

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

)	
In re:	)	Chapter 11
)	
EDISON MISSION ENERGY, <i>et al.</i> , ¹	)	Case No. 12-[_____] (____)
)	
Debtors.	)	(Joint Administration Requested)
)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that on December 17, 2012, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) filed the *Debtors’ Motion to Approve Implementation of Incentive Plans for Non-Insider Employees* (the “Motion”).

PLEASE TAKE FURTHER NOTICE that the Debtors have requested a hearing on the Motion on Monday, December 17, 2012, at a time to be determined before the Honorable [_____] or any other judge who may be sitting in [**his/her**] place and stead, in Courtroom [___] in the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, at which time you may appear if you deem fit.

PLEASE TAKE FURTHER NOTICE that the hearing date and time once determined as well as copies of all documents are available free of charge by visiting the case website maintained by GCG, Inc. proposed notice and claims agent for these chapter 11 cases, available at www.edisonmissionrestructuring.com or by calling (866) 241-6491. You may also obtain copies of any pleadings by visiting the Court’s website at www.ilnb.uscourts.gov in accordance with the procedures and fees set forth therein.

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 Fuel Resources, Inc. (3014); Edison Mission Fuel Transportation, Inc. (3012); Edison Mission Holdings Co. (6940); Edison Mission Midwest Holdings Co. (6553); 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 parent Debtor Edison Mission Energy’s corporate headquarters and the Debtors’ service address is: 3 MacArthur Place, Suite 100, Santa Ana, California 92707.

Dated: December 17, 2012

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

In re:)	
	)	Chapter 11
EDISON MISSION ENERGY, <i>et al.</i> , ¹	)	Case No. 12-[_____] (____)
Debtors.	)	(Joint Administration Requested)
)	

**DEBTORS’ MOTION TO APPROVE IMPLEMENTATION
OF INCENTIVE PLANS FOR NON-INSIDER EMPLOYEES**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) state as follows in support of this Motion (this “Motion”):²

Preliminary Statement

1. The Debtors’ employees are the lifeblood of the Debtors’ business and vital to operations. And employee support is critical to stabilizing the Debtors’ businesses and implementing a successful reorganization that ultimately maximizes value for all of the Debtors’ stakeholders.

2. The Debtors historically have maintained a number of incentive programs that are designed to align employee incentives with the Debtors’ operational and other business goals.

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 Fuel Resources, Inc. (3014); Edison Mission Fuel Transportation, Inc. (3012); Edison Mission Holdings Co. (6940); Edison Mission Midwest Holdings Co. (6553); 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 parent Debtor Edison Mission Energy’s corporate headquarters and the Debtors’ service address is: 3 MacArthur Place, Suite 100, Santa Ana, California 92707.

² The facts and circumstances supporting this Motion are set forth in the *Declaration of Maria Rigatti, Senior Vice President and Chief Financial Officer of Edison Mission Energy, in Support of Chapter 11 Petitions and First Day Pleadings* (the “First Day Declaration”), filed contemporaneously herewith.

The ability to continue and implement new incentive programs will be critical to demonstrating the Debtors' ongoing commitment to the workforce in the face of challenges associated with this restructuring. Continuation of the Debtors' incentive compensation practices also sends a clear, positive message to employees that the Debtors' chapter 11 cases are not a reason to seek alternative employment. Instead, the continuation of incentive programs will provide motivation and drive value for the benefit of *all* parties in interest. Thus, continuation and implementation of incentive plans are necessary and in the best interests of the Debtors and these estates.³

Relief Requested

3. By this Motion, the Debtors request entry of an order, substantially in the form attached hereto as **Exhibit A**, (a) approving and authorizing the Debtors to implement incentive programs for their *non-insider* employees (collectively, the "Employee Incentive Programs") and (b) authorizing but not directing the Debtors to make payments to *non-insider* employees under the Employee Incentive Programs as and when such payments come due.

4. Importantly, the Debtors believe that maintaining the Employee Incentive Programs is in the ordinary course of business and thus does not require approval, but nonetheless seek relief, to the extent required, out of an abundance of caution.

Jurisdiction

5. The United States Bankruptcy Court for the Northern District of Illinois (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

6. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

³ Contemporaneously herewith, the Debtors have filed the *Debtors' Motion to Approve (A) Payment of Certain Prepetition Compensation and Reimbursable Employee Expenses, (B) Continued Employee Medical and Other Benefits, and (C) Continued Employee Compensation and Benefits Programs*, by which the Debtors seek authorization to pay certain prepetition wages, salaries and other compensation, taxes, withholdings, and reimbursable expenses and to continue employee compensation and benefit programs on a postpetition basis.

7. The statutory bases for the relief requested herein, to the extent required, are sections 363(b) and 503(c) of title 11 of the United States Code (the “Bankruptcy Code”) and rule 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Background

8. Edison Mission Energy, together with its Debtor and non-Debtor affiliates, is a leading independent power producing enterprise specializing in developing, operating, and selling energy and capacity from over 40 generating facilities in 12 states and the Republic of Turkey. The Debtors have approximately 950 employees and maintain headquarters in Chicago, Illinois and Santa Ana, California.

