IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: EDISON MISSION ENERGY, *et al.* Debtors.[1]	Chapter 11 Case No. 12-49219 (JPC)
MIDWEST GENERATION, LLC Plaintiff, v. RELCO FINANCE, INC. Defendant.	Adv. Proc. No. 16-_____-____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Midwest Generation, LLC ("MWG"), as plaintiff in this adversary proceeding, by its undersigned attorneys, alleges for its complaint ("Complaint") against RELCO Finance, Inc. ("RELCO") as follows:

INTRODUCTION

1. This is an adversary proceeding for a declaratory judgment that the Terminated Agreements (as defined below) terminated in accordance with their terms during the Chapter 11

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Edison Mission Energy (1807); Camino Energy Company (2601); Chestnut Ridge Energy Company (6590); Edison Mission Energy Fuel Services, LLC (4630); Edison Mission Finance Co. (9202); Edison Mission Fuel Resources, Inc. (3014); Edison Mission Fuel Transportation, Inc. (3012); Edison Mission Holdings Co. (6940); Edison Mission Midwest Holdings Co. (6553); EME Homer City Generation L.P. (6938); Homer City Property Holdings, Inc. (1685); Midwest Finance Corp. (9350); Midwest Generation EME, LLC (1760); Midwest Generation, LLC (8558); Midwest Generation Procurement Services, LLC (2634); Midwest Peaker Holdings, Inc. (5282); Mission Energy Westside, Inc. (0657); San Joaquin Energy Company (1346); Southern Sierra Energy Company (6754); and Western Sierra Energy Company (1447).

Cases and that any obligations of MWG in relation thereto are subject to the terms of the Plan. More specifically, MWG seeks a declaration that (i) the Terminated Agreements were not Executory Contracts[2] at the time of the Effective Date and therefore could not be assumed and (ii) the Late Claims (as defined below) are barred by (a) the Plan's discharge, release and injunction provisions of Article VIII and/or (b) the General Bar Date or the Administrative Claims Bar Date (both as defined below). Finally, MWG seeks an order either (i) permanently enjoining RELCO from the prosecution of the Late Claims or (ii) requiring RELCO to show cause why an order finding RELCO in contempt for failure to comply with the injunction provisions of the Court's Confirmation Order should not be entered.

JURISDICTION

2. The United States Bankruptcy Court for the Northern District of Illinois (the "Court") has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157 and 1334.

3. This adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

4. Venue for this adversary proceeding is proper in this Court pursuant to 28 U.S.C. § 1409.

THE PARTIES

5. MWG is a Delaware limited liability company that is authorized to do business in Illinois, and, among other things, owns and operates a power station in Joliet, Illinois. MWG's bankruptcy case is currently still pending before this Court. *See In re Edison Mission Energy, et al.*, Case No. 12-42919 (JPC) (Bankr. N.D. Ill. 2012).

[2] Capitalized terms used but not otherwise defined in this Complaint will have the meanings ascribed to them in the Plan.

6. RELCO is an Illinois corporation with its principal office located at 1001 Warrenville Rd., Lisle, Illinois. RELCO primarily engages in the business of locomotive leasing, rebuilding, and repairing.

GENERAL BACKGROUND

7. On December 17, 2012, MWG and certain of its affiliates filed petitions for relief with the Court commencing cases under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases").

8. On March 6, 2014, the Debtors filed the *Debtors' Third Amended Joint Chapter 11 Plan of Reorganization (with Technical Modifications)* [Dkt. No. 2187] (together with all additional modifications, the "Plan"), and on March 11, 2014, the Court entered an order [Dkt. No. 2206] confirming the Plan (the "Confirmation Order").

9. On April 1, 2014, the Effective Date of the Plan occurred. Among other things, NRG Energy Holdings Inc. ("NRG") and the Post-Effective Date Debtor Subsidiaries (collectively, the "Purchaser Parties") consummated a sale of substantially all of EME's assets to NRG pursuant to an Asset Purchase Agreement dated October 18, 2013 between such parties (the "APA")[3] and the Confirmation Order, as provided for in Article IV.B. of the Plan.

