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:

BERNICE BOONE, **CASE NO. 14-14056-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. 47) filed by Bernice Boone (the "Debtor") and the Entergy Mississippi, Inc.'s Objection to Motion to Determine Security Deposit (the "Response") (Dkt. 50)[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 Debtor, 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 October 30, 2014, the Debtor 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 Debtor filed the Petition, EMI received notice of the Bankruptcy Case and requested a security deposit of $555.00 from the Debtor as adequate assurance of payment for future services under 11 U.S.C. § 366(b).[2] The Debtor did not a pay any security deposit to EMI.

3. On February 12, 2015, the Debtor filed the Motion claiming that the $555.00 adequate assurance security deposit is unreasonable and unduly burdensome, and no security deposit is necessary, and the Court should require EMI to continue providing her utility services without a security deposit.

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

5. At the Hearing, Powell revised his position and argued that the adequate assurance security deposit should be $200.00, the amount he states the Mississippi Public Service Commission (the "MPSC") authorizes EMI to charge new residential customers as a security deposit to open a new account. EMI contrarily argued that $555.00 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 $555.00 adequate assurance security deposit was calculated by doubling the amount of the

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

highest monthly "Actual Usage" of services associated with the Debtor's most recent account during the twelve (12) months prior to filing the Petition.[3] Majewski further opined that $555.00 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 Adelphia Bus. Solutions, Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002)); *Hennen v. Dayton Power & Light Co. (In re Hennen)*, 17 B.R. 720, 725 (Bankr. S.D. Ohio 1982) (citations omitted). While state public utility

[3] The Court notes that upon review of the spreadsheet detailing the Debtor's account history (the "Account History") (EMI Ex. 1), the highest monthly "Actual Usage" of services associated with the Debtor's most recent account during the twelve (12) months prior to filing the Petition was $276.21. Thus, it appears that the $555.00 adequate assurance security deposit was calculated by doubling the amount of the highest monthly "Actual Usage" of services associated with the Debtor's most recent account during the twelve (12) months prior to filing the Petition date ($276.21 × 2 = $552.42) and "rounding up" $2.58 ($552.42 + $2.58 = $555.00).

[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.

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. Majewski also testified at the Hearing that the Debtor has not made a payment, including the requested adequate assurance security deposit, to EMI since November 2014 and her "Actual Usage" bill is more than $2,000.00 since filing the Petition. As to her pre-Petition payment history, the Account History shows that the Debtor has been charged $40.00 for a

"retrun [*sic*] check charge" and charged a $50.00 "Reconnect Fee" on four (4) occasions,[5] which, according to Majewski's testimony, suggests that the Debtor's services were disconnected on four (4) separate occasions. In addition, Powell conceded that the Debtor's post-Petition history with EMI distinguishes her from ordinary customers who are not in bankruptcy and from customers who are in bankruptcy but are current in their payments for post-petition services. While the Court notes that adequate assurance is not the equivalent of a guarantee of payment, the Court does find that under these circumstances, $552.42[6] is an appropriate amount of an adequate assurance security deposit under § 366(b)(2). For these reasons, the Court finds that the Motion should be granted to the extent that $552.42 is an appropriate amount of an adequate assurance security deposit for the Debtor to pay EMI pursuant to § 366(b).

IT IS, THEREFORE, ORDERED that the Motion hereby is granted to the extent that $552.42 is an appropriate amount of an adequate assurance security deposit for the Debtor to pay EMI pursuant to § 366(b).

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

##END OF ORDER##

[5] These charges do not include the $45.00 "Connect Fee" EMI charged the Debtor when it opened a new account for the services provided to the Debtor after she filed the Petition.

[6] $552.42 is double the amount of the highest monthly "Actual Usage" of services associated with the Debtor's most recent account during the twelve (12) months prior to filing the Petition, which is the calculation Majewski testified that EMI used to determine the $550.00 deposit amount. The Court finds that under the circumstances present here, this calculation renders an appropriate amount of an adequate assurance security deposit but the unexplained, seemingly arbitrary $2.58 amount is not appropriate. *See supra* note 3.