9. On the date hereof (the “Petition Date”), each of the Debtors filed a petition with this Court under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Concurrently with the filing of this Motion, the Debtors requested procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). No party has requested the appointment of a trustee or examiner in these chapter 11 cases, and no committees have been appointed or designated.

The Debtors’ Employee Incentive Programs

10. The Debtors have historically maintained a number of incentive programs for their employees, as well as employees of their non-Debtor subsidiaries. Incentive programs have always been an important and critical component of employee compensation, providing substantial benefits and value to the Debtors through alignment of employee incentives with the Debtors’ business goals. The Debtors base incentive awards on an employee’s then-current pay (taking into account any ordinary course raises and adjustments for overtime). Between 2008

and 2011, the Debtors paid an average of \$29.5 million annually pursuant to their incentive programs for all employees of both Debtor and non-Debtor companies.⁴

I. The Debtors' 2012 Employee Incentive Programs

11. In 2012, the Debtors' non-insider employees (and employees of certain of their non-Debtor subsidiaries) earned approximately \$26 million under applicable Employee Incentive Programs, substantially all of which was paid prior to the Petition Date. The following is a general description of the 2012 incentive programs:

A. EME Short-Term Incentive Program

12. More than 400 non-insider employees of Debtors Edison Mission Energy ("EME"), Midwest Generation, LLC ("MWG"), Midwest Generation EME, LLC ("MWG EME"), and Midwest Finance Corporation ("Midwest Finance"), approximately 60 management employees of non-Debtor Edison Mission Operation & Maintenance, Inc. ("EMOMI"), and approximately 80 non-energy trader employees of non-Debtor Edison Mission Marketing and Trading, Inc. ("EMMT") participate in a short-term, performance-based cash bonus program based on the attainment of certain corporate and individual performance targets. In 2012, participants earned approximately \$12.7 million in the aggregate on account of the EME short-term incentive program. As of the Petition Date, the Debtors have made substantially all payments under the 2012 EME short-term incentive program, with the exception of payments that will come due on account of December 2012 overtime worked by hourly employee

⁴ The Debtors analyzed their senior management personnel to determine which employees may be considered an "insider" as defined in section 101(31) of the Bankruptcy Code. Regardless of an employee's title, considerations included (a) whether a particular employee sits on a particular board and the responsibilities and oversight roles of such board; (b) whether a particular employee is elected or appointed by a board to manage daily operations; or (c) whether a particular employee has a controlling interest in a Debtor or exercises sufficient authority over all of the Debtors so as to dictate corporate policy and the disposition of corporate assets. Based on this analysis, the Debtors determined that three individuals would likely be considered "insiders" under the Bankruptcy Code (collectively, the "Insiders"). *The Debtors intend to file a separate motion to seek authorization for the Insiders to participate in the Debtors' Employee Incentive Programs.*

(the “2012 Overtime Payments”). By this Motion, the Debtors seek authority but not direction to make the 2012 Overtime Payments as they come due in the ordinary course of business. The Debtors estimate the 2012 Overtime Payments will be less than \$20,000 in the aggregate.

B. Union Short-Term Incentive Program

13. More than 650 non-insider union employees participate in a short-term, performance-based cash bonus program based on the attainment of certain corporate performance targets. In 2012, union employees earned approximately \$2.04 million in the aggregate on account of the union short-term incentive program. As of the Petition Date, the Debtors have made substantially all payments under the 2012 union short-term incentive program.

C. Edison Mission Operation & Maintenance, Inc. Incentive Program

14. Non-management employees of non-Debtor subsidiary EMOMI have historically been able to participate in a short-term incentive program designed to provide market-based compensation to EMOMI employees and to incentivize these employees to attain certain business objectives. In 2012, EMOMI non-management employees earned approximately \$1 million in the aggregate on account of the EMOMI incentive program. As of the Petition Date, the Debtors have made substantially all payments under the 2012 EMOMI incentive program.

D. EMMT Incentive Program

15. The non-insider proprietary trading employees of non-Debtor subsidiary EMMT have historically been able to participate in a separate incentive program designed to align, motivate, and retain this unique employee population. In 2012, participants earned approximately \$5.2 million in the aggregate on account of the EMMT incentive program. As of

the Petition Date, the Debtors have made substantially all payments under the 2012 EMMT incentive program.

E. Long-Term Incentive Program

16. Approximately 50 non-insider senior managers of the Debtors and their non-Debtor subsidiaries participate in a long-term, equity-based incentive plan sponsored by the Debtors' ultimate parent Edison International ("EIX"). In 2012, participants were awarded EIX stock valued at approximately \$5.1 million in the aggregate on account of the 2012 long-term incentive plan.

