTER 13

ORDER ON THE MOTION TO DETERMINE SECURITY DEPOSIT

This matter came before the Court for hearing on March 19, 2015 (the “Hearing”) on the Motion to Determine Security Deposit (the “Motion”) (Dkt. 27) filed by Charles Groves, Jr. and Angela S. Groves (collectively, the “Debtors”) and the Entergy Mississippi, Inc.’s Objection to Motion to Determine Security Deposit (the “Response”) (Dkt. 34)¹ filed by Entergy Mississippi, Inc. (“EMI”) in the above-styled bankruptcy case (the “Bankruptcy Case”). At the Hearing, Chris F. Powell (“Powell”) represented the Debtors, and Christopher R. Shaw represented EMI. The Court, being fully advised in the premises, finds as follows:

¹ Although this document is labeled as an objection, the Court determines that the true nature of the document, according to its substance rather than its label, is a response. *See Armstrong v. Capshaw, Goss & Bowers, LLP*, 404 F.3d 933, 936 (5th Cir. 2005) (“[W]e have oft stated that ‘the relief sought, that to be granted, or within the power of the Court to grant, should be determined by substance, not a label.’”) (citing *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (quoting *Bros. Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594, 606 (5th Cir. 1963)).

1. On November 19, 2014, the Debtors filed a voluntary petition for relief (the “Petition”) (Dkt. 1) pursuant to chapter 13 of the United States Bankruptcy Code (the “Code”).

2. Sometime after the Debtors filed the Petition, EMI received notice of the Bankruptcy Case and requested a security deposit of \$380.00 from the Debtors as adequate assurance of payment for future services under 11 U.S.C. § 366(b).² The Debtors accordingly paid \$380.00 to EMI.

3. On February 11, 2015, the Debtors filed the Motion claiming that the \$380.00 adequate assurance security deposit is unreasonable and unduly burdensome, no security deposit should be required, and EMI should refund the \$380.00 to the Debtors.

4. On March 6, 2015, EMI filed the Response requesting the Court to deny the Motion.

5. At the Hearing, the Debtors revised their position and argued that the adequate assurance security deposit should be \$200.00, the amount they state the Mississippi Public Service Commission (the “MPSC”) authorizes EMI to charge new residential customers as a security deposit to open a new account. As such, the Debtors requested the Court to order EMI to refund the Debtors \$180.00 from the \$380.00 adequate assurance security deposit previously made. EMI contrarily argued that \$380.00 is a reasonable amount of an adequate assurance security deposit. Jon Majewski (“Majewski”), a senior customer service specialist for EMI, testified it is EMI’s policy once a current customer files a petition for relief under the Code, to close that customer’s current account and then open a new account for the services it provides that customer post-petition. Majewski also explained that the \$380.00 adequate assurance security deposit was calculated by doubling the second highest “Consumption billing receivable”

² Hereinafter, all code sections refer to the Code found at title 11 of the United States Code unless otherwise noted.

amount from the Debtors' account during the twelve (12) months prior to filing the Petition.³ Majewski further opined that \$380.00 is a reasonable amount because EMI bills in arrears and, thus, has a "two-month exposure."⁴

6. Section 366(b) provides that a utility may discontinue services to a debtor if the debtor does not furnish adequate assurance of payment for continuing utility services, in the form of a deposit or other security, to the utility within 20 days after the petition for relief is filed. 11 U.S.C. § 366(b). Upon request, the Court has the ability to modify the amount of the deposit. *Id.* It is within the Court's reasonable discretion to determine what constitutes adequate assurance of payment. *Steinebach v. Tuscon Elec. Power Co. (In re Steinebach)*, 303 B.R. 634, 641 (Bankr. D. Ariz. 2004); *In re Spencer*; 218 B.R. 290, 293 (Bankr. W.D.N.Y. 1998). It is important to note that adequate assurance is not the equivalent of a guarantee of payment but is instead designed to protect a utility from an unreasonable risk of non-payment for services rendered post-petition. *In re Steinebach*, 303 B.R. at 641 (citations omitted) (quoting *In re Adelpia Bus. Solutions, Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002)); *Hennen v. Dayton Power & Light Co. (In re Hennen)*,

³ Specifically, Majewski testified that the second highest "Consumption billing receivable" amount from the Debtors' account during the twelve (12) months prior to filing the Petition was \$190.00, which when doubled, equals \$380.00. The Court, however, notes that upon review of the spreadsheet detailing the Debtors' account history (the "Account History") (EMI Ex. 1), the three highest "Consumption billing receivable" amounts during the twelve (12) months prior to the filing of the Petition were \$206.46, \$195.27, and \$185.12. Thus, it appears that the \$380.00 adequate assurance security deposit was calculated by doubling an amount near the average of the second and third highest "Consumption billing receivable" amounts from the Debtors' account during the twelve (12) months prior to the Petition date.

