Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: June 19, 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:

JOHN F. FOX. AND **CASSIE D. FOX,**	**CASE NO. 15-11390-NPO**
DEBTORS.	**CHAPTER 7**

ORDER ON THE MOTION TO DETERMINE REASONABLE UTILITY DEPOSIT

This matter came before the Court[1] for hearing on June 18, 2015 (the "Hearing") on the Motion to Determine Reasonable Utility Deposit (the "Motion") (Dkt. 12) filed by John F. Fox and Cassie D. Fox (collectively, the "Debtors") and the Entergy Mississippi, Inc.'s Response to Debtor's [*sic*] Motion to Determine Reasonable Utility Deposit (the "Response") (Dkt. 18) 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. On April 19, 2015, the Debtors filed a voluntary joint petition for relief (the "Petition") (Dkt. 1) pursuant to chapter 7 of the Bankruptcy Code.

[1] The Court has issued two recent orders regarding this same issue in other cases: *In re Boone*, Case No. 14-14056-NPO at Dkt. 53 and *In re Groves*, Case No. 14-14298-NPO at Dkt. 41.

2. Sometime after the Debtors filed the Petition, EMI received notice of the Bankruptcy Case and requested a security deposit of $545.00 from the Debtors as adequate assurance of payment for future services under 11 U.S.C. § 366(b).[2] The Debtors have not paid any security deposit to EMI since filing the Petition.

3. On May 5, 2015, the Debtors filed the Motion claiming that the $545.00 adequate assurance security deposit is "unreasonable and oppressive" and requesting the Court to allow EMI to request just a $200.00 security deposit as adequate assurance.

4. On June 1, 2015, EMI filed the Response requesting the Court to deny the Motion.

5. At the Hearing, Jon Majewski ("Majewski"), a senior customer service specialist for EMI, testified that 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 $545.00 adequate assurance security deposit was calculated by doubling the amount of the highest monthly "Actual Usage" of services associated with John F. Fox's most recent account[3] during the twelve (12)

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

[3] According to the Petition, both Debtors reside at 913 Seventh Avenue Cleveland, MS. (Dkt. 1 at 1). According to the billing statements admitted into evidence at the Hearing, the EMI account for the Debtors' residence is in John F. Fox's name only. (Debtors Ex. 3 & 4).

months prior to filing the Petition.[4] Majewski further opined that $545.00 is a reasonable amount because EMI bills in arrears and, thus, has a "two-month exposure."[5]

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

[4] At the Hearing, EMI introduced into evidence a spreadsheet detailing John F. Fox's account history (the "Account History") (EMI Ex. 1). As Powell pointed out during his cross examination of Majewski, the highest monthly "Actual Usage" of services associated with John F. Fox's most recent account during the twelve (12) months prior to filing the Petition was $271.47. Thus, the $545.00 adequate assurance security deposit requested by EMI was calculated by doubling the amount of the highest monthly "Actual Usage" of services associated with John F. Fox's most recent account during the twelve (12) months prior to filing the Petition date ($271.47 × 2 = $542.94) and "rounding up" $2.06 ($542.94 + $2.06 = $545.00). Majewski testified that the $2.06 discrepancy partially accounts for a late payment fee that would be charged to John F. Fox's account in the event he does not timely pay his bill.

[5] 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. Majewski testified at the Hearing, and Powell agreed, that EMI is regulated by the Mississippi Public Service Commission (the "MPSC") and that the MPSC currently 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 $545.00 is an appropriate amount to protect EMI from an unreasonable risk of non-payment. Majewski testified that prior to filing the Petition, John F. Fox incurred numerous late payment charges and received multiple notices informing him that his service would soon be disconnected due to his failure to pay his bill. According to Majewski's testimony and a review of the Account History, John F. Fox would commonly wait until receiving a "disconnect notice" before paying his

overdue bill. EMI also introduced into evidence a printout of EMI's online customer tracking program, titled "C&C Management Tool Bankruptcy Tracking & Reporting System" (the "Tracking Report") (EMI Ex. 2). The Tracking Report provides that Cassie D. Fox had two (2) prior accounts with EMI for separate addresses that have a combined unpaid balance of $649.16. Majewski testified that EMI requires customers to pay any past due balances from prior accounts before creating a new account for a different address, but that because the Debtors' most recent account was in John F. Fox's name, EMI did not know that it was associated with Cassie D. Fox. While the Court notes that adequate assurance is not the equivalent of a guarantee of payment, the Court does find that under these circumstances, $545.00 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 denied[6] and that the Debtors should pay $545.00 to EMI as an adequate assurance security deposit within fourteen (14) days from the date of this Order or EMI may then alter, refuse, or discontinue service in accordance with § 366(b)(2).

IT IS, THEREFORE, ORDERED that the Motion hereby is denied.

IT IS FURTHER ORDERED that the Debtors hereby shall pay $545.00 to EMI as an adequate assurance security deposit within fourteen (14) days from the date of this Order or EMI may then alter, refuse, or discontinue service in accordance with § 366(b)(2).

##END OF ORDER##

[6] At the conclusion of the Hearing, Powell also requested the Court to not allow EMI to charge a "Connect Fee" that appears on John F. Fox's most recent billing statement. The Court notes that at this juncture, the only issue properly before the Court is whether $545.00 is an appropriate amount for an adequate assurance security deposit. Therefore, it is unnecessary for the Court to determine the validity of any other charges that appear on John F. Fox's billing statements at this time.