Harold V. Dye
I.D. Number 408
Dye & Moe, P.L.L.P.
120 Hickory Street, Suite B
P.O. Box 9198
Missoula, Montana 59807
406/542-5205
hdye@dyemoelaw.com
Attorney for Unsecured Creditors Committee

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF MONTANA

IN RE	
	Case No. 11-62031-11
SOUTHERN MONTANA ELECTRIC GENERALTION AND TRANSMISSION COOPERATIVE, INC.	**NOTICE OF HEARING** **Date: September 24, 2013** **Time: 1:30 P.M.** **Location: Fifth Floor Courtroom, Federal Courthouse, 2601 2nd Avenue North, Billings, Montana**
Debtor.	

UNSECURED CREDITORS COMMITTEE'S OBJECTIONS TO DISCLOSURE STATEMENT

The Unsecured Creditors Committee objects to the "Disclosure Statement for Trustee's Second Amended Plan Of Reorganization For Southern Montana Electric Generation And Transmission Cooperative, Inc." [Doc # 1018] (herein "DS") on the following grounds:

1. **Advocacy Statements.** The Committee objects to statements of advocacy that attempt to "sell" the plan. These should be stricken on the Trustee compelled to supply counter statements from the Committee, Member Cooperatives and other objecting parties. For example, page 2 of the DS contains the following statement:

THE TRUSTEE BELIEVES THAT THE PLAN PROVIDES THE GREATEST OPPORTUNITY FOR THE DEBTOR TO SUCCESSFULLY EMERGE FROM CHAPTER 11 ON TERMS THAT ARE FAIR TO ALL PARTIES IN INTEREST. HE STRONGLY RECOMMENDS THAT YOU VOTE TO ACCEPT THE PLAN.

This could be balanced by the following:

THE UNSECURED CREDITORS COMMITTEE BELIEVES THAT THE PLAN IS DESIGNED TO BENEFIT ONLY THE TRUSTEE, ESTATE PROFESSIONALS AND THE NOTEHOLDERS AND THAT ALL OTHER CLASSES WOULD BE BETTER OFF REJECTING THE PLAN

2. **Failure to Project Payment to Unsecured Creditors**. Under the Second Amended Plan Class 6 unsecured creditors (other than convenience class members and favored creditors First Interstate Bank and CFC), are to receive pro rata distribution of the "unencumbered cash" of the Estate. However, the Disclosure Statement contains no projections as to the amount of unencumbered cash that will be available for distribution and what individual creditors might expect to receive.

In the fine print of in the table on page 6 of the DS it is stated that "Unencumbered Cash in the Estate as of December 31, 2013 is projected to

be approximately $1,878,000." Exhibit 2 to the Trustee's February 15, 2013 Disclosure Statement is a table setting forth all claims against the Estate – a document missing from the current DS. As far as the Committee can determine, its schedule of Class 6 claims remains accurate.

The Committee believes that there is a reason for this omission. $1,878,000 in Unencumbered Cash divided pro rata among $392,494,222.89 in unsecured claims the result is .47 cents on the dollar (.0047), It is the Committee's belief that *all* Class 6 creditors other than PPL would be better off electing convenience class treatment and that many unsecured creditors would receive nothing as the distribution would be less than the $10.00 *de minimus* floor under Plan ¶ 5.15. All of this could be clearly shown by applying the estimated Unemcumbered Cash to the documented claims.

3. **Failure to Explain Discriminatory Treatment.** While general unsecured claims are to receive essentially nothing under the plan, the unsecured claims of First Interstate Bank (Class 4.4) and the unsecured potion of the CFC Loan (Class 4.3) are to be paid in full. While the Committee realizes that unfair discrimination is a confirmation objection, the Trustee should disclose why he feels that this discrimination is warranted.

4. **Inadequate Disclosure Regarding Construction Lien Claims.** The DS is completely inadequate when it comes to the construction lien claims. There is currently pending Adversary Proceeding 13-00016 in which the priority of the construction liens vis-à-vis the Prepetition Noteholders. If the lien claimants prevail in that action, then under the Prompt Payment Act, they would be entitled to their attorney's fees and interest at 18% per annum. M.C.A. §§ 28-2-2104; 2105. This is substantially more that payment in full without interest as contemplated by the Plan and it not discussed at all in the DS. The DS should be amended to adequately discuss Adversary 13-00016 and the risks and benefits to the claimants of continuing with that litigation as opposed to accepting the Plan.