II. Debtors' 2013 Employee Incentive Programs

17. Each year, the Debtors and their non-Debtor subsidiaries analyze and reevaluate their incentive programs to ensure that their programs are designed to achieve the Debtors' objectives. On August 24, 2012, the Debtors engaged Hewitt Associates LLC (d/b/a Aon Hewitt) ("Aon Hewitt") to provide advice and support to the Debtors' efforts to evaluate and design their 2013 incentive plans and to ensure that the Debtors' business goals are aligned with incentive compensation. Over the course of more than three months, in conjunction with the Compensation Committee of the Board of Directors of Debtor EME, which consists of two independent directors (the "Compensation Committee"), the Debtors and Aon Hewitt reviewed the Debtors' existing incentive plans to ensure that they remained market-based and competitive, and Aon Hewitt provided guidance and analysis on strategies to incentivize and retain employees in light of the Debtors' restructuring initiatives.

18. As part of this analysis, the Debtors, in consultation with Aon Hewitt and the Debtors' other advisors, carefully considered which compensation strategies would best incentivize and reward employees for maximizing value while remaining competitive and market-driven. The Debtors also considered which elements of their incentive plans would need

to be changed, if any, to take into account their restructuring efforts. As a result of those discussions, the Debtors made certain adjustments to their incentive programs but generally retained the overall structure of their programs.

19. The Debtors and Aon Hewitt developed the 2013 Employee Incentive Programs, which consist of six different incentive plans and are largely a continuation of the Debtors' historical incentive plans with certain adjustments to take into account the Debtors' current circumstances. The Debtors implement the Employee Incentive Programs on an organizational basis; therefore, the EME subsidiaries participating in the Employee Incentive Programs include certain non-Debtors. The Debtors are not seeking relief as it relates to the employees of non-Debtor entities who may be eligible to participate in the Debtors' Employee Incentive Programs (and whose incentive payments are paid by non-Debtors) and such programs are included herein in the interest of full disclosure. The Debtors' 2013 Employee Incentive Programs are described below:

A. Short-Term Incentive Plan for EME Participants

20. More than 400 non-insider employees of Debtors EME, MWG, MWG EME, and Midwest Finance, approximately 60 management employees of non-Debtor EMOMI, and approximately 80 non-energy trader employees of non-Debtor EMMT participate in a short-term, performance-based cash bonus program based on the attainment of certain corporate and individual performance targets (the "EME Plan").⁵ The incentive pool for the EME Plan is accrued through (a) the achievement of six-month target goals for cash flow based on adjusted EBITDAR and (b) an upward or downward adjustment based on the achievement of industry-

⁵ Certain insider employees would ordinarily be eligible to participate in the EME Plan absent the Debtors' chapter 11 filing. *By this Motion, however, the Debtors do not seek relief related to the EME Plan for the Insiders. The Debtors will seek separate approval from the Court for any payments or bonuses awarded to the Insiders.*

standard worker and facility safety targets. At the recommendation of Aon Hewitt, the EME Plan includes six-month performance periods to allow for more effective short-term goal-setting. Once the incentive pool is determined based on the Debtors' overall performance, the Debtors' management calculates proposed individual awards, which may be adjusted up or down 20 percent based upon individual performance. Individual awards are capped at 200 percent of the target award.

21. In 2013, the Debtors estimate that participants could earn approximately \$6.45 million at target-level performance for each six-month performance period (approximately \$12.9 million annualized value) under the EME Plan.

B. Short-Term Incentive Plan for Union Participants

22. The Debtors offer approximately 540 non-insider union employees the ability to participate in a short-term, performance based cash bonus program based on the attainment of certain corporate performance targets (the "Union Plan"). The incentive pool for the Union Plan is accrued through the following three measures of the Debtors' performance: (a) 50 percent by the achievement of six-month target goals for cash flow based on adjusted EBITDAR; (b) 50 percent by the achievement of specific reliability measures at the Debtors' unionized coal facilities; and (c) an upward or downward adjustment based on the achievement of industry-standard worker and facility safety targets. At the recommendation of Aon Hewitt, the Union Plan includes six-month performance periods to allow for more effective short-term goal-setting.

23. In 2013, the Debtors estimate that union employees could earn approximately \$825,000 at target-level performance for each six-month performance period (approximately \$1.65 million annualized value) on account of the Union Plan.

C. Short-Term Incentive Plan for Edison Mission Operation & Maintenance, Inc. Participants

24. Non-management employees of non-Debtor subsidiary EMOMI have historically been able to participate in a short-term incentive program designed to provide market-based compensation to EMOMI employees and to incentivize these employees to attain certain business objectives. EMOMI provides essential operational and maintenance services to a substantial portion of the Debtors' portfolio of indirectly owned coal, gas, and renewable energy projects, many of which have few or no employees and depend on EMOMI for essential services.