⁴ Majewski explained that EMI typically has a "two-month exposure" because two (2) days after thirty (30) days of metered usage by a customer, EMI issues an invoice to the customer that is due twenty-one (21) days later, which is fifty-three (53) days after the customer's metered usage began. Because there is an additional seven (7) days given as part of the notice of disconnection of service, there is a total of sixty (60) days between the date a customer begins using its services and the date EMI will disconnect the customer's service if no payment is made.

17 B.R. 720, 725 (Bankr. S.D. Ohio 1982) (citations omitted). While state public utility regulations are not binding on a bankruptcy court's decision as to the reasonableness of an adequate assurance security deposit, bankruptcy courts have often looked toward such regulations for guidance when determining the issue. *See In re Cannon*, No. 08-23636-svk, 2008 WL 2553475, at *1-2 (Bankr. E.D. Wis. June 23, 2008); *In re Steinebach*, 303 B.R. at 642; *In re Spencer*, 218 B.R. at 293-94; *In re Hennen*, 17 B.R. at 725.

7. At the Hearing, Majewski testified, and Powell agreed, that EMI is regulated by the MPSC and that the MPSC authorizes EMI to charge new residential customers a maximum security deposit of \$200.00 to open a new account. One prominent bankruptcy treatise provides that “[t]he deposit set by the court should rarely, if ever, exceed that permitted by state regulations, since the maximum deposit under state regulations is in theory designed to protect the utility from default by even the riskiest customer.” 3 COLLIER ON BANKRUPTCY ¶ 366.03[1] (16th ed. 2015). Bankruptcy courts, however, have found that the circumstances of a particular case may warrant a departure from the maximum deposit amount prescribed by state regulations. *Id.* (“Those circumstances may include the nature of the debtor, debtor’s financial condition, the frequency of payments, the likely usage, the possibility of sureties and the availability of other funds, such as governmental assistance, for payments.”); *see also In re Steinebach*, 303 B.R. at 641-43; *In re Spencer*, 218 B.R. at 293-94.

8. Based on the circumstances of the Bankruptcy Case, the Court finds that \$200.00 is an appropriate amount to protect EMI from an unreasonable risk of non-payment. At the Hearing, the Debtors testified that they are current on all of their post-Petition obligations to EMI. In addition, the Debtors’ Schedule I: Your Income and Schedule J: Your Expenses (Dkt. 1 at 23-26) reflect that they have more than enough monthly income to pay EMI for future

services. As to their pre-Petition payment history, the Account History shows that during the twelve (12) months prior to the Petition, the Debtors were charged numerous \$5.00 late payment charges and at one point were charged a \$50.00 “Reconnect Fee,” which, according to Majewski, suggests that the Debtors had their services disconnected on one occasion.⁵ Despite the series of late charges and the one-time reconnect charge, Majewski testified that there is nothing in the Debtors’ Account History that indicates the Debtors would not have paid their bills through the normal billing process if not for the filing of the Petition, which caused EMI to close the Debtors’ account for the services it provided them pre-Petition. The Court finds that under these circumstances, \$200.00, which, in theory, is the maximum amount set by the MPSC to protect EMI from default by even the riskiest customer, is an appropriate amount of an adequate assurance security deposit under § 366(b)(2). EMI’s argument and Majewski’s testimony at the Hearing primarily focused on the fact that \$200.00 is not sufficient to compensate EMI for its “two-month exposure” in the event the Debtors do not make their payments going forward. This argument, however, mischaracterizes the purpose of an adequate assurance payment. As the Court previously stated, adequate assurance of payment is not the equivalent of a guarantee of payment. *In re Steinebach*, 303 B.R. at 641 (citations omitted) (quoting another source); *In re Hennen*, 17 B.R. at 725 (citations omitted). For these reasons, the Court finds that the Motion should be granted to the extent that EMI should credit \$180.00 to the Debtors’ post-Petition account within fourteen (14) days from the date of this Order.

IT IS, THEREFORE, ORDERED that the Motion hereby is granted to the extent that EMI shall credit \$180.00 to the Debtors’ post-Petition account within fourteen (14) days from the date of this Order.

⁵ This charge does not include the \$45.00 “Connect Fee” EMI charged the Debtors when it opened a new account for the services provided to the Debtors after they filed the Petition.

IT IS FURTHER ORDERED that in all other respects, the Motion hereby is denied.

##END OF ORDER##