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Electric Generation and Transmission
Cooperative, Inc.*

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

IN RE:) Case No. 11-62031-11
)
)
SOUTHERN MONTANA ELECTRIC)
GENERATION AND TRANSMISSION) **MOTION TO ENFORCE: (1)**
COOPERATIVE, INC.,) **CONFIRMATION ORDER,**
) **TOGETHER WITH INJUNCTION**
) **INCORPORATED THEREIN; AND (2)**
Debtor.) **ORDER APPROVING 9019 MOTION**
)
)

Come Now, Southern Montana Electric Generation and Transmission Cooperative Company, pre-confirmation “Debtor” and post-confirmation “Reorganized Debtor, and, as outlined further below, moves the Court to enforce: (1) the Order of Confirmation entered in this case by the Court on June 20, 2014, docket #1459, together with amendment thereto (collectively the “Confirmation Order”); and (2) the Order of April 5, 2013, docket # 784 (“9019 Order”), approving the former Chapter 11 Trustee’s “Motion for (I) Approval of Compromise and

Settlement Pursuant to F.R.B.P 9019(a); and (II) Approval of Partial Assumption and Assignment of Executory Contract Pursuant to 11 USC 365”, dated January 16, 2013, docket # 652 (“9019 Motion”).

In support of its Motion, the Reorganized Debtor states as follows:

1. On June 20, 2014, the First Amended Plan of Reorganization, dated May 12, 2014 (the “Plan”), proposed by the Debtor was confirmed in the Confirmation Order. As provided in the Plan, the Bankruptcy Court retained jurisdiction over this Case pursuant to the Plan, Article XI, Sections 11.1(e) [*...issue such orders in aid of execution of the Plan to the extent authorized by Section 1142 of the Bankruptcy Code*], (l) [*..hear all matters relating to the Plan...*], and (m) [*...hear any other matter consistent with the provisions of the Bankruptcy Code*].

2. As provided in the Confirmation Order at Paragraph 38, pursuant to Sections 105(a) and 1142 of the Code, post-confirmation the Court retains jurisdiction over any matter: (a) arising under the Code; (b) arising in or related to the case; or (c) that relates to the matters set forth under Article XI of the Plan.

3. Importantly, Paragraphs 44 and 46 of the Confirmation Order provide for the imposition of a permanent injunction against all Persons and Entities (capitalized terms not defined herein are as defined under the Plan and Disclosure Statement) “...who have been, are, or may be holders of Claims against or Interests in the Debtor shall be permanently enjoined from taking any of the following actions against or affecting the Debtor, Reorganized Southern, the Estate, the assets, or any of the Released Parties, or their respective assets and property, with respect to Claims or Equity Interests (other than actions brought to enforce any rights or obligations under the Plan)...”.

4. The 9019 Motion, which was filed by the former Chapter 11 Trustee, provided for the settlement of an ongoing dispute between the Debtor and Yellowstone Valley Electric

Cooperative, Inc. (“YVEC”). That dispute had resulted in the filing of an action by YVEC against the Debtor and others before the Thirteenth Judicial District Court, Yellowstone County, Montana, Cause No. DV 08-1797 (the “Action”) prior to the filing of this bankruptcy by the Debtor. Without limiting the effect of the Action, its general purpose was to permit YVEC to exit from Southern Montana and its liabilities. As the Court will note from the filed 9019 Motion, YVEC had requested this Court to abstain from hearing matters related to the Action and for relief from the stay (Docket #'s 274, 278), which motions were denied by this Court (Docket #433).