5. **The DS' Cash Projections Are Inadequate**. A crucial component of any reorganization disclosure statement is "pro forma projections that would be relevant to creditor's determination of whether to accept or reject the plan." Norton, *Bankruptcy Law & Practice* § 110:5.

The pro forms contained in DS Exhibit 2, Part 1 brings to mind Gertrude Stein's famous quote about Oakland, "There is no there there." In the narrative at the beginning of the pro formas, the accountants claim that they considered things like payments to creditors but there are no projected cash flow statements that a creditor could reference to decide whether to

accept or reject the plan. Instead the pro forma contains tables with members' historical usage and rates; projected member rates and amortization schedules for certain creditors.

What is needed is:

- Projected cash on hand at confirmation with a breakdown between encumbered and unencumbered cash.
- Projected uses for this cash for unimpaired claims; professional fees; executory contract cures and payment for general unsecured and convenience claims and any other amounts to be paid on or about the effective date together with the "pot" that these claims are to be paid from.

It would be helpful to have a projected cash receipts and disbursements be provided on an go forward basis since that would give creditors a meaningful basis to review the feasibility and fairness of the plan. The Committee suspects that the Trustee will claim that such information would involve disclosure of Morgan Stanley's trade secrets thus begging the question of how the Trustee is supposed to provide adequate information to creditors while simultaneously playing hide the ball with them. That said, the proposed agreement with Morgan Stanley has nothing to do with the distribution of cash on hand at confirmation and

the amount, character and uses of this cash needs to be adequately disclosed.

6. **The Liquidation Analysis Is Grossly Inadequate.** The Liquidation Analysis (DS Exhibit 3) begins with the assumption that a Chapter 7 trustee would liquidate the Highwood Generating Station rather than abandoning it which is certainly what would happen (and assumes that Debtor would continue to pay payroll and security costs for Highwood and the Trustee and his counsel). The analysis assumes that "Debtor will continue to provide power to its members through *May 31, 2013* and commence the liquidation and winding down process on that date." Page 6 (emphasis supplied). Even if the date was corrected, the liquidation analysis does not reflect that Debtor will receive income from power sales even though it assumes that it will bear the expense.

The "bottom line" on the liquidation analysis (found on page 7) is that *all* of the proceeds from liquidation of Debtor's collateral would go to secured creditors. This is inconsistent with the promise of the plan that there is an undisclosed amount of "Unencumbered Cash" and "Litigation Recoveries" that will be paid to general unsecured creditors. Just how do these unencumbered assets suddenly become encumbered upon conversion to Chapter 7?

The liquidation analysis also does not discuss potential recoveries by the Chapter 7 trustee. For example, it is virtually certain that a Chapter 7 Trustee would review pursuing disgorgement of the $2.685 Million paid (to date) to the Noteholders' professionals since their entitlement to these fees depends on their being oversecured and it requires a certain amount of magical thinking to believe that the Noteholders are oversecured. Likewise, a Chapter 7 Trustee might pursue recovery of the more than $15 Million in payments to the Noteholders on the theory that these amounts are, in fact, not true adequate protection at all but rather disallowable post-petition interest. Finally, the Chapter 7 trustee might pursue disgorgement and recovery of a portion of the $2.7 Million paid to estate professionals.[1]

7. **The DS Fails To Disclose The Nature Of "Litigation Recoveries."** In addition to unencumbered cash, unsecured creditors are promised "Litigation Recoveries" which are defined as proceeds from the YVEC settlement and "avoidance actions." The nature and potential recovery from such avoidance actions is not stated. The statute of limitations on such actions expires on October 21, 2013 under 11 U.S.C. 546(a)(1)(a).

1 Along this line, the DS should have a total for the table of payments to professionals on pages 35 and 36.

DATED: September 18, 2013.

DYE & MOE, P.L.L.P.

/s/ Harold V. Dye
Harold V. Dye

CERTIFICATE OF SERVICE

I, the undersigned certify under penalty of perjury that on September 18, 2013, copies of the foregoing Unsecured Creditors Committee's Objections To Disclosure Statement were served electronically by ECF notice to all persons/ entities requesting special notice or otherwise entitled to same and that in addition service by mailing a true and correct copy, first class mail, postage prepaid, was made to the following persons/ entities who are not ECF registered users

/s/ Harold V. Dye
Harold V. Dye