**UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF MONTANA**

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| In re<br><br>**SOUTHERN MONTANA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC**,<br><br>Debtor. | Case No. **11-62031-11** |

# O R D E R

At Butte in said District this 5th day of June, 2014.

In this Chapter 11 case, Lee A. Freeman, the duly-appointed former Chapter 11 trustee (the "Trustee") for the Debtor Southern Montana Electric Generation and Transmission Cooperative, Inc., and Horowitz & Burnett, P.C. ("H & B") and Waller & Womack ("W & W"), as bankruptcy counsel for the Trustee, filed on April 30, 2014, a Joint Application of Lee A. Freeman, Horowitz & Burnett, P.C., and Waller & Womack for Fees for Services Rendered and Costs Incurred in Successfully Defending Objections to Final Fee Applications ("Application") requesting an award of fees in the amount of $6,950.00 and costs in the amount of $325.59 for the Trustee, attorney's fees of $50,184.50 and costs in the amount of $994.61 on behalf of H & B, and attorney's fees and costs of $4,732.50 on behalf of W & W. Joseph Womack of W & W also filed a Notice of the Application, with proof of service of the Application on the parties, which states that if no response and request for hearing on the Application are timely filed within fourteen (14) days, "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." No objections to allowance of

this Application have been filed. The U.S. Trustee has not filed a response to this Application pursuant to 28 U.S.C. § 586(a)(3)(A).

As set forth in numerous decisions entered by this Court, including prior Orders entered in this case, notwithstanding the absence of opposition to this fee application, this Court has an independent obligation to review each application to evaluate the propriety of the compensation requested. *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3rd Cir. 1994); *In re Wildman*, 72 B.R. 700, 701 (Bankr. N.D. Ill. 1987). In *Busy Beaver*, the court explained:

> [T]he integrity of the bankruptcy system ... is at stake in the issue of a bankruptcy judge's performance of the duty to review fee applications *sua sponte*. The public expects, and has a right to expect, that an order of a court is a judge's certification that the result is proper and justified under the law.... Nothing better serves to allay [public perceptions that high professional fees unduly drive up bankruptcy costs] than the recognition that a bankruptcy judge, before a fee application is approved, is obliged to [review it carefully] and find it personally acceptable, irrespective of the (always welcomed) observation of the [United States trustee] or other interested parties.

19 F.3d at 841 (*quoting In re Evans*, 153 B.R. 960, 968 (Bankr. E.D.Pa 1993)).

This Court is obligated to review each request for fees and costs to insure that applicants provide:

1. a description of the services provided, setting forth, at a minimum, the parties involved and the nature and purpose of each task;
2. the date each service was provided;
3. the amount of time spent performing each task; and
4. the amount of fees requested for performing each task.

*In re WRB-West Assocs.*, 9 Mont. B.R. 17, 18-20 (Bankr. D. Mont. 1990).

As explained by the Ninth Circuit Court of Appeals: "The detailed fee applications enable the bankruptcy court to fulfill its obligation to examine carefully the requested compensation in order to ensure that the claimed expenses are justified." *In re Nucorp Energy, Inc.*, 764 F.2d 655,

658 (9th Cir. 1985).

The instant Application is accompanied by billing statements setting forth services provided, dates, billing rate, time increment, and fee requested for services. Upon review of the billing statements filed with the instant Application the Court finds that the applicants provided adequate detail for the Court to undertake its independent investigation. After independent review and in the absence of any objection after notice, the Court finds and concludes that the requested fees are excessive and unreasonable. Accordingly, the Application is approved in part and denied in part as discussed below.