RELCO AND MWG BACKGROUND

10. On April 26, 2005, RELCO and MWG entered into a locomotive lease agreement (the "Locomotive Lease Agreement"), which was amended by an Addendum dated October 30, 2012 (the "Lease Agreement"), whereby RELCO leased to MWG a locomotive bearing the identifier RLCX 1276 (the "Locomotive"). Concurrent with the Locomotive Lease Agreement, both MWG and RELCO entered into a maintenance agreement dated April 26, 2005, amended

[3] An executed copy of the APA is available on the Court's docket in these cases [Dkt. No. 1424].

by an Addendum dated October 30, 2012 (the "Maintenance Agreement" and with the Locomotive Lease Agreement, collectively the "Terminated Agreements") pursuant to which RELCO performed certain maintenance services on the Locomotive.

11. The Terminated Agreements originally had seven-year terms, which were converted to month-to-month terms on October 30, 2012, prior to the commencement of the Chapter 11 Cases. Pursuant to their terms, the Terminated Agreements were to terminate thirty days after written notice of termination.

12. On February 9, 2013, MWG sent an email to RELCO (the "February 9 Email"), stating "The new loco lease has been put on hold I need to end the lease extension on the loco on site and arrange to have removed from site."

13. On February 11, 2013, RELCO replied by email (the "February 11 Email") to the February 9 Email stating "You are currently on a month to month lease as per the extension agreement we can end the lease 30 days from official notification. Please confirm you would like to use this as your notification of termination."

14. After receiving the February 11 Email, MWG replied by email to RELCO, stating "Yes[.] Please, consider this the notice and I would like to have off site by 3/11/13 or sooner."

15. Pursuant to the terms of the Terminated Agreements and the parties' agreement that the February 9 Email would constitute the required notice of termination, each of the Terminated Agreements terminated as of March 11, 2013 (the "Termination Date").

16. Despite MWG's request that RELCO promptly remove the Locomotive, the Locomotive was not removed from MWG's premises until the summer of 2015.

17. Notwithstanding the fact that both parties had acknowledged the termination of the Terminated Agreements, MWG inadvertently and mistakenly listed a contract with RELCO Finance, Inc. and RELCO Locomotives, Inc. for "Terms and Conditions for Procurement of Services and Material" on the 67-page list of Assumed Contracts filed on January 17, 2014 [Docket No. 1851-2, Exhibit B].

18. As a result of the mistaken inclusion of the Terminated Agreements on the assumed contract list, on information and belief, RELCO received a payment on or about April 9, 2014 in the amount of $12,201.81 on account of the prepetition amounts owed to RELCO.

19. On information and belief, RELCO ceased performing maintenance services under the Maintenance Agreement by March, 2013, and did not thereafter provide services under the Maintenance Agreement.

20. Despite (i) the termination of the Terminated Agreements, (ii) the cessation of services under the Maintenance Agreement, (iii) MWG's request that RELCO remove the Locomotive, and (iv) the entry of the Confirmation Order, on September 23, 2015, RELCO sent a notice of default and demand for payment to MWG (the "Demand Letter") demanding MWG to remit alleged outstanding amounts owed to RELCO under the Terminated Agreements. RELCO claimed that because the Terminated Agreements were listed on the Assumed Contracts List, the Terminated Agreements were assumed (and presumably revived in the process). RELCO offered no other ground that the Terminated Agreements were alive other than being listed in the Assumed Contracts List.

21. On December 9, 2015, MWG responded to RELCO's Demand Letter, wherein MWG stated that the Terminated Agreements were in fact terminated. MWG specifically disputed RELCO's assertion that the Terminated Agreements were assumed, citing the provision

in the Confirmation Order stating that "[n]either the exclusion nor inclusion of any contract or lease in the Plan Supplement, nor anything contained in the Plan, shall constitute an admission by the Debtors that any such contract or lease is in fact an Executory Contract or Unexpired Lease." [Dkt. No. 2206-1, at Article V.J].

22. Nevertheless, with full knowledge of the Plan and this Court's Confirmation Order, on April 18, 2016, in willful violation of the Confirmation Order, RELCO commenced an action in the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois styled *RELCO Finance, Inc. v. Midwest Generation, LLC*, case number 16-L-296 (the "State Court Action"), seeking to collect amounts that it now alleges are due under the Terminated Agreements.

