Minutes of Proceedings

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Date: **December 28, 2005**	:	
In re:	:	
	:	Case No. 01-16034 **(AJG)**
ENRON CORP., et al.,	:	Chapter 11
Debtors.	:	

Before: Hon. Arthur J. Gonzalez
Bankruptcy Judge

Proceedings: ☒ The Applications of the Dunhill Group, the Dominion Entities, and the Independent Producers Group for payment of Attorneys' Fees and Expenses, pursuant to 11 U.S.C. § 503(b)(3) & (4) for substantial contribution to the Enron North America Estate (collectively, the "Applications").

Orders: ☒ For the reasons set forth on the record, as contained in Exhibit "A" attached hereto, the relief sought in the Applications is denied.

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/Arthur J. Gonzalez	12/28/05	Lynda Nulty
United States Bankruptcy Judge	Date	Courtroom Deputy

EXHIBIT A

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Before the Court are the applications of the Dunhill Group, the Independent Producers Group and the Dominion Entities seeking an award under section 503(b) of the Bankruptcy Code. Two other section 503(b) applications - that of the Southern Ute Indian Tribe d/b/a Red Willow Production Company and Calyon New York Branch - have been withdrawn.

In its October 7th 2004 ruling on the request to continue the role of the ENA Examiner postconfirmation, the Court determined, as it also does in the instant matter, that its ruling needed to be framed in the context of its initial decision to direct the appointment of an ENA Examiner. As stated by the Court:

> At the outset of these cases, there were numerous requests for emergent relief that placed heavy demands on all parties involved. Many of the requests were reactions to the concerns raised by allegations surrounding Enron's management and its accounting irregularities.

As further noted in this Court's October 7th ruling and amplified herein, although some members of the Creditors' Committee (the "Committee") held claims against various estates, the Committee predominately consisted of creditors with claims against Enron Corp., and the claims of the largest single constituency were financial in nature. Many of the members of the Committee held claims in more than one estate - often in both Enron Corp. and ENA. With "trade creditors" in the minority on the Committee, certain trade creditors that were not on the Committee expressed a number of concerns over ENA. They raised two major issues of concern. One was the integrity of ENA assets. The other was the putative increase in liabilities against ENA allegedly brought about by Enron Corp. engaging in financial transactions that did not provide ENA with equivalent value yet burdened the ENA estate with significant liabilities. Inasmuch as the Committee was comprised of mostly Enron Corp. creditors, some of whom were large financial institutions criticized for their role in the fall of Enron, certain ENA creditors did not view the Committee as addressing their concerns regarding the protection of ENA.

Regarding ENA, a number of its trade creditors continued to express concern over the treatment of ENA. Also, at least some of the ENA creditors expressed concern over the possibility that Enron Corp. was preparing to seek substantive consolidation of all of the debtor estates, which the ENA creditors perceived as being against their interests. The Court also noted that as additional allegations had been leveled against Enron's prepetition management, some of whom had continued in management positions postpetition, there was a level of distrust in postpetition management.

As reflected by the above, the Court recognized various constituents' concerns, including certain ENA creditors, over prepetition management's continued role in Enron. However, from the outset, the Committee was extremely active and soon convinced the Board of Directors that a change

was necessary. This led to an agreement to enter into a contract with Stephen Forbes Cooper, LLC, as independent contractor, to provide management services for the Debtors. Many saw this as putting to rest the management issue for at least a time and, consequently, providing an opportunity to focus on preserving value. Nonetheless, although the appointment of Cooper seemed to address concerns raised by many constituencies, including various governmental agencies and departments, his appointment did not address concerns raised by many of the energy-trading constituents who, from the inception of these cases, saw their primary means of recovery through the ENA estate. These constituencies expressed concerns that assets of ENA had been put at risk prepetition and were continuing to be put at risk postpetition, and that Enron Corp had improperly burdened ENA with liabilities. More fundamentally, they complained that the interests of those controlling the Debtors and of the Committee were better served by not protecting ENA-creditor interests. Further, they feared that the Debtors and the Committee could take actions inconsistent with their fiduciary duties or that they were conflicted and should not be permitted to continue in a fiduciary role with respect to ENA.