5. As noted in the 9019 Motion, its purpose was to “...settle all matters between and among the Trustee [Chapter 11 Trustee], the Debtor and YVEC, including those arising out of or related to the Contract [Wholesale Power Contract between YVEC and the Debtor], the State Court Litigation [the Action], the Proof of Claim and the Western Contract...”. *9019 Motion, Para. 10*. As provided under the 9019 Motion, YVEC, upon Court approval of the 9019 Motion, would thereafter “cease to be a member of the Debtor, a creditor of the Debtor, or a party in interest in this bankruptcy case.” *Id.* Attendant to the 9019 Motion was a Settlement Agreement and Release (“Release”) which were attached as Exhibit A to the 9019 Motion. The Release states that upon the occurrence of the Effective Date [which occurred upon approval of the 9019 Motion by the Court and completion of the required tasks, such as the dismissal of the Action], YVEC released and discharged the Debtor “from any and all contracts, actions, claims, causes of action, demands or expenses for damages or injury whether asserted or unasserted, known or unknown, foreseen or unforeseen, including, without limitation, any claim arising out of, related to, or which were or could have been made in the State Court Litigation or the Bankruptcy Case.” [Emphasis added]. *9019 Motion, Exh A (Docket 652-1), Para. 1*. The Release by YVEC was broad in nature and included all claims, demands and damages arising under state and federal law. *Id.* In the Release, the Debtor released YVEC under similar language. *Id., Para. 2*.

6. Upon the entry of the Court's 9019 Order, the parties performed the terms of the 9019 Motion and Release, including the dismissal of the Action with prejudice.

7. Upon the completion of the 9019 Motion tasks, other than the obligations assumed by YVEC under the Western Contract, YVEC had effectively "divorced" itself from the Debtor in that it was no longer responsible for any of the outstanding liabilities of the Debtor, of which there were many at that time. The Court can take judicial notice of the fact that during the time of the 9019 Motion and its approval by the 9019 Order, and during the period of the Chapter 11 Trustee's administration of the case thereafter, there was no certainty that the Debtor would successfully reorganize. The Court can also take judicial notice of the fact that until the Debtor returned as DIP in December 2013, following the removal of the Trustee, and thereafter obtained confirmation of a completely consensual plan of reorganization, but for the divorce of YVEC under the 9019 Motion and 9019 Order, YVEC was threatened by the potential inability of the Trustee to resolve the obligations owed by the Debtor, and perhaps YVEC, to a variety of conflicting creditors, including the other members of the Debtor. For this reason, the 9019 Motion produced a significant and timely benefit to YVEC upon its approval by this Court in the 9019 Order.

8. Contemporaneous with the Trustee's administration of this case and the negotiation and submission of the 9019 Motion to the Court, on September 21, 2012, the U.S. Federal Energy Regulatory Commission ("FERC") issued an Initial Decision regarding Northwestern Energy Company's ("NWC") filing of revised tariff sheets for Schedule 3 service under its Open Access Transmission Tariff ("Tariff"). This was reported at 140 FERC ¶ 63,023 (2012). By its terms, this FERC Initial Decision determination required a refund by NWC of an increased Tariff charged by NWC with respect to the Dave Gates Generating Station. That Initial Decision was adverse to NWC, i.e., it was ordered by the ALJ for FERC who wrote the Initial Decision, to commence the refund process to customers, such as the Debtor, at which point NWC appealed the Initial Decision

to the next level of FERC and obtained a stay of the refund requirement pending the final outcome of the issue at FERC.

9. While, pursuant to the 9019 Motion, YVEC had withdrawn its proof of claim in this case, it and its counsel continued to get notice of various matters in the case, notably, the Disclosure Statement filed by the Debtor. *See, Certificate of Service, Docket# 1342.*

10. The Disclosure Statement provided a description of the assets of the Debtor, including the following language of Section 3b, page 25:

“[3]b. Potential Refund Claim Against NorthWestern Corporation

On September 21, 2012, the U.S. Federal Energy Regulatory Commission ("FERC") issued an Initial Decision regarding NorthWestern Corporation's ("NorthWestern") filing of revised tariff sheets for Schedule 3 service under its Open Access Transmission Tariff (the "Tariff"), see 140 FERC ¶ 63,023 (2012). This determination relates to an increased Tariff charged by NorthWestern with respect to the Dave Gates Generating Station. The Initial Decision was adverse to NorthWestern which then filed exceptions. The FERC ruled on the exceptions and affirmed the Initial Decision pursuant to Opinion No. 530 issued on April 17, 2014 at 147 FERC ¶ 61,049. In this opinion, the FERC ordered, among other things, that NorthWestern must make refunds to Schedule 3 customers consistent with the aforementioned order. The Debtor is a Schedule 3 customer of NorthWestern.