25. More than 180 non-management EMOMI employees have the ability to participate in a short-term, performance-based cash bonus program based on the attainment of certain corporate and individual performance targets (the "EMOMI Plan").⁶ The incentive pool for the EMOMI Plan is accumulated through the following three measures of performance: (a) 50 percent by the achievement of six-month target goals for cash flow based on adjusted EBITDAR; (b) 50 percent by the achievement of specific EMOMI operating metrics, including the attainment of certain energy availability, corporate safety, and environmental compliance goals; and (c) an upward or downward adjustment based on the achievement of industry-standard worker and facility safety targets. At the recommendation of Aon Hewitt, the EMOMI Plan includes six-month performance periods to allow for more effective short-term goal-setting.

26. In 2013, the Debtors estimate that EMOMI employees could earn approximately \$450,000 at target-level performance for each six-month performance period (approximately \$900,000 annualized value) on account of the EMOMI Plan.

⁶ EMOMI is not a Debtor in these chapter 11 cases. Accordingly, the Debtors do not believe that authority for EMOMI to pay the EMOMI Plan is required. The Debtors describe the EMOMI Plan in this Motion in the interest of full disclosure and out of an abundance of caution.

D. Trader Incentive Plan

27. EMMT offers its energy trading employees the ability to participate in a cash-based bonus program based on the attainment of certain corporate and individual performance targets over annual performance periods (the “Trader Incentive Plan”).⁷ During each annual performance period, EMMT establishes an aggregate incentive pool that is generally based on the achievement of performance targets, and management recommends a proposed allocation of the incentive pool among participants in the Trader Incentive Plan. EMMT’s board of directors has ultimate discretion to decide whether to pay the recommended allocation of the incentive pool to each participant. In certain cases, a portion of the compensation earned under the Trader Incentive Plan is deferred.⁸ To the extent that a participant’s incentive allocation for a particular year includes a deferred portion, the deferred portion is subject to an additional time-vesting requirement.

28. In 2013, the Debtors estimate that participants could earn approximately \$6.4 million at target-level performance on account of the Trader Incentive Plan.

E. Long-Term Incentive Plan

29. Approximately 50 non-insider senior managers of the Debtors and their non-Debtor subsidiaries participate in a cash-based long-term incentive plan (the “Long-Term Incentive Plan”).⁹ The Long-Term Incentive Plan is designed to improve the Debtors’ long-term stability and profitability by aligning management incentives with the Debtors’ business

⁷ EMMT is not a Debtor in these chapter 11 cases. Accordingly, the Debtors do not believe that authority for EMMT to pay amounts due under the Trader Incentive Plan is required. The Debtors describe the Trader Incentive Plan in this Motion in the interest of full disclosure and out of an abundance of caution.

⁸ Historically, at least 25 percent of all incentive awards exceeding \$250,000 are deferred and paid at a later date.

⁹ Certain insider employees of the Debtors would ordinarily be eligible to participate in the Long-Term Incentive Plan absent the Debtors’ chapter 11 filing. *By this Motion, however, the Debtors do not seek relief related to the Long-Term Incentive Plan for the Insiders. The Debtors will seek separate approval from the Court for any payments or bonuses awarded to the Insiders.*

objectives, while at the same time providing participants with competitive, market-based compensation.

30. The Long-Term Incentive Plan is entirely performance-based, with awards generally linked to three operating and performance metrics: (a) 40 percent of the Long-Term Incentive Plan incentive pool is earned by preserving corporate liquidity after adjusting for restructuring costs; (b) 40 percent of the Long-Term Incentive Plan incentive pool is earned by realizing overall reliability targets for the Debtors' coal, gas, and wind energy projects; and (c) 20 percent of the Long-Term Incentive Plan incentive pool is earned by successfully reducing general and administrative and controllable operations and maintenance expenses over the measurement period. The Long-Term Incentive Plan is designed to be earned over a two-year period but may terminate sooner if the Debtors emerge from chapter 11 or implement an alternative program to provide employees with alternative long-term incentives.

31. In 2013, the Debtors estimate that participants could earn approximately \$7.7 million at target-level performance (or \$15.4 million in the aggregate over two years) under the Long-Term Incentive Plan.

F. Key Contributor Plan

32. The Debtors, in consultations with Aon Hewitt and their legal and financial advisors, instituted a cash-based key contributor program to retain a small group of *non-insider* employees whose knowledge, expertise, and skills are essential to the success of the Debtors' businesses (the "Key Contributor Plan"). The Debtors' management will recommend up to 50 key employees (each a Key Employee," and collectively, the "Key Employees") for inclusion in the Key Contributor Plan from a group of non-executive employees who historically are not eligible to participate in the Debtors' long-term incentive programs. These Key Employees

provide critical services to the Debtors' businesses, and their departure would cause serious disruptions to the Debtors' operations and complications to the Debtors' restructuring efforts.

33. The Debtors' management will assign each participant a retention amount denominated as a flat dollar value, which the Debtors will distribute in two equal installments over 12 to 24 months after communicating the award to the applicable Key Employee. The Debtors will only make payments under the Key Contributor Plan to those participants who remain in good standing with the Debtors according to a specified schedule. The Debtors estimate that their aggregate retention payments under the Key Contributor Plan for 2013 will be up to \$2.2 million, which may be paid out over the course of 24 months.