In *Nucorp Energy, Inc.*, 764 F.2d at 657, the Ninth Circuit Court of Appeals concluded that awarding fees for time spent preparing and presenting fees applications was consistent with the purpose of § 330(a), which is "to ensure adequate compensation for bankruptcy attorneys so that highly qualified specialists would not be forced to abandon the practice of bankruptcy law in favor of more remunerative kinds of legal work." More recently, the Ninth Circuit Court of Appeals, discussing its earlier decision in *Nucorp Energy*, explained:

> Moreover, in dicta, we stressed that litigation over a fee award should also be compensable, otherwise fee awards would be diluted: "If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased." *Id*. at 660 (quoting *Prandin*i, 585 F.2d at 52–53). Dilution is "precisely the result that statutory fee award provisions are designed to prevent." *Id*. at 661.
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> In *In re Smith*, 317 F.3d 918 (9th Cir.2002), we again endorsed the anti-dilution rationale and applied it in a case involving litigation over a fee award. In *Smith*, the debtor challenged fees awarded to attorneys for services arising out of the successful defense of the initial fee award. *Id.* at 927. Relying on *Nucorp*, we affirmed the award. *Id.* at 928–29. While recognizing that Section 330(a) was silent as to the issue of compensation for litigation of fee applications, we noted that *Nucorp's* dicta regarding dilution suggested that compensation for time and expenses spent litigating a fee application may be appropriate. *Id.* (citing *Nucorp*,

764 F.2d at 660–61).

> We also acknowledged, though, that we had previously reached a contrary result in *In re Riverside–Linden*, 945 F.2d 320 (9th Cir.1991). In that case, we declined to overturn the BAP's denial of attorney's fees for unsuccessful litigation over a fee award. We expressed concern that compensating unsuccessful litigation over fee applications might lead to frivolous fee requests, and accordingly refused to adopt a per se rule that all litigation over fee awards should be compensated. However, *Riverside–Linden* left open the question of whether such litigation "under some other set of circumstances may be found necessary within the meaning Section 330(a)." *Id.* at 323. We addressed this inquiry a decade later in *Smith*, and held that recovery of legal fees for litigation over a fee application was appropriate if two factors were present: 1) the services for which compensation is sought satisfy the requirements of 330(a), and 2) the case "exemplifies a 'set of circumstances' where the time and expense incurred by the litigation is 'necessary.' " 317 F.3d at 928. We held that the *Smith* attorneys met this standard and affirmed the district court's award of fees in that case.

*In re Wind N' Wave*, 509 F.3d 938, 943 (9th Cir. 2007).

The Application presently before the Court does not involve the normal compensation requested under § 330, and in fact, does not seek compensation for time devoted to the preparation and presentation of fee applications. As explained in a Memorandum of Decision entered April 1, 2014, the Court previously allowed H & B fees and costs of at least $23,536.00 for preparation of and presentation of their prior fee applications. Similarly, the Court has awarded Freeman $21,000.00 for project categories identified as Fee/Employment Applications and Fee/Employment Objections. W & W has also been awarded a sum for preparing and presenting fee applications, which the Court need not calculate.

1. Application of the *Smith* test to the Trustee's request for fees.

As additional background, the Trustee was appointed in this case on November 29, 2011, and was removed as trustee on November 26, 2013. During his two-year tenure, the Trustee was faced with a number of obstacles and achieved many positive results, including reaching an

agreement with the prepetition noteholders. However, the one desirable result that eluded the Trustee was reaching a consensus between the noteholders, the members of Debtor and the unsecured creditors committee. For instance, although the Court approved the Trustee's disclosure statement filed September 23, 2013, the Trustee was facing mounting opposition to his proposed Chapter 11 plan, which incorporated the agreement he reached with the prepetition noteholders. In any Chapter 11 case, the ultimate goal is confirmation of a plan, whether it be a liquidation plan or a plan of reorganization. The Trustee was not able to achieve that goal during his two year tenure and appeared to be facing mounting opposition on that front.

After his removal, the Trustee, through counsel, filed an Eighth and Final Application on January 30, 2014, at docket no. 1254. In that application, the Trustee sought approval of fees in the amount of $64,300 for services rendered and costs incurred of $1,027.05 for the period from September 1, 2013, through November 26, 2013, and also sought final approval of all prior interim fee awards. The Court, fully appreciating the obstacles the Trustee had faced, ultimately awarded the Trustee aggregate professional fees and costs in the amount of $682,633.27.