Initially, the Court contemplated not taking any *sua sponte* action and simply continuing to preside over and rule upon contested matters as they were presented. However, during this period, some of the most pressing issues in these cases - those related to cash-management concerns - were raised. These were significant issues to all concerned and went to the operational functions of the Debtors. Following a hearing related to cash management, the Court recognized that extensive, time consuming efforts would have to be undertaken to resolve these issues. As a result, the Court determined that if it chose to forbear from *sua sponte* action, all the estates would be exposed to significant erosion in value which would leave any prevailing party with a real potential for an empty victory or, at least, a diminished recovery.

The Court considered the options available, including the appointment of an examiner. Such an appointment would have provided, at a minimum, a temporary solution. It would have delayed the immediate need for further litigation regarding the cash management issues, while providing protections in the event that any of the concerns raised by certain ENA creditors, including applicants, were well founded. The Court, however, had certain reservations to this approach, including the fact that there had been no actual finding of improper activity that is normally a prerequisite for taking such action. Although appointing an examiner to provide oversight without any actual finding of improper activity certainly can be done, such course of action should not undermine the ability of the estates' fiduciaries to perform their duties. Pursuant to its duties, the Committee had been providing oversight of the estates. Other than speculation that the Enron Corp. creditors, especially the institutional creditors, would force the Committee to promote their interests to the detriment of other estates, there was no indication or any evidence that the Committee's oversight was not sufficient or, for that matter, that the Debtors' postpetition management structure was insufficient to address the concerns raised.

The Court concluded that the best solution was the appointment of an ENA Examiner with a limited mandate to examine the cash system and related issues, which, at that time, appeared to be the pressing issues. In the Court's view, that solution would allow the parties to move in the direction of

resolving complex issues and the Debtors to focus their attention on stabilizing the estates. If the ENA Examiner did not find any irregularities, it seemed likely that most of the concerns of the various movants would be lessened or eliminated. Further, the ENA Examiner could have a continuing role regarding use of cash management without causing disruption to the Debtors, which would permit the parties to engage in more productive activities. As the need for oversight had not been established, the issue before the Court had to be dealt with in a manner that would not interfere with the efforts to stabilize the Debtors. The decision to appoint the ENA Examiner and provide his oversight was the best method to avoid unnecessary, destructive litigation while addressing the concerns of certain ENA creditors. Moreover, it would not undermine the fiduciary roles of the Debtors and the Committee to all of the estates.

After the appointment of the ENA Examiner, there was a reduction in tensions. However, the appointment did not end litigation regarding, among other things, the request for separate committees. The hearing on that issue went forward and the relief requested was denied by the Court in all respects. In its decision, the Court referenced the role played by the ENA Examiner. The Court stated that " ... [t]he functioning and composition of the current Creditors' Committee (as well as the role of the ENA Examiner) lends support for its maintenance as the sole committee." The Court's decision was appealed by the Ad Hoc Committee of Energy Merchants and the Court's decision was affirmed. None of the applicants before the Court were members of that ad hoc committee.

Following the denial of the motion, there was still little movement toward a mutual understanding of the issues that separated the parties. Inasmuch as the ENA Examiner had established credibility with the major constituents, the Court saw the need to expand the ENA Examiner's role to include functioning as a plan facilitator. One should not, however, lose sight of the fact that at no time was there any evidence of any improper action by the Debtors or the Committee with respect to the issues raised by the various ENA creditors, including the applicants. There is no doubt that there was a significant difference of opinion as to certain rights to assets or the amount of estate liabilities as between and among the various estates, especially Enron Corp. and ENA. But that is all they were - differences of opinion that would either have to be consensually resolved or resolved by the Court. Further, the role of the ENA Examiner, as a plan facilitator, was a reflection of the parties inability to bridge those gaps on their own.