34. In addition, in 2010 (prior to the development of the Key Contributor Plan), the Debtors entered into retention agreements with three essential, *non-insider* employees (the "Retention Agreements"). The Retention Agreements authorize payments to the three employees on account of the valuable services they provide to the Debtors as long as they remain continuously employed with the Debtors until February 2013 (with regard to two of the Retention Agreements) or April 2013. The Debtors estimate that their aggregate retention payments pursuant to the Retention Agreements will be up to \$70,000.

Basis for Relief

I. Section 363(c) of the Bankruptcy Code Authorizes the Debtors to Implement the Employee Incentive Programs in the Ordinary Course of Business.

35. Section 363(c)(1) of the Bankruptcy Code provides that a debtor in possession "may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing." 11 U.S.C. § 363(c)(1). Pursuant to

sections 1107 and 1108 of the Bankruptcy Code, the Debtors are operating as debtors in possession.

36. Section 363(c)(1)'s ordinary course of business standard was intended to allow a debtor in possession the flexibility to run its business. Moore v. Brewer (In re HMH Motor Servs., Inc.), 259 B.R. 440, 448–49 (Bankr. S.D. Ga. 2000). A debtor in possession may therefore use, sell, or lease property of the estate without the need for prior court approval if the transaction is in the ordinary course of business. Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (holding that ordinary course of business use of estate property does not require a prior hearing); Armstrong World Indus. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.), 29 B.R. 391, 394 (S.D.N.Y. 1983) (holding that where a debtor in possession is merely exercising the privileges of its status, there is no general right to notice and a hearing concerning particular transactions conducted in the ordinary course of business).

37. The Bankruptcy Code does not define the “ordinary course of business.” In re Commercial Mortg. and Fin. Co., 414 B.R. 389, 393 (Bankr. N.D. Ill. 2009). Courts in this district apply the “reasonable expectations” test to determine whether a specific transaction is in the ordinary course of business. Id. (citing In re Garofalo's Finer Foods, Inc., 186 B.R. 414, 424 (Bankr. N.D. Ill. 1995)). Under the reasonable expectations test, the court must analyze a debtor's prepetition conduct as a means to inform and develop expectations of its postpetition conduct while considering the changing circumstances inherent in a debtor's efforts to operate its business under chapter 11. Id. The test seeks to discern “any significant alterations” in a debtor's prepetition and postpetition activities. Id. at 393–94. A fundamental characteristic of

an “ordinary” postpetition business transaction is its similarity to a prepetition business practice. Id. at 394.

38. Here, the Employee Incentive Programs continue the overall structure and philosophy of the Debtors’ prepetition employee incentive plans. The Debtors have made changes to the Employee Incentive Programs to take into account current circumstances, including shifting from an equity-based to a cash-based long-term incentive plan and supplementing their historical incentive programs with the Key Contributor Plan. In general, however, the Employee Incentive Plans remain consistent with the Debtors’ prepetition incentive compensation practices. Thus, the Debtors submit that that maintaining all aspects of the Employee Incentive Programs—other than the Key Contributor Plan, for which authority is sought in the following section—is in the ordinary course of their business under section 363(c)(1) and thus Court authority is not required for the Debtors’ continued performance of those Programs.

II. The Debtors’ Implementation of the Employee Incentive Programs Is a Sound Exercise of the Debtors’ Business Judgment and Is in the Best Interests of the Debtors’ Estates.

39. The Debtors believe that implementation of the Key Contributor Program should be approved as a sound exercise of their business judgment and in the best interests of the estates pursuant to section 363(b). Moreover, even if the Debtors’ implementation of the overall Employee Incentive Programs is not in the ordinary course of business, the Debtors’ implementation of those Programs should similarly be approved.

40. Section 363(b)(1) of the Bankruptcy Code provides that a debtor “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). A debtor may use, sell, or lease property of the estate where a sound business purpose justifies such actions. Fulton State Bank v. Schipper (In re Schipper),

933 F.2d 513, 515 (7th Cir. 1991) (noting that the criteria for approval of a transaction under section 363(b) is whether the debtor has “an articulated business justification”); Contrarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.), 600 F.3d 231, 248 n.8 (2d Cir. 2010); Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1070 (2d Cir. 1983); In re Borders Grp., Inc., 453 B.R. 459, 473 (Bankr. S.D.N.Y. 2011). Specifically, once a debtor articulates a valid business justification for a particular form of relief, the court reviews the debtor’s request under the business judgment rule. See Commercial Mortg. and Fin. Co., 414 B.R. at 394 (noting that a debtor in possession “has the discretionary authority to exercise his business judgment in operating the debtor’s business similar to the discretionary authority to exercise business judgment given to an officer or director of a corporation”).

