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Electric Generation and Transmission
Cooperative, Inc.*

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

In re

**SOUTHERN MONTANA
ELECTRIC GENERATION AND
TRANSMISSION
COOPERATIVE, INC.,**

Debtor.

Case No. 11-62031-11

**STIPULATION PROVIDING FOR ORDER PURSUANT TO 11 U.S.C. § 1142(b)
COMPELLING BEARTOOTH ELECTRIC COOPERATIVE, INC., TO EXECUTE
AMENDED WHOLESALE POWER CONTRACT**

Southern Montana Electric Generation and Transmission Cooperative, Inc., the debtor and debtor-in-possession herein (the “Debtor”) and Beartooth Electric Cooperative, Inc. (“Beartooth”) each respectively represented by undersigned counsel, stipulate and agree as follows:

FACTUAL BACKGROUND

1. The Debtor is a not-for-profit, tax exempt generation and transmission cooperative formed under the Montana Rural Electric and Telephone Cooperative Act (the "Act"). The Debtor provides wholesale electricity and related services to its Members (as defined in the Plan) for retail supply to their respective members in Montana and Wyoming.
2. Beartooth is a not-for-profit, tax-exempt distribution cooperative formed under the Act. Beartooth provides retail electrical supply and related services to its members in Montana and Wyoming. Beartooth is a Member of the Debtor.
3. Prior to the Petition Date, Debtor and Beartooth executed that certain Wholesale Power Contract dated May 27, 2004 (the "WPC"). The WPC provided, *inter alia*, that Beartooth purchase from Debtor, and Debtor sell to Beartooth, wholesale power and related services.
4. Prior to the Petition Date, Debtor and Beartooth entered into an Amended Wholesale Power Contract dated April 13, 2007 (the "Amended WPC"). The Amended WPC replaced the WPC. The Amended WPC has a term through 2048 and is effective and binding on Beartooth and Debtor. The Amended WPC also requires that the Rural Utility Services (the "RUS") approve any amendment thereto. The Amended WPC is what is commonly called an "all requirements contract".
5. Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on October 21, 2011 (the "Petition Date") in the United States Bankruptcy Court for the District of Montana (the "Court").
6. By order of the Court dated November 22, 2011, Lee A. Freeman was appointed chapter 11 trustee of the Debtor. His appointment was subsequently terminated by order of the

Court dated November 26, 2013, and the Debtor has since that time been in control of its business and affairs as a debtor in possession.

7. On April 21, 2014, the Debtor, as proponent, filed its Chapter 11 Plan of Reorganization, which was amended on May 16, 2014, by the First Amended Plan of Reorganization dated May 12, 2014 (the “Plan”) [Docket No. 1369].

8. On May 20, 2014, the Debtor filed the Plan Supplement (as amended, the “Plan Supplement”) [Docket No. 1374], which included, *inter alia*, an amended all requirements contract between Debtor and Beartooth (the “All Requirements Contract”). On June 12, 2014, the Debtor filed an Amended Plan Supplement, which included, *inter alia*, the final proposed form of the All Requirements Contract [Docket No. 1440]. Beartooth had an opportunity to review, did review and provided comments on, and approved the form and content of the All Requirements Contract before it was filed with the Court.

9. The Effective Date for the Plan shall be “no [] later than ten (10) days after entry by the [Court] of the Confirmation Order.”¹ The Plan provides:

The All-Requirements Contracts, as modified, are assumed pursuant to the Plan with no cure amount due under any of the All Requirements Contracts. The All Requirement Contracts shall be amended as of the Effective Date in such manner as necessary to comply with the agreements among the Debtor, Members and the Noteholders, as reflected in the Plan, including that the maturity of the All Requirements Contracts shall be shortened to expire upon the payment of the Restructured Notes in full and satisfaction of the obligations thereunder.²

10. On June 20, 2014, the Court entered its Order Confirming the Debtor’s Amended Chapter 11 Plan of Reorganization (the “Confirmation Order”) [Docket No. 1459]. The

¹ Plan § 1.40.

² Plan § 5.9.

Confirmation Order incorporates by reference and makes an integral part of the Confirmation Order the All Requirements Contract.³ The Court ordered:

Enforceability of Plan and Plan Supplement Documents

9. Pursuant to §§ 1123(a), 1141(a) and 1142 of the Bankruptcy Code and the provisions of this Order, the Plan and all Plan-related documents (including, but not limited to, the documents comprising the Plan Supplement) shall be, and hereby are, valid, binding and enforceable notwithstanding any otherwise applicable non-bankruptcy law. Each of the documents comprising the Plan Supplement, including, without limitation, the ... Amended All Requirements Contracts ... is hereby approved. The Debtor, Members and Noteholders, upon mutual agreement may modify, amend or enter into the documents comprising the Plan Supplement, without further order of the Bankruptcy Court.