Returning to the issue at hand, the applicants' requests to be compensated for substantial contribution can be divided into two stages - before and after the appointment of the ENA Examiner. It does not appear that the parties disagree on the standard to be applied but there is a significant difference in the inferences and conclusions they reach.

The statutory substantial contribution provisions are to be construed narrowly. *In re U.S. Lines*, 103 B.R. 427, 430 (Bankr. S.D.N.Y. 1989). As set forth in the opposition to this motion, the granting of an award for a substantial contribution is rare and a party seeking an award based upon a substantial contribution must establish that it provided a substantial contribution to the estate and that its actions were credibly connected to the substantial contribution and, further, that its actions were extraordinary

and not duplicative. *In re Granite Partners, L.P.*, 213 B.R. 440, 447 (Bankr. S.D.N.Y. 1997); *In re Best Prods. Co.*, 173 B.R. 862, 865 (Bankr. S.D.N.Y. 1994); and *In re Alert Holdings, Inc.*, 157 B.R. 753, 757 (Bankr. S.D.N.Y. 1993). Further, this extraordinary action must lead to direct tangible benefits to creditors. *Alert Holdings, Inc.*, 157 B.R. at 757. Moreover, by itself, a creditors' extensive participation, does not warrant an award for substantial contribution. *In re Granite Partners, L.P.*, 213 B.R. 440, 445 (Bankr. S.D.N.Y. 1997).

Turning to the role of the applicants, initiated prior to the ENA Examiner's appointment, during this period, the applicants involvement in the proceedings primarily related to the following:

1) Venue motion
2) Objection to UBS Sale
3) Cash management related issues

With the exception of the venue motion, the concerns raised were purely ENA-related issues. Regarding the venue motion, although supported by many ENA trade creditors, some of whom argued just for the transfer of venue of the ENA debtor, the request for a change of venue was not purely an ENA issue and was supported by some creditors of Enron Corp. and other estates. The applicants do not seek an award for substantial contribution for their efforts regarding the venue motion but reference it as part of their overall effort that led to the appointment of the ENA Examiner.

With respect to the UBS Sale, the objections, for the most part, were overruled. The UBS Sale represented an effort by the estate to monetize the value of its trading operations. The concept was a good one and, had the trading market not suffered a complete collapse, the UBS trading entity would have been a significant player in the energy trading market because its parent, UBS, would have provided backing that presumably would have resulted in an AAA rating of the trading entity. Further, the Debtors and the Committee argued that the energy traders' objections to the UBS Sale were motivated by their own self interests, as competitors of any surviving entity, and, therefore, the objectors were trying to undermine the sale for their individual interests. While numerous objections were filed to the UBS Sale and some resulted in modification to the Sale Order, the applicants' role in the sale did not provide a substantial contribution to the ENA estate.

The objections to the Debtors' motion for the continued use of existing bank accounts and the applicants' cash management system motion involved related issues. The applicants' opposition was ultimately addressed in the final order. Specifically, with respect to the "interest" component related to the cash management system, while it can be argued - although no evidence to this effect has ever been presented - that, but for certain ENA creditors, including the applicants, the Committee would not have been as aggressive with its efforts in modifying the Debtors' cash management system, the dynamic that took place reflects the efforts of many active creditors in a large complex chapter 11 case. Even the "cash freeze," that was requested by the applicants to provide added protection for ENA assets, was never established to be necessary.

