

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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In re:)	Chapter 11
)	
EDISON MISSION ENERGY, <i>et al.</i> , ¹)	Case No. 12-49219 (JPC)
)	
Debtors.)	(Jointly Administered)
)	

NRG’S LIMITED OBJECTION TO THE MOTION OF THE EME REORGANIZATION TRUST TO TERMINATE THE EME REORGANIZATION TRUST AND FOR ENTRY OF A FINAL DECREE CLOSING CERTAIN CHAPTER 11 CASES

NRG Energy, Inc. and the Post-Effective Date Debtor Subsidiaries² (collectively, “NRG”), hereby file this limited objection (the “Limited Objection”) to the *Motion of the EME Reorganization Trust to Terminate the EME Reorganization Trust and for Entry of a Final Decree Closing Certain Chapter 11 Cases* [Docket No. 2667] (the “Motion”) and respectfully state as follows:

PRELIMINARY STATEMENT

1. In providing more than \$2.5 billion of consideration that formed the basis of the Debtors’ reorganization in these cases, NRG negotiated for the preservation of EME’s historic documents and records. Specifically, section 9.12 of the Purchase Agreement obligates the Reorganization Trust to keep and preserve in an organized manner the books and records in its

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). The location of the Reorganization Trust’s service address is: 3 MacArthur Place, Suite 100, Santa Ana, California 92707.

² Capitalized terms used but not otherwise defined in this Limited Objection have the meanings given in the Plan or the Motion, as applicable.

possession for a period of seven years, and to make such books and records available to NRG, including as it relates to any legal proceeding. NRG appreciates the nature of the Reorganization Trust and does not oppose its termination nor the closure of the cases under its stewardship once there has been an appropriate provision for all of the trust's obligations. However, NRG has ongoing discovery and document preservation obligations to opposing parties in various pending litigation matters that relate to the businesses and assets NRG acquired from EME under the Plan. Due to the volume of records the Reorganization Trust proposes to destroy and the lack of an adequate index or detailed description of such records, NRG and the parties with which it is in litigation cannot determine whether or to what extent there are spoliation concerns. Documents relevant to existing or anticipated litigation must not be destroyed. Accordingly, NRG requests that the Court condition the termination of the Reorganization Trust upon the satisfaction of its document retention obligations under the Purchase Agreement.

BACKGROUND

2. On December 17, 2012, Edison Mission Energy ("EME") and certain of affiliates (together with EME, the "Debtors") filed petitions with the Court under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

3. On October 18, 2013, the Debtors and NRG entered into that certain Asset Purchase Agreement dated October 18, 2013 (the "Purchase Agreement"), which provided for the sale to NRG of substantially all assets of EME, including its equity interest in the Acquired Companies. On that same date, NRG, the Debtors, the Official Committee of Unsecured Creditors and certain other creditors of the Debtors entered into a plan sponsor agreement (the "Plan Sponsor Agreement"), which the Court approved on October 25, 2013. *See* Docket No. 1424.

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

5. On April 1, 2014, the Effective Date of the Plan occurred. *See* Docket No. 2260. NRG consummated the purchase of substantially all of EME's assets and assumed certain liabilities pursuant to the Purchase Agreement³ and the Confirmation Order, as provided for in Article IV.B. of the Plan. Also on the Effective Date, the Reorganization Trust was established as the successor in interest to EME pursuant to Article IV.E of the Plan.

6. On December 1, 2016, the Reorganization Trust filed the Motion.

LIMITED OBJECTION

7. NRG objects to the Motion to the extent the Reorganization Trust proposes to destroy documents in contravention of the Reorganization Trust's obligations under section 9.12 of the Purchase Agreement and Article IV.E of the Plan. Section 9.12 of the Purchase Agreement (titled the "Post-Closing Record Retention and Access") provides:

Each of Purchaser and EME shall keep and preserve in an organized and retrievable manner, at the headquarters for the Business or any other location at which a portion of the Business is conducted and any such books or records are stored (in the case of Purchaser) and at the headquarters of EME (in the case of EME) the books and records in its possession for seven (7) years from the Closing Date. . . . [E]ach Party shall provide the other Parties and their Affiliates and their authorized representatives with reasonable access (for the purpose of examining and copying), during normal business hours, to any books and records and other materials relating to periods prior to the Closing Date . . . (b) in connection with the management and handling of any Legal Proceeding The obligations of the respective Parties with respect to such records shall include maintaining, for at least the retention period specified above, computer systems permitting access (subject to applicable Laws or regulations of any Governmental Authority) to any of such records which are stored in electronic form in a fashion which is not less efficient than current access methods.

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

Article IV.E of the Plan further provides that “the Reorganization Trust shall assume all obligations of the Debtors and the Non-Debtor Subsidiaries under the Plan.” The Plan incorporates the Plan Supplement, which includes the Purchase Agreement. Plan, Art. I.138 and I.143. Thus, the Reorganization Trust remains obligated to NRG under the Purchase Agreement, including section 9.12 thereof.

8. NRG and/or certain of the Post Effective Date Debtor Subsidiaries are parties to various litigation matters that relate to the businesses NRG acquired under the Plan and Purchase Agreement. NRG therefore has ongoing document preservation obligations, the scope of which extends to documents in the Reorganization Trust’s possession. While the Reorganization Trust has provided NRG with an index of the trust’s hard-copy documents, the Reorganization Trust has been unable to provide a detailed description of the substantial number of documents that it proposes to destroy. Without further description or an opportunity to review, NRG is unable to obtain the consent of opposing parties in litigation to the proposed destruction. Stated differently, without further description of the documents, NRG cannot determine the extent to which such documents may subsequently give rise to spoliation claims.

9. Documents that are relevant to pending litigation must be preserved. EME and its successor agreed to retain documents, at their expense, for a period of seven years. They should not be allowed to evade this obligation or otherwise impose additional costs of storage and review on NRG. To be clear, NRG is not demanding that the Reorganization Trust remain open for five more years. Rather, NRG requests that the Reorganization Trust establish and fund a repository for these documents for the requisite time period notwithstanding the termination of the Reorganization Trust.

10. Accordingly, NRG requests that the Court's order on the Motion provide that any closure of the Reorganization Trust be subject to the satisfaction of the Reorganization Trust's obligations under section 9.12 of the Purchase Agreement and Article IV.E of the Plan.

Dated: December 16, 2016

Respectfully submitted,

/s/ Jeremy C. Kleinman

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CERTIFICATE OF SERVICE

I, Jeremy C. Kleinman, an attorney, hereby certify that on **December 16, 2016**, I caused a copy of the foregoing **NRG's Limited Objection to the Motion of the EME Reorganization Trust to Terminate the EME Reorganization Trust and for Entry of a Final Decree Closing Certain Chapter 11 Cases** to be served upon all parties on the attached Court's Electronic Mail Notice List by operation of the Court's CM/ECF system. In addition, copies were served via electronic mail or messenger delivery, as indicated, upon the parties listed below.

/s/ Jeremy C. Kleinman

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