Authorization to Implement the Plan

10. Upon the entry of this Order, the Debtor is authorized to take or cause to be taken all corporate actions necessary or appropriate to implement all provisions of, and to consummate, the Plan and to execute, enter into, or otherwise make effective all documents arising in connection therewith, including, without limitation, the documents comprising the Plan Supplement (as they may be amended or modified as contemplated or permitted by the Plan or this Order), prior to, on and after the Effective Date. All such actions taken or caused to be taken shall be, and hereby are, authorized and approved by the Bankruptcy Court such that **no further approval, act or action need to be taken under any applicable law, order, rule or regulation** including, without limitation, any action otherwise required by the Members or trustees of the Debtor.⁴

11. In response to pre-petition business affairs of Beartooth and the Debtor, and in an effort to improve transparency and accountability to its members, in August 2013 Beartooth amended its Bylaws. The Amended Bylaws included the following at Article IV, Section 1.G:

The Board shall provide at least 60-day notice to Members of proposals before the Board ... enters or amends power contracts exceeding two (2) years. During the notification period, Members shall be allowed to comment on such proposals, including, at the monthly Board Meeting immediately prior to the Board Meeting at which a vote on the proposal is scheduled, or at specially scheduled Board Meeting for Member comments and discussion.

³ Confirmation Order ¶ 2.

⁴ Confirmation Order ¶¶ 9-10 (emphasis added).

RELIEF REQUESTED

12. The Court retains jurisdiction over any matter arising in or related to the Plan pursuant to Sections 105(a) and 1142 of the Bankruptcy Code.⁵ Execution of the All Requirements Contract is a matter related to the Plan because the All Requirements Contract is incorporated in and an integral part of the Plan and the Confirmation Order.⁶

13. “The court may direct ... any other necessary party ... to perform any other act ... that is necessary for the consummation of the plan.”⁷ The Court has statutory jurisdiction under 11 U.S.C. § 1142(b) to ensure that any act necessary for the consummation of the plan is carried out and it has continuing responsibilities to satisfy itself that the plan is being properly implemented.⁸ The Court’s authority under 11 U.S.C. § 1142(b) includes, to the extent necessary to protect the confirmation order and aid in the Plan’s execution, the authority to order the execution of an instrument expressly called for and included in the Plan.⁹

14. The All Requirements Contract is a power contract with a term exceeding two years. Beartooth Bylaws require a 60-day member notice and comment period before Beartooth can execute the All Requirements Contract. The proposed execution form of the All Requirements Contract was filed of record with the Court on June 12, 2014, meaning that absent the aforementioned provisions of the Confirmation Order, the earliest date that Beartooth could execute the All Requirements Contract after the requisite member notice and comment period

⁵ Confirmation Order ¶ 38.

⁶ Confirmation Order ¶ 2.

⁷ 11 U.S.C. § 1142(b); *see also In re Harlow Properties, Inc.*, 56 B.R. 794, 798 (B.A.P. 9th Cir. 1985) (finding that “[11 U.S.C. § 1142(b)] implicitly contemplates a ... party affected by the plan moving for an order which triggers the court’s authority to direct a ... party to perform acts necessary to consummate the plan.”).

⁸ *Hillis Motors, Inc. v. Hawaii Auto. Dealers’ Ass’n*, 997 F.2d 581, 587 n 11 (9th Cir. 1993) (citing *Chase Manhattan Bank N.A. v. Sultan Corp. (In re Sultan Corp.)*, 81 B.R. 599, 602 (9th Cir. BAP 1987)).

⁹ *See In re Chatham Parkway Self Storage, LLC*, 507 B.R. 13 (Bankr. SD Georgia 2014) (ordering the debtor and creditor to execute loan documents based on the agreed-upon terms and conditions included in the confirmed plan.)

would be August 11, 2014. This is after the deadline for the Effective Date under the Plan. The Plan requires that the All Requirements Contract be executed on or before the Effective Date.

15. Execution by Beartooth of the All Requirements Contract on or before the Effective Date is necessary to aid in the consummation of the Plan.¹⁰ If Beartooth did not execute the All Requirements Contract on or before the Effective Date, then, in the best case, the Effective Date would be delayed causing (i) the Debtor to incur significant additional expenses (including professional fees to the Noteholders), (ii) delay in finalizing one or more long-term power arrangements at beneficial rates, (iii) violations of provisions of one or more stipulations approved by the Court and incorporated into the Plan by reference, and (iv) general uncertainty among the Debtor's creditors and other parties in interest regarding the Debtor's ability to consummate its confirmed Plan.

WHEREFORE, in an abundance of caution for the Protection of Beartooth and the Debtor, the parties request that the Court enter an Order compelling Beartooth to execute immediately the All Requirements Contract without the member notice and comment period required under its Bylaws.

Dated: this 24th day of June, 2014

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¹⁰ Beartooth shall attempt to acquire RUS approval for the All Requirements Contract. However, regardless of RUS approval, the All Requirements Contract is binding on and enforceable against Beartooth. Confirmation Order ¶ 28.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury that on June 24, 2014 a copy of the foregoing pleading was served by electronic means, pursuant to LBR 7005-1 9013-1(c) and 9036-1 on the parties noted in the Court's ECF transmission facilities.

/s/ Maggie W. Stein