At no time in these cases was it established that the Debtors or the Committee breached their fiduciary duties to any of the estates. One situation comes to mind in this regard - the cash management issue previously discussed. It is difficult to determine whether the changes to the cash management system would have been sought by the Committee absent the actions of the applicants and other ENA creditors. Regardless, even if all or some of the changes that were implemented had not been made, the ENA creditors' actions were merely those of an active creditor constituency. Further, with respect to the ENA creditors' opposition to the fact that in the Debtor's initial proposal, intercompany loans from ENA, or other subsidiaries, to Enron Corp. were not to be repaid with interest, the Debtors' presented a reasonable rationale for not being obligated to pay such interest as substantial value was provided to the subsidiaries by Enron Corp. There was no evidence that the Debtors breached their fiduciary duty in proposing that structure. Even though as the cash management system was eventually configured, the interest component provided substantial value to the lending subsidiaries, such as ENA, the record does not support a finding that the Committee would not have sought such a modification absent the involvement of the ENA creditors. The applicants' participation in that controversy does not constitute a substantial contribution under section 503(b). Rather, it was simply advocacy between a creditor constituency and the debtors, taking into consideration the difficulties inherent in a complex interdebtor structure such as was present in these cases. Further, many other ENA creditors participated in the controversy surrounding the cash management system and it was not a "but for" situation in which this Court could find that but for the actions of the applicants the benefits would not have been conferred. Moreover, as noted previously, while the "freeze" certainly provided added protection for the ENA creditors, it was ordered because it put off a contentious issue and it was clear that the cash management system could function with the freeze in place.

There is no doubt that the ENA Examiner's appointment was prompted by certain active ENA creditors, especially including the applicants, but it was not done at the request of any of the applicants. In fact, had there actually been a litigation as contemplated by the applicants, even if the applicants had prevailed, the result may well have been a hollow victory. Further, even though in some respects the ENA Examiner's role did not provide as extensive an oversight as was sought by some of the various energy traders in their motion seeking the appointment of a ENA fiduciary, it must have addressed some of the concerns expressed. This is evidenced by the fact that after the Court adjourned the ENA fiduciary motion without date, pending the ENA Examiners' report, no request was made to the Court to place the motion back on the calendar following the issuance of that report and there was no further action ever taken to pursue it. Upon the effective date of the confirmation, it became moot.

However, the appointment of the ENA Examiner did not completely address the concerns of the ENA energy trading creditors, including the applicants, as shown by the separate litigation that was pursued after his appointment seeking separate committees (an ENA creditor committee and an energy merchant committee). The Court denied the various requests and in addressing certain of the concerns raised, mentioned the role of the ENA Examiner.

Certain ENA creditors, including the applicants before the Court, continued to have concerns.

The issues revolving around the requests for separate committees highlight the problem that confronted the Court. On one hand, the Committee was representative and, on the other hand, the cost of litigating every ENA issue to ensure that ENA was not being put at risk was counterproductive. Had this Court appointed a separate committee based upon the record that was before it, the result would have been the splintering of the existing committee and parties seeking to serve on both committees. In addition, this would have opened the floodgates for creditors of the other debtor-estates seeking separate representation, as they would have argued for application of the same softened standard that would have been applied to the ENA creditors' request. Thus, even if there were a finding of adequate representation for these estates, their creditors would have argued that separate committees should nonetheless be appointed. Moreover, all of the separate constituencies would have had little incentive to work toward a consensual resolution of the matters necessary for the confirmation of a plan.

In responding to the separate committee requests in its June 21st 2002 decision, the Court denied each of these requests. However the court did state

> The only missing component is the Movants' access to immediate compensation for their efforts. Their ability to be compensated has not been foreclosed, and the Movants may file an appropriate application for administrative expense payment for substantial contribution pursuant to 11 U.S.C. § 503(b)(3) at an appropriate time.

However, the comment was made in the context of stating that the requesters were active participants and adequately represented under the then existing structure, and that they could seek compensation under section 503(b) This was not a finding that the relevant standard had already been established or that the standard was not applicable or somehow lessened.