41. The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. See In re Abbott Labs. Derivative S’holders Litig., 325 F.3d 795, 807 (7th Cir. 2003). Consequently, a debtor’s business decision “should be approved by the court unless it is shown to be ‘so manifestly unreasonable that it could not be based upon sound business judgment, but only on bad faith, whim, or caprice.’” In re Aerovox, Inc., 269 B.R. 74, 80 (Bankr. D. Mass. 2001) (quoting In re Logical Software, Inc., 66 B.R. 683, 686 (Bankr. D. Mass. 1986) (citations omitted)). Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

42. The implementation of the Employee Incentive Programs is a proper exercise of the Debtors’ business judgment and is in the best interests of the Debtors, their estates, and their stakeholders. The Debtors’ restructuring initiatives have placed additional demands on the

workforce, making the provision of appropriate, market-based compensation and incentives essential to the success of the Debtors' restructuring efforts. In addition to their ordinary-course activities needed to drive the Debtors' financial and operational performance, many of the Debtors' employees have taken on additional responsibilities related to the Debtors' restructuring efforts. The skills, expertise, and motivation of the Debtors' employees are essential to the Debtors' ability to achieve a successful reorganization in these chapter 11 cases.

43. Furthermore, the Employee Incentive Programs align the interests of the Debtors' employees and all stakeholders in these chapter 11 cases. The Debtors have structured the Employee Incentive Programs carefully to balance the Debtors' need to incentivize their employees and to provide them with appropriate, market-based compensation with the need to ensure that the Debtors' estates receive enhanced value in exchange for incentive payments—the result benefiting all parties in interest. The Employee Incentive Programs (with the exception of the Key Contributor Plan) are performance-based. Payments depend on the employees making possible the Debtors' attainment of certain cash flow, reliability, performance, and safety targets, all of which will increase the Debtors' value as a going concern.

44. The Key Contributor Plan and Retention Agreements also should be independently authorized as a sound exercise of the Debtors' business judgment. The Debtors require the specific knowledge, expertise, and focused attention of the Key Employees and those employees subject to the Retention Agreements during the pendency of these chapter 11 cases. These employees are intimately familiar with the Debtors' business and have the experience and knowledge necessary to ensure the Debtors' continued operations through the completion of the chapter 11 cases. The Debtors cannot easily replace these employees without significantly

reducing their operating efficiency and distracting management from the Debtors' restructuring efforts.

45. Courts in this jurisdiction and others have recognized that programs such as the Employee Incentive Programs can be an efficient means of maximizing value for a debtor's estate and, accordingly, have approved similar incentive programs. See, e.g., In re Kimball Hill, Inc., No. 08-10095 (SPS) (Bankr. N.D. Ill. Dec. 17, 2008) (approving associate and management incentive plans in connection with the sale or wind-down of debtors' operations); In re UAL Corp., No. 02-48191 (ERW) (Bankr. N.D. Ill. Feb. 6, 2003) (authorizing debtors' to continue key employee retention program in the ordinary course of business); In re Comdisco, Inc., No. 01-24795 (JBS) (Bankr. N.D. Ill. Aug. 28, 2001) (authorizing continuation of key employee incentive and retention programs); In re Velo Holdings, Inc., No. 12-11384, 2012 WL 2015870, at *9 (Bankr. S.D.N.Y. June 6, 2012) (approving key employee incentive plan for both insiders and non-insiders with incentive targets tied to financial performance and sales of debtors' business units); In re AES E. Energy, L.P., No. 11-14138 (KJC) (Bankr. D. Del. Mar. 30, 2012) (authorizing payment of certain employee incentive awards and distribution of fully vested performance units under debtors' long-term compensation plan); In re Hostess Brands, Inc.; No. 12-22052 (RDD) (Bankr. S.D.N.Y. Apr. 30, 2012) (authorizing debtors to perform under certain employee incentive plans in the ordinary course of business); In re Borders Grp., Inc., No. 11-10614 (MG) (Bankr. S.D.N.Y. Apr. 22, 2011) (approving incentive plan for senior management employees, including insiders, based on achievement of certain financial performance metrics in addition to timely confirmation of a plan of reorganization or court-approved asset sale); In re Mesa Air Grp., Inc., No. 10-10018 (MG) (Bankr. S.D.N.Y. Sept. 23, 2010) (authorizing debtors to implement employee incentive plan and to make payments thereunder); In re Lyondell

Chemical Co., No. 09-10023 (REG) (Bankr. S.D.N.Y. Aug. 26, 2009) (approving management incentive plan, non-insider retention plan, discretionary bonus plan, and hardship plan); In re Mark IV Indus., Inc., No. 09-12795 (SMB) (Bankr. S.D.N.Y. Aug. 24, 2009) (approving key employee incentive plan and continuation of annual incentive plan).¹⁰

46. Accordingly, the Debtors submit that implementing the Employee Incentive Programs is a valid exercise of the Debtors' business judgment and the approval of the Employee Incentive Programs is in the best interests of the Debtors, their estates, and all parties in interest in these chapter 11 cases.

III. The Executive Incentive Plans Do Not Violate Section 503 of the Bankruptcy Code.

A. Maintaining the Key Contributor Plan Is a Sound Exercise of the Debtors' Business Judgment and Does Not Violate Section 503(c) of the Bankruptcy Code.

47. Section 503(c)(1) of the Bankruptcy Code generally prohibits retention payments to "insiders," as that term is defined in section 101(31) of the Bankruptcy Code, for the purpose of inducing the "insider" to remain with a Debtor's business. Section 503(c)(1) of the Bankruptcy Code does not, however, prohibit the Debtors' implementation of the Key Contributor Plan. Although the Key Contributor Plan is a retention plan, it applies only to *non-insiders* of the Debtors. Indeed, the primary participants in the Key Contributor Plan will be selected by the Debtors' management from the salary bands directly below the executive payroll, and insiders are *not* eligible for the Key Contributor Plan.

48. Section 503(c)(3) also provides that any transfer to or obligations incurred on behalf of employees (including insiders) of a debtor outside the ordinary course of business must be justified by the facts and circumstances of the case. 11 U.S.C. § 503(c)(3). To the extent the

¹⁰ Because of the voluminous nature of the orders cited herein, such orders have not been attached to the Motion. Copies of these orders are available upon request to the Debtors' proposed counsel.

Key Contributor Plan is deemed outside the ordinary course of business, however, it is nevertheless authorized under section 503(c)(3) because it is a valid exercise of the Debtors' business judgment and is justified by the facts and circumstances of the case.

49. Without the Key Contributor Plan, the Debtors fear that many of their mission-critical, mid-level employees may seek alternative career opportunities, which would impede the Debtors' ability to execute on critical business and restructuring initiatives. The Debtors cannot afford to lose their most talented and valuable employees, who each possess unique and vital institutional knowledge that is critical to business operations at this crucial time. If the Key Contributor Plan participants were to resign, the value and benefits of these employees' experience would be lost and would cause the Debtors to incur significant costs in recruiting and attracting similarly qualified replacements. Relying on newly hired employees to perform the Key Contributor Plan participants' functions would severely hinder the Debtors' operations and training and utilizing new employees would also come at a huge expense, in terms of both actual cost and unquantifiable damage to the Debtors' business. In addition, the scope of the Key Contributor Plan is reasonable and appropriate, as it applies only to up to 50 of the Debtors' most vital contributors. The facts and circumstances of these chapter 11 cases justify implementation of the Key Contributor Plan, which constitutes a sound exercise of the Debtors' business judgment and therefore satisfies section 503(c)(3) of the Bankruptcy Code.

B. Honoring the Retention Agreements Is a Sound Exercise of the Debtors' Business Judgment and Does Not Violate Section 503(c) of the Bankruptcy Code.

50. The Court should also authorize the Debtors to honor their obligations under the Retention Agreements for the same reasons supporting implementation of the Key Contributor Plan. The Debtors saw value in retaining these employees because of their critical skills and expertise, and their departure during this critical time would disrupt the Debtors' attempts to

stabilize operations and operate their businesses.

51. Section 503(c)(1) does not apply to the Retention Agreements because the Key Employees who are party thereto are non-insiders. The Debtors submit that honoring the Retention Agreements is in the ordinary course of business and thus section 503(c)(3) does not apply. If performance under the Retention Agreements is deemed outside the ordinary course, however, it is nonetheless a valid exercise of the Debtors' business judgment under the facts and circumstances of the case pursuant to section 503(c)(3). The Debtors have entered into the Retention Agreements because they deemed the retention of the three non-insider employees as essential to their ongoing operations. Should the Debtors fail to honor their obligations under the Retention Agreements, these employees may leave the Debtors for competitors, disrupting the Debtors' businesses and distracting the Debtors' management from their restructuring efforts.¹¹

Satisfaction of Bankruptcy Rule 6004(a) and Waiver of Bankruptcy Rule 6004(h)

52. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established caused to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

Notice

53. The Debtors have provided notice of this Motion to: (a) the Office of the U.S. Trustee for the Northern District of Illinois; (b) the entities listed on the Consolidated List of Creditors Holding the 30 Largest Unsecured Claims; (c) the indenture trustee for the Debtors' senior unsecured notes; (d) counsel to the ad hoc committee of certain holders of the Debtors'

¹¹ The Debtors also believe that because the payment obligations under the Retention Agreements will arise postpetition, they are entitled to administrative priority pursuant to section 503(b)(1)(A) of the Bankruptcy Code. Honoring such payment obligations benefits the Debtors' estates because the three employees are "at will" employees and may otherwise leave their positions with the Debtors at a time when retaining these employees is essential to the success of the Debtors' ongoing operations.

senior unsecured notes; (e) the indenture trustee for the lessor notes related to the Debtors' Powerton generating station in Pekin, Illinois, and units 7 and 8 of the Debtors' Joliet, Illinois, generating station and the pass-through trustee for the related pass-through certificates; (f) counsel to the ad hoc committee of certain holders of pass-through certificates related to the Debtors' Powerton and Joliet generating stations; (g) the owner trusts and the equity investors for the Debtors' Powerton and Joliet generating stations (and their respective counsel, if known); (h) the lender under Debtor Edison Mission Energy's letter-of-credit facility; (i) the state attorneys general for states in which the Debtors conduct business; (j) United States Attorney for the Northern District of Illinois; (k) the Internal Revenue Service; (l) the Securities and Exchange Commission; and (m) the Environmental Protection Agency and similar state environmental agencies for states in which the Debtors conduct business. In light of the nature of the relief requested herein, the Debtors respectfully submit that no further notice is necessary.

No Prior Request

54. No prior request for the relief sought in this Motion has been made to this or any other court.

[Remainder of page intentionally left blank.]

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and such other and further relief as the Court deems appropriate.

Dated: December 17, 2012

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EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

In Re:	)	BK No.:	12-49219
EDISON MISSION ENERGY, et al.,)		
	)	Chapter:	11
)		
)		
)		
Debtor(s))		

**ORDER AUTHORIZING THE DEBTORS TO IMPLEMENT
INCENTIVE PLANS FOR NON-INSIDER EMPLOYEES**

Upon the motion (the “Motion”) of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an order (this “Order”) (a) approving and authorizing the Debtors’ Executive Incentive Programs and (b) authorizing but not directing the Debtors to make certain payments to certain senior management employees under the Executive Incentive Programs, all as more fully set forth in the Motion; and upon the First Day Declaration; and the Court having found that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors, and other parties in interest; and the Court having found that the Debtors provided appropriate notice of the Motion and the opportunity for a hearing on the Motion under the circumstances; and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before the Court (the “Hearing”); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

2. The Employee Incentive Programs, including the Key Contributor Plan and the Retention Agreements, are approved in their entirety.

3. The Debtors are authorized but not directed to implement the Employee Incentive Programs including, but not limited to, the EME Plan, the 2012 EME Plan Overtime Payments, the Union Plan, the Long-Term Incentive Plan, the Key Contributor Plan, and the Retention Agreements, on a postpetition basis, in the ordinary course of business, in accordance with the Debtors’ prepetition policies and practices, and, in the Debtors’ discretion, to pay and honor prepetition amounts related thereto.

4. In accordance with this Order and any other order of this Court, each of the financial institutions at which the Debtors maintain their accounts relating to the payment of the obligations described in the Motion is directed to receive, process, honor, and pay any and all checks, drafts, wire transfers, and automated clearing house transfers issued, whether before or after the Petition Date, for payment of obligations described in the Motion to the extent that sufficient funds are on deposit in such amounts.

5. The Debtors are authorized to issue postpetition checks, or to effect postpetition wire transfer requests, in replacement of any checks or wire transfer requests in respect of payments of prepetition obligations described in the Motion that are dishonored or rejected.
6. All postpetition payments from a Debtor to another Debtor are hereby accorded superpriority administrative expense status and shall have priority over any administrative claims that arise under section 503(b) of the Bankruptcy Code in accordance with the Court's order approving continued use of the Debtors' cash management system.
7. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied by the contents of the Motion.
8. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules of the United States Bankruptcy Court for the Northern District of Illinois are satisfied by such notice.
9. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
10. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall be deemed: (a) an admission as to the validity of any claim against a Debtor entity; (b) a waiver of the Debtors' right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; or (f) a waiver of the Debtors' rights under the Bankruptcy Code or any other applicable law.
11. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to Order in accordance with the Motion.
12. The Court retains jurisdiction with respect to all matters arising from or related to the interpretation or implementation of this Order.

Enter:

Dated:

United States Bankruptcy Judge

Prepared by:

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

)	
In re:	)	Chapter 11
)	
EDISON MISSION ENERGY, <u>et al.</u> , ¹	)	Case No. 12-[_____] (____)
)	
Debtors.	)	(Joint Administration Requested)
)	

CERTIFICATE OF SERVICE

I, David R. Seligman, P.C., an attorney, certify that on the date hereof, I caused to be served by GCG, Inc. (the proposed notice and claims agent for these chapter 11 cases) on behalf of the above-captioned debtors and debtors in possession, in the manner and to the parties set forth on the attached service lists, a true and correct copy of the foregoing pleading.

Dated: December 17, 2012

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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 Fuel Resources, Inc. (3014); Edison Mission Fuel Transportation, Inc. (3012); Edison Mission Holdings Co. (6940); Edison Mission Midwest Holdings Co. (6553); 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 parent Debtor Edison Mission Energy’s corporate headquarters and the Debtors’ service address is: 3 MacArthur Place, Suite 100, Santa Ana, California 92707.

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STATE OF MONTANA
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CHAGRIN FALLS OH 44023-4398

THE BANK OF NEW YORK
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WILMINGTON TRUST COMPANY
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