UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

IN RE:	*	NO. 05-17697
	*	
ENTERGY NEW ORLEANS, INC.,	*	CHAPTER 11
	*	
DEBTOR	*	SECTION "B"
* *	*	

OPPOSITION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE STIPULATION AND ORDER REGARDING PAYMENT OF ADEQUATE PROTECTION TO THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE, AND FINANCIAL GUARANTY INSURANCE COMPANY AND MODIFICATION OF FEE ORDER

NOW INTO COURT, through undersigned counsel, comes the Official Committee of Unsecured Creditors (the "Committee") and objects to the *Stipulation and Order Regarding Payment of Adequate Protection to the Bank of New York, as Successor Trustee, and Financial Guaranty Insurance Company and Modification of Fee Order* (the "Stipulation and Proposed Order") **[P-1469, P-1478].** The Stipulation and Proposed Order seeks this Court's approval of the agreement among Entergy New Orleans, Inc. ("ENOI" or the "Debtor"), ENOI's parent, Entergy Corp., Financial Guaranty Insurance Company ("FGIC") and the Bank of New York, as Successor Trustee (the "Bond Trustee") (collectively, the "Stipulating Parties") under which the Debtor will pay to FGIC and/or the Bond Trustee certain post-petition interest on the bonds issued by ENOI (collectively, the "Bonds"). The Bond Trustee and FGIC are not entitled to these payments as a matter of law, as neither the Debtor, FGIC nor the Bond Trustee has established that the collateral securing the Bonds (the "Bond Collateral") has decreased or is decreasing in value since the commencement date of this case. In fact, the finding of this Court on October 24, 2006 and the evidence in the record are to the contrary. In addition, the

Committee objects to the modification of the Fee Order **[P-1081]** to include The Blackstone Group L.P. ("Blackstone") as a "Lender Professional" entitled to recover its fees and costs during this Case. The reasons for the Committee's objection are discussed in detail below.

I. PROCEDURAL AND FACTUAL BACKGROUND

1.

On September 22, 2006, the Bond Trustee and FGIC filed the *Amended Motion of the Bank of New York, as Successor Trustee, and Financial Guaranty Insurance Company for Adequate Protection Pursuant to Sections 361 and 363(e) of the Bankruptcy Code or for Certain Alternative Relief* (the "Adequate Protection Motion") **[P-1155]** in which they sought the identical relief relative to the Debtor's payment of post-petition interest as that now agreed to by the Debtor in the Stipulation and Proposed Order.

2.

The Adequate Protection Motion was opposed by the Debtor and the Committee.[1] Both the Debtor and the Committee contended there was not any evidence that the Bond Collateral was decreasing in value. Indeed, the evidence, including the testimony of the Bond Trustee's financial advisor, was to the contrary.

3.

Regarding the payment of post-petition interest as interest, the Debtor refused to pay such interest in the exercise of its business judgment. The Committee took the same position as it

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[1] See *Opposition of the Debtor to Motion of the Bank of New York, and Financial Guaranty Insurance Company for Adequate Protection Pursuant to Sections 361 and 363(e) of the Bankruptcy Code* **[P-1225]** and *Opposition of the Official Committee of Unsecured Creditors to the Amended Motion of the Bank of New York, as Successor Trustee, and Financial Guaranty Insurance Company for Adequate Protection Pursuant to Sections 361 and 363(e) of the Bankruptcy Code or for Certain Alternative Relief* **[P-1220]**.

takes now with regard to the payment of interest as interest. Paragraph 6 of the opposition of the Committee stated:

> The Committee does not oppose the current payment of postpetition interest if the Movants [FGIC and the Bond Trustee] prove that the cumulative claims of the bondholders and Entergy Corp., as the DIP lender, are less than the value of the collateral such that they are entitled to postpetition interest under Section 506(b). If the Movants are shown to be oversecured, they will ultimately be entitled to the interest under Section 506(b) and the Committee acknowledges that payment at this time would prevent the compounding of interest that would otherwise occur if the current interest is allowed only to accrue (without prompt payment). In such an event, where the Movants are shown to be oversecured, the Court's approval to allow the commencement of interest payments would be beneficial to the estate and in the best interest of the unsecured creditors and the estate.

4.

A hearing was held on October 24, 2006 to consider the Adequate Protection Motion. FGIC and the Bond Trustee called Mr. William Hardie as a witness and qualified him as an expert in the "restructuring of utilities, the economic analysis and valuation of utilities, and a financial expert on utility financing."[2] Mr. Hardie testified that FGIC and the Bond Trustee were oversecured as of the petition date and that the value of the Bond Collateral had not declined in value since that time. Mr. Hardie observed:

> I had performed in December of last year a valuation analysis that concluded that the value of the collateral as of the filing date exceeded the claims of the bondholders by a relatively significant amount. . . . We have no [update to] that valuation analysis since it was originally performed in December of last year, although my view is that based on all of the circumstances of which I am aware, the value of the collateral has not declined since the petition date.[3]

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2 Transcript of October 24, 2006 hearing at 29.