While the applicants' actions were the prelude to the appointment of the ENA Examiner, those actions do not warrant a finding of or establish a basis upon which the Court should make an award for substantial contribution. One cannot lose sight of the fact that no one requested the relief that now forms at least part of the basis for the request for substantial contribution. Therefore, based upon the aforementioned, any request for substantial contribution for efforts that occurred prior to the appointment of the ENA Examiner is denied in all respects.

Next, the Court will turn to the actions related to the ENA Examiner's role as plan facilitator. Here the applicants focus on two major points: the ENA Examiner's successful results in facilitating the Plan and a statement by the ENA Examiner's counsel that the applicants provided a substantial contribution to these cases. With respect to the first point, it is the ENA Examiner's view that through his efforts more than one billion dollars in value was transferred to ENA, which the ENA Examiner asserts is evidenced by a comparison of the various drafts of the confirmed plan. With respect to the second point, the applicants direct the Court's attention to a statement made by counsel to the ENA Examiner in which counsel said that he believes that the applicants provided a substantial contribution to the ENA estate in their collaboration with the ENA Examiner. Further, the applicants request that the Court consider the aforementioned and the record of the case in support of their applications. They

provide, however, no evidence of any specific contribution made to the ENA Examiner's plan facilitation efforts. In fact, based upon the assertion of attorney-client privilege or the work product doctrine, they have resisted efforts by the Debtors and the Committee to discover and examine such alleged contributions. Nor have they attempted to otherwise provide the Court with the information.

Further, although the facilitation effort was largely successful, there was still significant opposition from some members of the Ad Hoc Committee that worked with the ENA Examiner. In addition, the one billion dollar transfer of value referenced by the ENA Examiner is not without dispute and only time will reveal the economic consequences of the very complex movement of rights and liabilities as compromises were reached. As to the last issue, it is this Court that must determine the contribution that a particular party made to the ENA estate in order to assess whether a substantial contribution was made. The view of counsel for the ENA Examiner, or the ENA Examiner himself for that matter, is certainly relevant but it must be supported by facts that provide substance upon which the Court can make the determination. The applicants' failure to provide this Court with details as to the specific contribution that was made regarding plan facilitation precludes a ruling in the applicants' favor. The ENA Examiner was compensated by the estate for his, and his counsel's, efforts. To a certain extent, in the plan facilitation process, his role with the Ad Hoc Committee had certain similarities to counsel to a committee, in that he was a fiduciary. Yet, the ENA Examiner was a fiduciary to the ENA estate, not necessarily to a specific body of creditors. However, based upon the presumption of insolvency there was really only one constituency - the unsecured creditors of ENA. Further, the ENA Examiner was not subject to the direction of the ad hoc committee nor could it be considered his client. However, their goals in preserving value to the ENA creditors was nonetheless the same and the ENA Examiner had the attendant retained professionals to fulfill his fiduciary duties. Then, in some important respect, the participants here had the benefits of a statutory committee whose members would have received reimbursement of expenses for travel, etc., but not generally attorneys' fees. Therefore, the success of this structure should not relieve these participants of the requirement of establishing a substantial contribution before they may receive an award for reimbursement of their attorney fees.

There is no question that the applicants were very active creditors who influenced the Court's decisions. An examiner was put in place to provide oversight and ultimately to function as a plan facilitator. Prior to the appointment of the ENA Examiner and the expansion of his role, the actions of the applicants and the other ENA creditors made it clear to the Court that if some form of fiduciary were not put in place, significant litigation concerning the allegation of value erosion would ensue, litigation that would surpass in intensity and frequency that which had occurred to that date.

While the applicants certainly participated extensively in these cases, there is no evidence that their actions were directly connected to concrete benefits to creditors that would allow for one of those rare grants of an award for a substantial contribution. Rather than being extraordinary, each applicant's participation in these cases was as an active creditor that seeks to protect its interests and in certain respects was duplicative of the protection provided by the Committee.

Based upon the foregoing, the applicants have not met the applicable standard for an award for substantial contribution. Therefore, each applicant's request for an award for substantial contribution is denied.