23. On April 26, 2016, in response to the State Court Action, MWG sent RELCO a letter requesting that RELCO withdraw the State Court Action with prejudice by no later than May 2, 2016, citing the termination of the Terminated Agreements in February, 2013, as well as numerous provisions of the Plan and Confirmation Order as grounds for withdrawal.

24. As of this filing, the State Court Action is still pending, albeit in its infancy. MWG has not yet filed an answer or response in the State Court Action, the deadline for which has been extended. The initial case management is set for August 2, 2016 at 9:00 a.m.

Count I – Declaratory Judgment

25. MWG hereby incorporates all previous allegations from Paragraphs 1-24 as though fully set forth herein.

26. Section 2201(a) of Title 28 of the United States Code provides:

> [i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). Section 2202 of Title 28 of the United States Code provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

27. Pursuant to 28 U.S.C. §§ 2201(a) and 2202, MWG requests the Court to declare that:

i. the Terminated Agreements were not Executory Contracts at the time of the Effective Date and therefore could not be assumed; and

ii. any claims or obligations arising in or relating to the Terminated Agreements prior to the Effective Date (the "Late Claims") are (a) barred by the Plan's discharge, release and injunction provisions in Article VIII and/or (b) subject to the General Bar Date or the Administrative Claims Bar Date.

28. The Terminated Agreements were not Executory Contracts at the time of the Effective Date. Because the Terminated Agreements terminated on the Termination Date, which occurred before the Effective Date, the Terminated Agreements were not executory contracts. As such, the Terminated Agreements could not be assumed.

29. Email correspondence between RELCO and MWG confirms that the Terminated Agreements terminated on the Termination Date. Such admission may be used against RELCO as an admission of a party opponent under Federal Rule of Evidence section 801(d)(2) or as a business record under Federal Rule of Evidence section 803(6), among others.

30. Contracts listed on the Assumed Contracts List are not deemed to be Executory Contracts simply by their inclusion on the list. The Assumed Contracts List expressly establishes that:

> NEITHER THE EXCLUSION NOR INCLUSION OF ANY CONTRACT OR LEASE IN THE LIST OF CONTRACTS AND LEASES ATTACHED HERETO, NOR ANYTHING CONTAINED IN THE PLAN, SHALL CONSTITUTE AN ADMISSION BY THE REORGANIZATION TRUST, THE

> DEBTORS, THE PURCHASER PARTIES, OR THE POST-EFFECTIVE-DATE SUBSIDIARIES THAT ANY SUCH CONTRACT OR LEASE IS IN FACT AN EXECUTORY CONTRACT OR UNEXPIRED LEASE OR THAT ANY SUCH PARTY HAS ANY LIABILITY THEREUNDER.

See Assumed Contracts List, at 3. Similarly, the Confirmation Order provides that "[n]either the exclusion nor inclusion of any contract or lease in the Plan Supplement, nor anything contained in the Plan, shall constitute an admission by the Debtors that any such contract or lease is in fact an Executory Contract or Unexpired Lease or that Post-Reorganization EME, the Reorganization Trust, or the Post-Effective-Date Debtor Subsidiaries . . ., as applicable, have any liability thereunder." [Dkt. No. 2206-1, at Article V.J]. The mere inclusion of the Terminated Agreements in the Assumed Contracts List did not, by the explicit terms of the filing, make the Terminated Agreements either (i) Executory Contracts or (ii) contracts subject to assumption under section 365 of the Bankruptcy Code.

31. The Late Claims are (a) barred by the Plan and/or (b) subject to the General Bar Date or the Administrative Claims Bar Date, as applicable. The Late Claims consist of two types of claims: prepetition claims and Administrative Claims. With respect to prepetition claims, on April 10, 2013, the Court entered *the Order (A) Setting Bar Dates for Filing Proofs of Claim, Including 503(b)(9) Proofs of Claim and (B) Approving the Form and Manner of Notice Thereof* [Dkt. No. 669] (the "Bar Date Order") that set the bar date for all claims (as defined in section 101(5) of the Bankruptcy Code) against the Debtors that arose before the petition date (each, a "Claim") on June 17, 2013 (the "General Bar Date"). The bar date notice was served on June 7, June 10, and June 11, 2013 [Dkt. Nos. 855-857] and published in the May 16, 2013 editions of *The New York Times* and the *Chicago Tribune* as well as the September 26, 2013 edition of *The New York Times*. [See Dkt. Nos. 2271, 2272]. The bar date notice expressly provided that failure to file a proof of claim by the General Bar Date may result in the claimant being forever