3 Mr. Hardie further confirmed this testimony in response to the Court's direct inquiry. The colloquy was as follows:

5.

This Court denied the Adequate Protection Motion at the October 24, 2006 hearing. The Court found that FGIC and the Bond Trustee "did not carry the burden of proof as to proving the diminution in value of the collateral . . .."[4] This ruling was confirmed by the Court's order dated October 27, 2006 **[P-1275]**.

II. THE DEBTOR MAY NOT NOW PAY POST-PETITION INTEREST WITHOUT A FINDING THAT THE BONDHOLDERS ARE OVERSECURED

6.

Submission of the Stipulation and Proposed Order to this Court at this time is basically the re-urging of the Adequate Protection Motion by FGIC and the Bond Trustee with the convenient removal of the opposition of the Debtor.

> THE COURT: Let me make sure I understood your second to last statement. I believe you testified the value of collateral has not declined since the date of filing, is that correct?
>
> THE WITNESS: That's my opinion, yes, Your Honor.

See transcript of October 24, 2006 hearing at 54-55.

4 Transcript of October 24, 2006 hearing at 105. For the convenience of the Court, the full text of the Court's ruling was as follows:

> THE COURT: I've considered the memoranda, the testimony, the arguments of Counsel, and the statements of Counsel. I'm going to deny the motion of the Trustee from Bank of New York and FGIC in its entirety on the basis primarily they did not carry the burden of proof as to proving the diminution in value of the collateral and, therefore, they lose on the adequate protection portion of the motion. As to the other portion calling for me to apply Section 105(a) and revisit the business judgment of the Debtor on the basis that it would be in the best interest of the estate to pay the interest at this time under 105(a), I deny that on the basis they have not given me any square authority and I do not see any basis for me to review the best business judgment of the Debtor because there's no blatant misapplication of that, or no gross negligence, or no fraud, or anything else that would cause me to revisit or overrule the best judgment of the Debtor at this time.

7.

Notwithstanding the prior ruling of this Court and the testimony of Mr. Hardie at the hearing on October 24, 2006, the Stipulation and Proposed Order seeks to authorize the Debtor to pay to FGIC and/or the Bond Trustee, *as adequate protection* and not as post-petition interest, all interest accruing on the Bonds from September 23, 2006 (the one year anniversary of the petition date) through the Effective Date of the Third Amended Plan. The portion of this interest that has already accrued since September 23, 2006 is proposed to be paid shortly after the hearing on December 19, 2006 if the Stipulation and Proposed Order is approved by this Court at that time. The remaining portion of this interest is to be paid by the Debtor as it accrues.[5] Regarding the interest that accrued during the first year of the Bankruptcy Case, *i.e.*, prior to September 23, 2006, the Stipulation and Proposed Order appears to provide FGIC and the Bond Trustee interest on this deferred interest (*i.e.*, compound interest) in quarterly payments thereof accruing after July 1, 2007 but payable on and after October 1, 2007, if the Effective Date of the Third Amended Plan does not occur by June 30, 2007.[6] There is no breakdown as to actual amounts to be paid and the timing of any of these payments.[7]

8.

All of these proposed "adequate protection" payments are to be made without any requirement that the value of the Bond Collateral be established as greater than the amount owed collectively to FGIC, the Bond Trustee and Entergy Corporation, as DIP lender. Further, there

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5 Stipulation and Proposed Order at ¶¶ 2-5.

6 Stipulation and Proposed Order at ¶6.

7 The Stipulation and Proposed Order fails to quantify any of the proposed payments. Additionally, the Stipulation and Proposed Order refer to a Third Amended Plan which has yet to be filed.

would be no finding that these payments constitute accrued post- petition interest under Section 506(b).

9.

The Committee opposes the Stipulation and Proposed Order for the same reason presented in the Committee's opposition to the earlier denied Adequate Protection Motion; the position of the Committee remains the same as stated above in Paragraph 2. *Again, the Bond Collateral is not diminishing in value; it is increasing in value. Thus, adequate protection is not required and cannot be paid.*[8]

10.

Because under the current circumstances, as confirmed by this Court's findings on October 24, 2006, interest cannot be paid as adequate protection, the proposed payment of post-petition interest can be permitted now only in favor of an *oversecured* creditor.[9] Nevertheless, the Stipulation and Proposed Order expressly rejects any factual finding that the value of the Bond Collateral exceeds the amount of the debtor-in-possession indebtedness and the indebtedness plus accrued interest due under the Bonds.[10] Paragraph 9 of the Stipulation and Proposed Order provides:

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8 It should also be noted that adequate protection is not available to perpetuate an oversecured creditor's equity cushion. See *Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc.),* 154 F.3d 722, 730 (11th Cir. 1995) ("[W]e hold that an oversecured creditor's interest in property which must be adequately protected encompasses the decline in the value of the collateral only rather than perpetuating the ratio of the collateral to the debt.")