Any recovery of a refund from NorthWestern by the Debtor is highly speculative. This is true because based on a press release by NorthWestern dated April 18, 2014, indicating its disagreement with the April 17, 2014, FERC ruling and further indicating that NorthWestern is reviewing whether to exercise appellate rights. NorthWestern has thirty (30) days from the entry of the April 17, 2014, ruling within which to pursue appellate rights through a rehearing before the FERC. If unsuccessful in a rehearing, NorthWestern could appeal any such adverse determination to the US Court of Appeals. The press release by NorthWestern projects that such an appeal could extend into 2016 or beyond....”

11. Notably, the confirmed Plan of the Debtor provides at Section 10.3 that, to the maximum extent possible under 11 USC 1141(d), the distributions, rights and treatment that are provided in the Plan are in complete satisfaction, discharge and release, as of the Effective Date of the Plan, of Claims, Interests and Causes of Action (as such capitalized terms were defined under the Plan) whether known or unknown and against any assets of the Debtor (assets being defined in

Section 3 of the Disclosure Statement to include the NWC Refund), including Claims or Interests that arose prior to the Effective Date of the Plan as confirmed, regardless of whether a proof of claim was filed or not. The term “Claim” was given the definition provided under 11 USC Section 101(5) and, under the effect of Plan Section 10.3, was stated to include any pre-and post-petition Claims against the Debtor, whether filed or not.

12. Clearly, by the time of the confirmation of the Plan in June of 2014, if not before the Release and the dismissal of the Action, the potential refund claim from NWC was known, or was readily capable of being known, to YVEC, both through the information provided in the Disclosure Statement, which was served upon YVEC, and the public record nature of the FERC decisions, the first of which dated back to 2012.

13. The Confirmation Order provides at Paragraph 39 that the effect of confirmation is to provide a complete satisfaction, discharge and release of all Claims and Interests of any nature whatsoever against the Debtor and the Estate, including the Debtor’s “assets, properties or interests in property.” Again, as noted above, the term “Claims” included claims that were filed as proof of claim and those claims that were not filed as proof of claim. Subsequent to the confirmation, the Confirmation Order provides that all Persons and Entities are precluded from asserting any Claim or Interest against the Reorganized Debtor or its assets, whether or not the legal basis or the facts for such Claims or Interests “were known or existed prior to the Effective Date [of the Plan]”.

Confirmation Order, Para. 39.

14. The Confirmation Order naturally provides for injunctive relief at Paragraphs 44 through 46. In sum, the injunction provided therein enjoins all Persons and Entities “who have been, are or may be holders of Claims against or Interest in the Debtor” [emphasis added] from taking any action or make any claim against the Debtor, the Reorganized Debtor, the Released Parties (which includes the then current members of the Debtor) and the assets of the same.

Confirmation Order, Paragraph 44.

15. On May 26, 2016, FERC issued a final decision regarding the NWC refund matter in which it denied the motion for rehearing of NWC. 155 FERC ¶61,158 (the “Decision”). As a result of the Decision, FERC was required to refund to certain customers, such as the Reorganized Debtor, all overcharges collected by NWC (the “NWC Refund”). In June 2016, NWC paid a portion of the NWC Refund due to the Reorganized Debtor into an escrow account established by NWC and the Reorganized Debtor, with such Refund to be held pending the outcome of an appeal filed by NWC of the Decision. The remaining portion of the NWC Refund due to the Reorganized Debtor, but which was not placed into such escrow, was paid directly to Beartooth Electric Cooperative, Inc., a former member of the Reorganized Debtor, which was entitled to its allotted portion of the NWC Refund under the terms of its exit from the Reorganized Debtor.