barred, estopped, and enjoined from asserting any Claim against the Debtors. [See Dkt. No. 669, Ex. A]. On June 6, 2013, RELCO filed a proof of claim in the amount of $22,244.00 for "locomotive lease and maintenance payments" (the "RELCO Claim") [Claim No. 1050]. On January 22, 2014, the Court ordered that the RELCO claim be reassigned to the proper debtor and modified to $12,201.81. [Dkt. No. 1902]. Thereafter, this amount was paid on account on prepetition amounts due to RELCO and in connection with the mistaken inclusion of RELCO on the Assumed Contracts List. The RELCO Claim was thereafter expunged [Dkt. No. 2409]. RELCO did not file any additional proof of claims.

32. With respect to Administrative Claims, the confirmed Plan provided for an Administrative Claims Bar Date, which was the first Business Day that was 30 days following the Effective Date (i.e. May 1, 2014). Article II.A of the Plan expressly provides:

> Holders of Administrative Claims that are required to File and serve a request for payment of such Administrative Claims by the Administrative Claims Bar Date that do not File and serve such request by the Administrative Claims Bar Date shall be forever barred, estopped, and enjoined from asserting such Administrative Claims against the Reorganization Trust, the Post-Effective-Date Debtor Subsidiaries . . . or their respective property and such Administrative Claims shall be deemed discharged as of the Effective Date.

33. RELCO has alleged that it has been damaged by MWG's failure to return the Locomotive to RELCO as required by the Lease Agreement upon termination.

34. To the extent that RELCO believed it was harmed by MWG's failure, on the Termination Date, to promptly return the Locomotive, RELCO, had actual notice of these Chapter 11 Cases as well as the Plan, and could have filed an Administrative Claim against MWG at any time during the fourteen months between the Termination Date and the Administrative Claims Bar Date.

35. RELCO choose not to file a request for payment of an Administrative Claim by the Administrative Claims Bar Date.

36. RELCO's failure to file any additional Claims it may have had by the General Bar Date and any Administrative Claims by the Administrative Claims Bar Date precludes RELCO from ever asserting the Late Claims. Indeed, the Confirmation Order enjoined RELCO from (1) commencing or continuing any action or other proceeding of any kind on account of or in connection with the released claims; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order with respect to the released claims; (3) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such released claims. Confirmation Order at 5-6.

37. Moreover, the Confirmation Order provides that the Exculpated Parties, which includes MWG, shall not "have or incur any liability for any claim, cause of action, or other assertion of liability for any act taken or omitted to be taken in connection with, or arising out of, the Chapter 11 Cases." Confirmation Order at 5.

38. Finally, Article VIII.A of the confirmed Plan provides that "the distributions, rights, and treatment that are provided in the Plan shall be in complete satisfaction, compromise, settlement, release, and discharge, as of the Effective Date, of all debt (as such term is defined in section 101 of the Bankruptcy Code) that arose before the Effective Date." Consequently, MWG has been discharged from any obligation to pay the Late Claims, and RELCO is forever enjoined and barred from asserting them.

39. In light of the foregoing, it is appropriate that this Court declare that (i) the Terminated Agreements were not Executory Contracts at the time of the Effective Date and therefore could not be assumed and (ii) the Late Claims are (a) barred by the Plan's discharge,

release and injunction provisions of Article VIII and/or (b) subject to either the General Bar Date or the Administrative Claims Bar Date.

Count II – Permanent Injunctive Relief, or in the Alternative, Issuance of a Show Cause Order

40. MWG hereby incorporates all previous allegations from Paragraphs 1-39 as though fully set forth herein.

41. A plaintiff seeking a permanent injunction must show (1) success, as opposed to a likelihood of success, on the merits; (2) irreparable harm; (3) that the benefits of granting the injunction outweigh the injury to the defendant; and, (4) that the public interest will not be harmed by the relief requested. *See, e.g., ADT Security Servs., Inc. v. Lisle–Woodridge Fire Prot. Dist.*, 672 F.3d 492, 498 (7th Cir. 2012).