9 Stipulation and Proposed Order at ¶9.

10 The debtor-in-possession financing lien that primes the Bonds secures up to $200,000,000 that may be borrowed by the Debtor. As of December 2, 2006, documents provided to the Committee by the Debtor indicate the balance of the debtor-in-possession loan was $21,841,000 and was projected by the Debtor to remain approximately this amount through the end of 2006. The indebtedness under the Bonds is approximately $229,935,000 not including accrued interest since September 23, 2005.

> Nothing herein shall be a determination by the Bankruptcy Court, or an agreement by the Parties or with any Bondholder, that the Bond Collateral has had, or has, a greater value than the principal amount of the Bond Claim, or that interest, attorneys' fees, costs or charges provided for under the Bonds accrue after the Petition Date pursuant to section 506(b) of the Bankruptcy Code, or shall be otherwise allowed by the Bankruptcy Code.

Thus, Paragraph 9 expressly negates the factual finding that is an absolute legal prerequisite for the payment of post-petition interest under these circumstances.

III. FGIC IS NOT ENTITLED TO REIMBURSEMENT OF FEES PAID AND TO BE PAID TO THE BLACKSTONE GROUP

11.

The Committee opposes the Stipulating Parties' agreement to amend the Fee Order **[P-1081]** to provide for payment of the fees of Blackstone as a "Lender Professional" thereunder. Such amendment would authorize the current payment of Blackstone as an administrative claim. The Stipulating Parties have not established (1) the basis for the Debtor's obligation to pay Blackstone, (2) the nature of the services to be provided by Blackstone, or (3) why Blackstone's fees would not be duplicative of the fees of other professionals[11] already approved under the Fee Order. In the event the fees of Blackstone are payable as part of a secured claim of the Bondholders, then the same valuation issues arise for an award of Blackstone's fees as discussed above with regard to the payment of post-petition interest under the Bonds. .

12.

The Committee has been informed that the proposed fee payment to Blackstone is $250,000 with a possible additional $500,000 in the future. The Committee respectfully submits that these funds would be more appropriately used to pay the fees to obtain exit financing,

[11] At the hearing on October 24, 2006 regarding the adequate protection issues, FGIC called a single witness, Mr. Hardie, who has been the financial advisor for the Bond Trustee since commencement of this case. Notably, FGIC did not present testimony by Blackstone.

thereby ensuring that a confirmed plan of reorganization in this case can go effective as quickly as possible.

13.

In short, there is absolutely no showing of a factual or legal basis for the payment of fees to Blackstone as administrative expenses or as fees payable to an oversecured creditor under Section 506(b).

IV. CONCLUSION

14.

The above-discussed agreements of the Stipulating Parties contained in the Stipulation and Proposed Order are contrary to the provisions of the Bankruptcy Code and are highly prejudicial to the interests of the unsecured creditors. The Committee's position has not changed since its opposition to the Adequate Protection Motion **[P-1220]** filed by FGIC and the Bond Trustee and denied by this Court less than two months ago. Neither FGIC nor the Bond Trustee is entitled to the current payment of post-petition interest *as adequate protection* absent proof that the Bond Collateral is declining in value since the petition date. The Committee does not oppose the Debtor's current payment of post-petition interest if (but only if) FGIC and/or the Bond Trustee establish that the cumulative claims of FGIC, the Bond Trustee and Entergy Corporation, as the DIP lender, are less than the value of the Bond Collateral, such that FGIC and the Bond Trustee would be entitled to make a claim to the accrual of post-petition interest under Section 506(b).[12]

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[12] This is the Committee's position because, to the extent these parties are shown to be oversecured, they will ultimately be entitled to the accrual of interest under Section 506(b) and the Committee acknowledges that payment at this time would prevent the compounding of the interest that would otherwise occur if the current interest is allowed to accrue (without prompt payment). In the event these parties are shown to be oversecured, the Court's approval to allow the

WHEREFORE, based upon the foregoing, the Committee opposes any order by this Court allowing the Debtor's payment of post-petition interest to FGIC and/or the Bond Trustee except to the extent that the Stipulating Parties establish entitlement to post-petition interest under Section 506(b). If Section 506(b) is fully satisfied in this regard, the Committee consents to payment of post-petition interest as being in the best interests of the estate. Furthermore, the Committee opposes the payment of the fees of Blackstone as an administrative expense of the estate and requests this portion of the Stipulation and Proposed Order be denied.

Respectfully submitted,

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commencement of interest payments would be beneficial to the estate and in the best interest of the unsecured creditors and the estate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing document was served electronically on PACER system participants on this 14th day of December 2006 and to those on the attached distribution list via United States Mail, properly addressed and postage prepaid, on the 15th day of December 2006.

S/ Philip K. Jones, Jr.
Philip K Jones, Jr.