16. Following the Decision, YVEC has put the Reorganized Debtor on notice that it asserts a right or claim to a portion of the NWC Refund based upon its position as a former member of the Debtor, due to its contention that the value attributable to the NWC Refund accrued during its tenure as a member of the Debtor. The Reorganized Debtor believes that YVEC is prevented from asserting a claim to, and is precluded from realizing payment of, any portion of the NWC Refund by virtue of the effect, in the singular or cumulatively, of the 9019 Motion and 9019 Order, the Release, the dismissal of the Action with prejudice, the terms of the confirmed Plan and approved Disclosure Statement which were served upon YVEC, and the Confirmation Order and the injunction provided therein.

17. The Reorganized Debtor remains hopeful that the dispute between YVEC and it relative to the NWC Refund can be amicably resolved. However, in order to ensure that the injunction provisions of the Confirmation Order are enforced in the event that such consensual resolution is not reached promptly, the Reorganized Debtor seeks an order from this Court to

enforce the Confirmation Order and the 9019 Order by preventing YVEC from making any claim against, or realizing the payment of any portion of, the NWC Refund from the Reorganized Debtor or its members.

18. The Reorganized Debtor notes that it is not seeking to obtain an injunction, which might require the filing of an adversary complaint, but is seeking to merely enforce an existing injunction in place in the form of the Confirmation Order through a motion, which is proper. *See, In re Continental Airlines, Inc.*, 236 BR. 318, 326-27 (Bankr. D. Del. 1995); *In re Kalikow*, 602 F.3d 82, 93 (2d Cir. 2010); *In re SemCrude, L.P.*, 2011 Bankr. LEXIS 3801, at *23 n.11 (Bankr. D. Del. Oct. 7, 2011); *In re Dunning*, 269 B.R. 357 (Bankr. N.D. Ohio 2001); *In re WorldCorp., Inc.*, 252 B.R. 890, 895 (Bankr. D. Del. 2000); *In re Beta Int'l, Inc.*, 210 B.R. 279 (Bankr. E.D. Mich. 1997); *In re Texaco, Inc.*, 182 B.R. 937, 945 (Bankr. S.D.N.Y. 1995).

19. The Reorganized Debtor believes that this Motion, and the relief sought herein, are appropriate in that the claim of YVEC against the NWC Refund will operate in contravention of this Court's Confirmation Order and the injunction contained therein, thereby satisfying the test established for such post-confirmation jurisdiction by the Court in the matter of *In re Yellowstone Club, LLC*, 460 BR 254, 279 (Bankr. D. MT 2011): ["where there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement, retention of post-confirmation bankruptcy court jurisdiction is normally appropriate."]

WHEREFORE, the Reorganized Debtor moves the Court for relief as requested herein.

DATED this 12th day of October, 2016.

GOODRICH & REELY, PLLC.

By /s/ Malcolm Goodrich
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NOTICE OF OPPORTUNITY TO RESPOND AND REQUEST A HEARING

If you object to the application, you must file a written responsive pleading and request a hearing within fourteen (14) days of the date of the notice. The responding party shall schedule the hearing on the application at least 21 days after the date of the response and request for hearing and shall include in the caption of the responsive pleading, the date, time and location of the hearing by inserting in the caption the following:

NOTICE OF HEARING

Date: _____

Time: _____

Location: _____

If no response and request for hearing are timely filed, the Court may grant the relief requested as a failure to respond by any entity shall be deemed an admission that the relief requested should be granted.

CERTIFICATE OF SERVICE

I, Malcolm H. Goodrich, of Goodrich & Reely, PLLC, hereby certify under penalty of perjury that on the 12th day of October, 2016, I caused to be mailed a true and correct copy of the foregoing document by ECF or electronic mail to the parties in interest who have requested special notice by ECF.

/s/ Malcolm H. Goodrich