The Trustee now seeks an award of fees and costs in the amount of $7,275.59 for defending his eighth and final fee application. The Court is mindful that the Trustee had to travel to and attend the hearing held in March of 2014, to defend his final application and the Court will allow the associated fees and costs of $4,725.59. However, the Court finds that the remainder of the Trustee's requested fees and costs do not satisfy the *Smith* test. The presentation of evidence at the hearing held in March of 2014 was essentially a verbal recitation of the final fee application, which was thoroughly and meticulously prepared. The foregoing fact convinces this Court that the necessary research supporting the fee applications filed prior to that date was done prior to

the filing of the Trustee's eighth and final application on January 30, 2014. The fees and costs over and above $4,725.59 requested by the Trustee at this juncture are excessive and were unnecessary. For the reasons stated, $2,550.00 of the Trustee's requested fees are denied.

2. Application of the *Smith* test to H & B's request for fees.

H & B, in its Final Application of Horowitz & Burnett, P.C. for Professional Fees and Costs filed January 8, 2014, at docket no. 1234, sought approval of fees in the amount of $148,816.50 for services rendered and costs of $4,217.32 for the period from November 1, 2013, through December 23, 2013, and also sought final approval of all prior interim fee awards. The Court awarded H & B professional fees in the amount of $2,303,296 plus reimbursement of costs in the amount of $92,850.76, or a total of $2,396,146.76.

In the latest joint application, H & B seeks an additional $51,179.11 for defending its final application. Of the foregoing amount, $2,700 relates to travel time; $2,025.00 relates to attending the hearing; $994.61 are expenses of travel; and $45,459.50 relates to research, drafting, preparation, discussions, etc. for defending the final fee application. The latter amount of $45,459.50 is shocking and the Court is unable to find any basis to conclude that such amount was either reasonable or necessary.

As explained above, the fee applications previously filed on behalf of H & B were thorough and meticulous and the Court is absolutely convinced that the research to support each and every one of the fee applications was completed prior to the time the fee applications were filed. The objections to the Trustee's and H & B's final fee applications filed by the Unsecured Creditors Committee were, excluding the certificates of service, at most three pages in length. On February 19, 2014, H & B responded, arguing in the introduction of its brief that "the Committee

filed essentially a two-page Objection that (i) rests on baseless factual allegations, (ii) cites no legal authority, and (iii) fails to include any analysis of any specific time entries, projects, or activities." H & B then proceeds in the next eighteen pages of its response to defend various actions taken in this case. The majority of H & B's written response, along with the testimony of the Trustee and John Parks of H & B at the March 11, 2014, hearing was, at its core, a restatement of what was already contained in prior fee applications and the record.

The Court is simply unable to find the reasonableness or necessity for the fees of $45,459.50. While the Court is initially inclined to deny the entire $45,459.50, the Court will allow $90.00 of fees associated with the .20 hours of time it took to review and analyze the committee's objection on January 22, 2014; will allow $2,700.00 of fees for drafting reply to objection to final fee application on January 29, 2014; and will allow, in addition to the travel time on March 10, 2014, that was already allowed, the 6.4 hours of time, or $2,880.00 of fees billed on March 10, 2014. Adding the foregoing number with the fees associated with travel and attending the hearing, and the costs, results in a total award for H & B of $11,389.61.

3. Application of the *Smith* test to W & W's request for fees.

Finally, W & W seeks an additional fee award of $4,732.50. The Court would note that W & W's final fee application filed January 14, 2014, was approved without objection. W & W's instant fee request relates solely to the fact that W & W was local counsel for the Trustee. For the reasons discussed above, the Court will only approve fees of $1.350.00 on behalf of W & W for attending the hearing on approval of the Trustee's and H & B's fee applications. In accordance with the foregoing,

**IT IS ORDERED** the Joint Application of Lee A. Freeman, Horowitz & Burnett, P.C.,

and Waller & Womack for Fees for Services Rendered and Costs Incurred in Successfully Defending Objections to Final Fee Applications filed April 30, 2014 (Document No. 1350) is approved in part and denied in part; Lee A. Freeman is awarded reasonable fees and costs in the total amount of $4,725.59; Horowitz & Burnett, P.C. is awarded reasonable fees and costs in the total amount of $11,389.61; Waller & Womack is awarded reasonable fees and costs in the total amount of $1,350.00; and the foregoing amounts shall be treated as an administrative expense of the bankruptcy estate.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana