

Laurence R. Martin (Bar No. 948)
lmartin@feltmartinlaw.com
Martin S. Smith (Bar No.: 8721)
msmith@feltmartinlaw.com
FELT, MARTIN, FRAZIER & WELDON, P.C.
208 North Broadway, Suite 313
P.O. Box 2558
Billings, Montana 59103
Telephone: (406) 248-7646
Fax: (406) 248-5485

ATTORNEYS FOR BEARTOOTH ELECTIC COOPERATIVE, INC.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re)	Case No. 11-62031-RBK
)	
SOUTHERN MONTANA ELECTRIC)	<u>NOTICE OF HEARING</u>
GENERATION AND TRANSMISSION)	Date: September 24, 2013
COOPERATIVE, INC.)	Time: 1:30 PM
)	Location: Federal Courthouse
Debtor.)	2601 2nd Ave. North.
)	Billings, Montana

**JOINDER IN FERGUS ELECTRIC COOPERATIVE, INC.’S MOTION TO REMOVE TRUSTEE
(DOCKET NO. 1101)**

Beartooth Electric Cooperative, Inc. (“BEC”), as a creditor and member of Southern Montana Electric Generation and Transmission Cooperative, Inc., (“Debtor”) and as a party in interest, by and through its counsel of record, hereby joins in the Fergus Electric Cooperative, Inc.’s (“Fergus”) *Motion to Remove Chapter 11 Trustee* [docket 1101] (the “Motion”). In addition, BEC states as follows:

1. The Commentary to 11 U.S.C.S. § 1105 (LEXIS 2010) states as follows:

Section 1105 of the Bankruptcy Code [11 USCS § 1105] is a seldom used provision governing the termination of a Chapter 11 Trustee’s appointment. At the outset, the scope of § 1105 must be differentiated from § 324 of the Bankruptcy Code [11 USCS § 324], which governs the removal of a trustee. Section 324 provides that the court may remove a trustee for cause. ...

In contrast, § 1105 does not deal with removing and then replacing particular Chapter 11 trustee with a successor trustee. Rather, § 1105 addresses when the appointment of a trustee should be terminated and the debtor restored to the management of its business and the possession of its properties in lieu of a Chapter 11 trustee.

The decision to terminate a Chapter 11 Trustee and restore the debtor to possession lies within the discretion of the Bankruptcy court. *See, e.g., In re General Oil Distributors, Inc.*, 42 B.R. 402, 409 (Bankr. E.D.N.Y. 1984) (referring to the Bankruptcy court's "uncircumscribed power" to terminate the appointment of a Chapter 11 trustee under § 1105). However the language of the statute provides no guidance as to how such discretion should be exercised.

The legislative history to § 1105 and the sparse case law under this provision provide some guidance in determining when relief under § 1105 is appropriate. Two different grounds have been delineated from the termination of a Chapter 11 trustee's appointment—improvidence and changed circumstances. *In re Curlew Valley Assoc.*, 14 B.R. 506 (Bankr. D. Utah 1981).

The improvidence ground is expressed in legislative history. The description of § 1105 in the House Report accompanying the Bankruptcy Code states: "This section would permit the court to reverse its decision to order the appointment of a trustee in light of new evidence." H.R. Rep. No. 595, 95th Cong., 1st Sess. 403 (1977), U.S. Code Cong. & Admin. News, 1st Sess. 403 (1977). Thus, if a party in interest can establish, based upon new evidence, that the original grounds for the appointment of the Chapter 11 trustee did not exist, § 1105 allows the Bankruptcy court to, in essence, reverse its decision appointing the trustee and restore the debtor to power.

The second ground for terminating a Chapter 11 trustee is changed circumstances. Under this standard, the movant does not contest that grounds existed to support the appointment of the trustee at such time the appointment was made; rather the movant asserts that factual circumstances have changed since the appointment of the trustee such that the restoration of the debtor to possession of its properties and management of its business is now warranted.¹

2. The above indicates the Court may terminate the appointment of a Chapter 11 trustee where either the apparent circumstances for appointing the trustee actually did not exist or the circumstances for appointing the trustee have ceased to exist.

3. In this case the Chapter 11 trustee was appointed because the Debtor's Board of Trustees were evenly divided on almost all issues: Yellowstone Valley Electric Cooperative,

¹ 11 U.S.C.S. § 1105 cmt (LEXIS 2010) (alterations in original).

Inc. (“YVEC”), BEC, and the City of Great Falls/ECP aligned on all material issues and Tongue River Electric Cooperative, Inc. (“TRECO”), Fergus Electric Cooperative, Inc. (“Fergus”), and Mid-Yellowstone Electric Cooperative, Inc. (“Mid-Yellowstone”) aligned on all material issues. The result was deadlock on the Debtor’s Board of Trustees.

4. Since then, YVEC and the City of Great Falls/ECP have terminated their membership in the Debtor and no longer have trustee’s on the Debtor’s Board of Trustees. Therefore, Debtor’s Board of Trustees is no longer deadlocked.

5. The elimination of the deadlock on the Debtor’s Board of Trustees eliminates the need for the appointment of the Chapter 11 trustee.

THEREFORE, the Court should terminate the Chapter 11 Trustee’s appointment.

Dated this 4th day of November 2013.

FELT, MARTIN, FRAZIER & WELDON, P.C.

/s/ Martin S. Smith

By: Martin S. Smith
208 North Broadway, Suite 313
Billings, Montana 59103

Attorneys for Beartooth Electric Cooperative, Inc.

CERTIFICATE OF SERVICE

The undersigned does certify under penalty of perjury that on November 4, 2013, a true copy of the foregoing document was served electronically by the Court’s ECF notice to all parties requesting special notice or otherwise entitled to the same. The undersigned does further certify that service by mailing a true and correct copy, first class mail, postage prepaid, was made to the following parties: NONE.

FELT, MARTIN, FRAZIER & WELDON, P.C.

/s/ Martin S. Smith

By: Martin S. Smith

Attorneys for Beartooth Electric Cooperative, Inc.