42. MWG, as set forth above, has shown success on the merits. First, MWG and RELCO agreed that the Terminated Agreements were to terminate on the Termination Date in an email exchange between them. As such, the Terminated Agreements could not have been assumed as executory contracts because no contract existed at the time of a potential assumption. Second, the Late Claims were addressed in the Plan and Confirmation Order, making them subject to the Plan's discharge, release and injunction provisions of Article VIII. Moreover, the Late Claims were subject to the General Bar Date and the Administrative Claims Bar Date because any claims that could have arisen from the Terminated Agreements could only have arisen on or prior to March 11, 2013—i.e., RELCO only had either prepetition Claims or Administrative Claims, both of which are subject to this Court's orders. Consequently, MWG has shown success on the merits.

43. In prosecuting the State Court Action, RELCO is forcing MWG to incur substantial time and cost defending a lawsuit that MWG should never have been required to

defend in the first instance, as the Plan's injunction covers the State Court Action. MWG thus seeks a permanent injunction prohibiting RELCO from further pursuing the State Court Action to avoid irreparable harm.

44. Granting MWG a permanent injunction outweighs any injury to RELCO. In fact, RELCO does not have an injury. The Late Claims underlying the State Court Action were properly treated and discharged under the Plan. RELCO's failure to comply with this Court's orders (i.e., the Bar Date Order and Confirmation Order) is not an injury for which RELCO is entitled to a remedy. Conversely, MWG is suffering significant irreparable harm by having to defend an action that violates the Court's Confirmation Order. Consequently, granting MWG the permanent injunction outweighs any injury to RELCO.

45. Finally, the public interest will not be harmed by the relief requested. No public interest is implicated by prohibiting RELCO from pursuing an action that it was already prohibited from pursuing. To the contrary, the public interest will be harmed if the relief requested is NOT granted, since there is a public interest in maintaining the integrity of this Court's orders.

46. Alternatively, MWG seeks a court order requiring RELCO to show cause why an order finding RELCO in contempt for failure to comply with this Court's Confirmation Order should not be entered. The Confirmation Order explicitly provided for a broad injunction covering the very claims and causes of action RELCO is pursuing in the State Court Action. In filing the State Court Action, RELCO is in willful violation of this Court's Confirmation Order. As such, MWG seeks an order from this Court ordering RELCO to show cause why it should not be held in contempt of this Court's Confirmation Order.

47. In light of the foregoing, MWG respectfully requests the entry of a permanent injunction prohibiting RELCO from (i) continuing to prosecute the Late Claims and the State Court Action and (ii) recovering against MWG for, or enforcing or collecting under any judgment purporting to award recovery for, amounts relating to the Late Claims. In the alternative, WMG respectfully requests that the Court enter an order requiring RELCO to show cause why an order finding RELCO in contempt for failure to comply with the injunction provisions of the Court's Confirmation Order should not be entered.

RESERVATION OF RIGHTS

48. MWG hereby reserves the right to assert additional causes of action based upon further investigation and/or discovery. MWG also reserves the right to amend or supplement the complaint, including without limitation an award of damages or other sanctions in connection with the enforcement of the Court's Confirmation Order, and for any such amendments or supplements to the Complaint to relate back to the filing of the original Complaint.

PRAYER FOR RELIEF

WHEREFORE, for all the foregoing reasons, MWG respectfully requests entry of:

A. A judgment declaring that the Terminated Agreements were terminated on the Termination Date;

B. A judgment declaring that the Terminated Agreements were not Executory Contracts at the time of the Effective Date and therefore could not be assumed;

C. A judgment declaring that the Late Claims are (a) barred by the Plan's discharge, release and injunction provisions of Article VIII and/or (b) subject to the General Bar Date or the Administrative Claims Bar Date, as applicable.

D. A permanent injunction order enjoining the further prosecution or commencement of the Late Claims either against MWG or any property in which MWG has a legal, equitable,

beneficial, contractual or other interest, or in the alternative, an order to show cause for violating the Confirmation Order and the Plan injunction provision; and

E. An order granting MWG such other and further relief as is just and equitable under the circumstances.

Dated: June 24, 2016

FRANK GECKER LLP

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